From: nora.graziano@akerman.com
To: RulesCommittee Secretary
Subject: Comments On Privilege Log Practice
Date: Friday, June 11, 2021 11:05:25 AM

I think documents by categories while perhaps quicker would not be a suitable format and might invoke more discovery. Identifying the date/to/from subject is helpful in further discovery and in preparing a motion to compel allowing the requester to specifically narrow down a date or subject.

Thank you.

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From: V. F. Liptak
To: RulesCommittee Secretary
Cc: usaeo.victimombudsman@usdoj.gov
Subject: Comment on Discovery log rule proposals
Date: Saturday, June 12, 2021 7:38:06 AM

For four decades I held state and federal agency licenses without any grievance (ever). I have never been convicted of a crime, yet I have been financially raped by private and public attorneys, at will, under the pretext of privilege and most importantly, absurd and concocted rules promulgated by cohorts in Congress and courts, who, as New Kings, "would be" absolutely immune for crime, fraud and collusion.

Today, big lies are the norm and we are at a Tipping Point, where truth has no place among lawyers who lie, cheat and steal without repercussions. Their defense against civil prosecution is that no one should believe a word they said. Yet Millions followed Mantra of "trial by combat", a Pied Piper of derision causing the US to be skating on thin ice. We need more true checks, oversight and disclosure ~ not less, as today, nothing is sacred by such wolves (with a sheepskin).

In my experience as a binding arbitrator for the National Association of Securities Dealers and a litigant in state and federal courts, I find lawyers will obfuscate and deprive disclosure, even when Brady and its progeny demand otherwise. They refuse because judges do not hold them accountable, as seen recently with the five-year saga of attempting to cause disclosure of tax information, when it was needed to help voters know just exactly who they were voting for, or against.

So, the idea of making it easier, by Rule that would invalidate any hope of judicial declarations against such bad practice, is unwarranted and wrong, at best.

The news is replete with how the Department of Justice has been not just politicized but weaponized, for example, by refusing to seek sentencing of an admitted felon, falsifying reports to Congress and recently: spying on members (who were political rivals [to their RICO Enterprise Don] a name not coincidentally reminding of Mafia bosses). In my experience, they do much worse, at will, with virtually no oversight, so long as lawyers can profit and avoid consequences.

Federal rules should make Discovery more available and less subject to withholding, often times by global and unwarranted claims of privilege (with the appearance of acting as both a shield and sword) which is supposed to be overruled by substance, or at least, it should be.

Sincerely, V. F. Liptak, CFP (retired)

From: Markowitz, Sharon
To: RulesCommittee Secretary
Cc: Markowitz, Sharon
Subject: Response to Invitation for Comment on Privilege Log Practice
Date: Wednesday, June 16, 2021 11:44:53 AM
Attachments: Template_ Privilege Log Protocol.DOCX

Rule Committee,

My name is Sharon Markowitz. I am a litigation partner at Stinson LLP in Minneapolis, and I am writing in response to the Invitation for Comment on Privilege Log Practice.

I think the rules/guidance on privilege logs could be substantially improved in federal (and state) courts. I find that preparing privilege logs is a lot of work -- both in big-document cases and in medium-document cases that have a high volume of relevant privileged documents (e.g. indemnity cases). And I think that the most time-consuming parts of the privilege log do little if anything to help the opposing party assess the privilege claims.

- I can electronically generate the metadata of each withheld document – including the To/From/CC info, the date, and the document title –in minutes. This information is useful to the opposing party in assessing privilege; they can see if a document involves attorneys or not, if it involves third parties that would waive the privilege, etc.
- But I have to put a lot of work into preparing the narratives for each document. The narrative will almost always say "communicating legal advice regarding X," but the "X" (the thing that takes the most time to populate) has no impact on whether the document is privileged. If it's a communication of legal advice, it's privileged, regardless of subject matter. So this information does not give the opposing party any information it needs to assess the privilege.

I think the solution to this problem is to allow parties to produce privilege logs with metadata only AND allow opposing counsel to ask follow-up questions about specific documents as needed. I have done this successfully in several cases, and I have attached a sample privilege log protocol that reflects this approach.

A few notes:

- The metadata-only privilege log will usually alleviate the need to debate whether a party will only log the most inclusive email in a thread because it is usually easy to generate the metadata for all emails in the thread.
- I think it is also helpful to agree that redacted documents do not need to be logged if the To/From/CC, date, and title for such documents are apparent on the face of the redacted documents. That is reflected in the attached protocol.
- I think the follow-up questions are most likely to relate to documents withheld as work product (i.e. documents for which there is no lawyer in the To/From/CC line). These are

helpful conversations and may involve much more than producing a "narrative."

- I don't think that filling in the Privilege Type is helpful (generally, if a lawyer is not in the To/From/CC line, the doc is probably being withheld as work product), but I don't feel very strongly about its omission.

I do not think that categorical privilege logs are the answer. Categorical logs require me to do all the work of identifying the subject matter of the documents (irrelevant to whether the doc is privileged) and do not communicate to the opposing party who was part of the communication (highly relevant to whether the doc is privileged) or the date of the communication (sometimes relevant to whether the doc is privileged – particularly whether it is subject to work-product protection).

Thank you for your attention to this matter. I think this is an area where we can significantly reduce inefficiencies in litigation.

Please let me know if you have any questions.

Sharon

Sharon R. Markowitz
Partner

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The parties in the above-captioned action have stipulated and agreed to the following terms regarding the content and format of their privilege logs:

1. **General Provisions**. The parties have agreed to exchange privilege logs in which each document will be logged individually utilizing certain metadata fields that can be electronically generated.

2. **Content and Format of Privilege Logs.** The Parties shall serve privilege logs in the format shown below.

a. **Documents to Be Logged**. The parties' privilege logs will consist of every individual responsive document which (1) has been withheld as privileged in full or (2) has been redacted in such a manner that the information that would appear on a privilege log does not appear on the face of the document. The parties agree that responsive *non-privileged* family members of privileged documents will be produced and therefore need not be logged.

b. **Document Fields.** The parties' privilege logs will list the following fields for each logged document, as applicable: Date; From or Author; To; CC; File Name or Subject Line; [OPTIONAL: Privilege Type]; and (if applicable) Bates Number. For each logged document, the parties may populate these fields using the metadata associated with the document or, if the document does not have the necessary metadata, manually, using other information reasonably available to the party.

The parties may in good faith redact any portion of the File Name or Subject that reveals privileged information.

For avoidance of doubt, the parties shall serve privilege logs in the substantially the same format shown below.

Priv Log ID	Date	From/ Author	To	CC	File Name/ Subject Line	OPTIONAL: Privilege Type	Bates No.
1	1/1/2004	[Full name and/or email address]	[Full name and/or email address]	[Full name and/or email address]	xxxxxx. msg		##
2	2/2/2005	[Full name]	[Full name]	[Full name]	Memo. doc		##

3. **List of Attorneys.** Along with each privilege log, the party serving the log will provide the other party with a list of attorneys referenced in the log, including the attorney's name, firm or company, and title.

4. **Reservation of Rights.** The parties may, in good faith, request a privilege description or explanation for any document listed on a privilege log that (a) does not contain an attorney in the from/author, to, or cc fields or (b) has been transmitted to or received by a third party. The parties reserve the right to challenge individual privilege assertions.

5. **Documents Not Required to Be Logged.** The parties agree that neither party shall be required to log communications between the party and counsel or attorney work product in this litigation dated on or after the date this action was filed.

6. **Privilege Log Schedule.** Privilege logs shall be served on the following schedule:

a. XXXX

7. **Production of Withheld Documents.** If a party disputes the withholding of certain documents based on privilege and the parties agree to or the court orders production of such documents, the parties shall meet and confer in good faith regarding the extension of relevant discovery deadlines. If the parties do not agree to an extension, each party reserves its rights to raise the issue with the Court.

` **EVANS LAW FIRM, INC.**

Ingrid M. Evans
Attorney

June 23, 2021

Ingrid M. Evans (CA, DC, NY)

VIA E-MAIL: RulesCommittee_Secretary@ao.uscourts.gov

MEMBERS OF THE JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

Re: *Fed. R. Civ. P. 26(b)(5)(A) – Privilege Logs*

To the Members of the Advisory Committee on Civil Rules:

I am the founder of Evans Law Firm, Inc., a plaintiff's law firm representing individuals and class action representatives in all four federal district courts in California and as co-counsel in U.S. District Courts throughout the U.S. My federal court practice includes federal question cases, as in *qui tam* actions brought under the False Claims Act, 31 U.S.C. § 3729 *et seq*. and diversity cases.

I write this letter to urge the members of the Judicial Conference Advisory Committee on Civil Rules to leave Fed. R. Civ. P. 26(b)(5)(A) ("the Rule") unchanged. As it currently stands, the Rule forces parties claiming privilege to disclose sufficient information regarding the withheld information or documents to allow the propounding party in turn to determine whether the asserted privilege should be challenged. In many of the federal cases I have litigated, the Rule has performed an important function in protecting against the unjustified assertion of privilege by defendants attempting to avoid full disclosure of information and documents.

Specifically, many of the diversity cases I litigate involve consumer insurance contracts such as annuities and universal life insurance. An important part of discovery is often the development of those contracts by the carrier over time. Contract development typically includes input from compliance personnel who are *not* attorneys. Despite involvement by non-attorneys in the process, I have been forced to litigate (successfully) against carriers who withheld such information on the basis of attorney-client privilege. Had the carrier defendants not been forced to provide the information required by Fed. R. Civ. P. 26(b)(5)(A) I would not have had the information I need to challenge the unfounded assertion of privilege.

A detailed privilege log is indispensable to discovery and adequate trial preparation. I have encountered defendants who sought to withhold documents on the basis of privilege which were not at all privileged. If the responding party had not been required by the Rule to disclose in a log the true circumstances of the documents (authors, recipients, subject matter, etc.) I would have been unable to compel disclosure of a document that should never have been withheld.

Thus, I cannot understate the importance of the Rule when it comes to discovery. A single document may be critical to a plaintiff's case so a document-by-document disclosure of the purported grounds of privilege is essential. Any change that would, for example, allow withholding parties to describe "categories" of documents would be too lax and vague to permit a propounding party to zero in on what is necessary to support claims or prepare for trial. The ability of the propounding party to "assess the claim" of privilege on a document-by-document basis as the current Rule allows is essential.

In the interest of full and truthful disclosure in the federal civil litigation, I urge the Advisory Committee to leave the Rule unchanged. As it is written, Fed. R. Civ. P. 26(b)(5)(A) is an important tool in any litigant's arsenal to compel full and honest pre-trial discovery.

Sincerely,

Ingrid M. Evans

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From: Baxter-Kauf, Kate M.
To: RulesCommittee Secretary
Cc: Riebel, Karen Hanson
Subject: Privilege Log Commentary
Date: Friday, June 25, 2021 6:32:01 PM

Good afternoon,

I submit these comments in response to the Invitation for Comment on Privilege Log Practice. My name is Kate Baxter-Kauf, and I'm a partner at Lockridge Grindal Nauen in Minneapolis, which is a midsize litigation firm. My background is in complex civil litigation, where I represent plaintiffs and defendants in complex class actions before state and federal courts. In general, these cases involve lots of privilege assertions and, often, motion practice on the contours of acceptable privilege. I was counsel for Plaintiffs in privilege disputes related to the Premera, Yahoo, Capital One, and other data breach litigation, and published a letter regarding Sedona Conference commentary on privilege in cybersecurity and privilege disputes (article for context here). I also have represented governmental entities in data breach and other litigation where privilege is an issue, and have both prepared extensive document-by-document logs and evaluated them for privilege and protection claims.

In my experience, Rule 26(b)(5) is relatively straightforward and easy to comply with. Most circuits have a list of information that is presumptively included in order for parties to describe materials being withheld in a manner that "enable[s] other parties to assess the claim" of privilege or protection, and most complex cases involve a recognition by all parties that such a list is necessary to evaluate any claims. In my experience, document-by-document privilege logs are essential to evaluating privilege and protection claims, and it is nearly impossible to accurately assess claims without that information. This is because the nature of complex civil practice means that (A) there are often both inside and outside counsel involved, (B) those inside and outside counsel are often working in both business and legal capacities, directing multiple entities, third parties and agents, and working simultaneously on matters that are related to legal and business advice, and (C) the volume of documents means that there are inevitably mistakes where documents that are not privileged or protected are withheld inadvertently and end up being produced. Without a document-by-document privilege log, it is simply not possible to precisely evaluate the privilege or protection claim being asserted. A revision to Rule 26(b)(5)(A) indicating that a document-by-document log is not routinely required or that specified categorical log would only exacerbate these problems by making the parties first fight over whether a document-by-document log was even required, *then* whether the log was adequate to allow proper evaluation of the privilege or protection asserted, *then* whether the underlying documents were properly withheld. Adding a layer of additional conflict for the parties in a way that makes it even harder to evaluate privilege or protection claims is likely to increase the problems faced by litigants in privilege disputes.

It is no doubt true that the result of complex privilege and protection claims under the current rule regime involves a fair amount of work to establish the privilege claim by the party seeking to

withhold documents or information. This is because the attorney-client privilege and work product protection are exceptions to the general rule that adverse parties are entitled to evidence that would support or rebut their claims and defenses. To me, the Discovery Subcommittee, in evaluating changes to any discovery rule, need evaluate not only the burden to the party who must produce evidence but also the likelihood that the party seeking the information will be deprived of relevant evidence because that evidence is inadvertently or otherwise withheld on a mistaken privilege claim. In my experience, it is mechanisms that attempt to short circuit the plain requirements of Rule 26(b)(5), and not the act of simply drafting a document-by-document log, that are most likely to waste judicial resources or become burdensome to the parties or the courts, or to increase the likelihood of expensive or prolonged disputes. For example, I have worked on cases where large corporate defendants have produced privilege logs created entirely by computers with no attorney oversight. These boilerplate attempts at document-by-document privilege almost never work to allow the party evaluating the privilege claim to fairly assess the claim, because the descriptions are generic coded verbiage and fields of information that would be easily available on the face of the document do not make it into the metadata to be captured. In these situations, the act of even getting a reasonable privilege log has been burdensome to the parties and to the Court. But categorical privilege logs are often worse, because they simply make the claim of privilege or protection even more opaque, leading to endless meet and confers about what it even is that is being withheld. Document-by-document logs that clearly set out the information being withheld and the privilege or protection claim being asserted are fundamental to evaluating privilege and protection claims, and my experience in meet and confers bears that out – even before motion practice ever takes place, when logs are facially deficient and require evaluation and discussion among the parties, huge swaths of withheld documents are often downgraded and produced, or produced with much more limited redactions.

We have found that categorical *challenges* to types of documents after review of a document-by-document log of documents withheld can be helpful in evaluating privilege claims, and often bring those types of challenges before courts (such as in the Premera Data breach litigation – orders here and here). In these cases, we start with a document-by-document log and meet and confers between the parties regarding the facial deficiencies of logs produced or information needed to assess privilege claims, and then figure out the *types* of documents where there are disputes to be submitted to the court, often with exemplar documents or log entries submitted for evaluation or in camera review. Case management tools used by courts such as these, rather than rule changes, seem most likely to encourage reasonable practice by the parties. To the extent that rule changes would be helpful, I can think of two things that might be helpful. First, District Courts in the District of Minnesota routinely include privilege logs in their Rule 16 conferences, including requirements to meet and confer, deadlines for log production, dates to cabin privilege claims after a complaint has been filed when no injunctive relief is sought, etc. This is often helpful and allows the parties to set themselves up in advance to understand where disputes might lie and if there are types of documents likely to be subject to a privilege dispute that can be evaluated categorically (such as in the case of forensic reports in the linked cases). Second, lots of circuits have rules about presumptive information that should be included on a log—such as Bates stamp/author/recipients/copied recipients/date/subject/title/attorney status/file name/type of communication/basis for privilege—that provides clear direction about the information that should be included if available. Changes to Rule 26(b)(5)(A) that would codify those requirements for all

privilege logs, assuming they are sufficiently comprehensive to capture all the information needed to assess the claim, would short-circuit a lot of the facial disputes about whether a log is compliant and make it much easier to evaluate whether a claim of privilege or protection is properly asserted. Such a rule might frontload work at the beginning in creating usable document-by-document privilege logs, but would surely make it clear to all parties what was being withheld and why.

I hope these comments are helpful. I am happy to answer any questions you might have.

Thanks,
Kate

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From: Mike Moore
To: RulesCommittee Secretary
Subject: Invitation to comment on Privilege Log Practice
Date: Wednesday, July 14, 2021 12:28:00 PM

Thanks for the opportunity to comment on the subject of the Invitation. I am a solo practitioner, representing plaintiffs in civil rights cases against, among others, police, children services agencies, and other state actors.

In the area of civil rights, the plaintiff commences a case at a decided disadvantage to the defendants. It is the rare case in which the plaintiff's lawyer has access to any but documents available through a public records request, such as detail incident reports, published policies, etc. On the other hand, the state actor defendants have most all the documents which bear on the claims made.

In light of this, the defendants are in a position to create delay by, among other tactics, withholding documents in discovery that bear on the relevant facts. Indeed, since the Rule does not specify the nature of the information that must be provided in a privilege log, it is entirely possible that the plaintiff must litigate how much information must be provided before even addressing the specifics of the withheld documents.

Without such specifics as the date, author, recipient, and subject matter of the document, it is virtually impossible for the plaintiff – or the trial court – to "assess the claim" of privilege.

When a trial court, as just happened in a case I am litigating, approves a privilege log which provides none of these specifics, the plaintiff has nothing to work with and no record to bring to the Court of Appeals.

While it may be burdensome for a defendant to specify the information necessary for the opposition to assess the merit of an objection, it cannot be undue burden – obviously, defense counsel must go through each document, exercising due diligence, to determine if that document merits a claim of privilege.

Any modification of the Rule to allow simple "categories" to be listed in a privilege log not only will dramatically impact the plaintiff lawyer's ability to intelligently argue that the privilege does not apply or has been waived, it will encourage defense counsel to simply lump documents together without making the individual determination that sound practice requires.

In short, there should be no modification of the Rule. Trial courts have

authority under current practice to modify the Rule in a specific case that merits such treatment.

Michael Garth Moore

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Working to restore justice,
one family at a time.

From: Thomas Beck
To: RulesCommittee Secretary
Subject: Privilege Log Rule change?
Date: Wednesday, July 14, 2021 2:40:58 PM

I for one would not be pleased to get a privilege log from the defense that allows generic descriptions. I have been litigating police misconduct cases for 42 years on the plaintiff's side and my experience with privilege logs has been that the defense does not use them routinely, merely objecting on WP or A/C or privacy grounds and the discovery magistrates let them get away with this practice. The purpose of the log is to help me identify what documents exist, whether the objections are applicable and whether the document is worthy of chasing down with a motion to compel. A proper descriptive log is a huge time saver as it is intended to be when we get them.
To allow a generic "personnel record" description to meet the rule defeats the purpose because personnel records include details of little value in cases such as mine, and others which are essential, such as complete investigations into complaints that are actually not privileged.

As noted, my practice as a solo plaintiff's attorney seldom requires me to withhold or even identify via a privilege log, documents the defense may ask for. The existing rule is a good one if only the courts would insist that defendants abide by the requirements.

--
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562 795 5835

From: Dennis E. Murray, Sr.
To: RulesCommittee Secretary
Cc: Dennis E. Murray, Sr.
Subject: Privilege log changes.
Date: Thursday, July 15, 2021 11:29:16 AM

I have been litigating for 58 years and the constant add-on to the required mechanics in order to properly represent persons who need legal assistance, is and will reduce/eliminate legal counsel from small firms.

We need to stop adding on complicated “dance steps” or else very few will be left to represent the extremely large proportion of citizens that from time-to-time need legal representation.

Dennis

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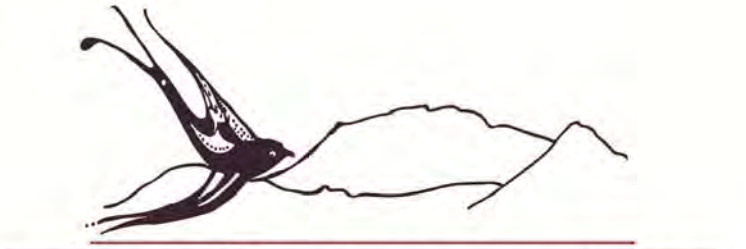

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SUBMITTED ELECTRONICALLY

July 14, 2021

Judicial Conference Advisory Committee on Civil Rules
Rules Committee Secretary

RE: Comment on Rule 26(b)(5)(A) Privilege Log Practice

Dear Friends:

I have been a lawyer since 1993 and since 2004, my small law firm has litigated mostly claims against healthcare systems. Much of the work we do is for patients and families harmed or killed by medical and institutional negligence for conduct including hospital staffing and credentialing/ granting and renewing privileges to hospital-based healthcare providers. Like most states, New Mexico has a Review Organization Immunity Act ("ROIA") that governs disclosure of documents and information maintained by hospital review organizations in the process of credentialing, granting and renewing privileges to hospital-based providers. To maintain licensure and eligibility for Medicare, federal regulations require that hospitals remain licensed and accredited, and govern their medical staff through Bylaws, rules and regulations delineating processes for credentialing, granting and renewing privileges, conducting ongoing and focused professional practice evaluations and performing peer review. The substantive law of many states permits a direct corporate liability claim against a hospital for failing to follow these processes, generically referred to as "negligent credentialing claims." New Mexico's Supreme Court has codified our cause of action in a Uniform Jury Instruction that states:

13-1119B. Duty of hospital; granting staff privileges.

In determining whether a [physician] [_____ *(other practitioner)*] should be permitted to exercise clinical privileges as a member of the hospital staff, a hospital has a duty to exercise reasonable diligence in obtaining and acting upon information concerning the competence of [applicants to] [members of] its staff. A hospital that [grants clinical privileges to] [permits the continued exercise of clinical privileges by] an individual, when the hospital knew or reasonably should have known that the individual was not qualified to exercise those privileges with reasonable skill, is negligent.

USE NOTES

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UJI Civ., Rule 13-1119B NMRA.

Our firm has brought such claims against hospitals that continued to renew privileges to physicians whose public records reflect problematic histories with State Medical Board disciplinary actions and prior malpractice lawsuits, settlements and judgments. We do not assert this cause of action as a matter of course. When we do, there is usually a history of multiple prior serious legal actions/ complaints and/or state medical board actions. The question for the jury and the Court in those cases is usually whether or not the hospital followed the processes set forth in its governing documents for safely credentialing and granting or renewing privileges or disregarded or even "rubber stamped" the provider's request for renewal despite concerning information.

A court or jury tasked with deciding if a hospital was negligent in its credentialing /privileges processes for an allegedly negligent provider requires a forensic expert review of the hospital's documents and information about the provider. New Mexico's ROIA statute and interpretive case law permit the hospital to assert ROIA as an immunity but not to hide behind. To this end, the confidentiality of records of a "review organization" are defined fairly narrowly so as to provide a qualified immunity to only those documents the hospital proves were "generated exclusively for peer review and no other purpose." § 41-9-5 NMSA (Confidentiality of records of review organization). The annotated statute is enclosed as **Exhibit 1**. New Mexico's courts require the party seeking to immunize discovery acquired by a review organization "to prove that the data or information was generated exclusively for peer review and for no other purpose, and that opinions were formed exclusively as a result of peer review deliberations [and] [i]f the evidence was neither generated nor formed exclusively for or as a result of peer review, it shall not be immune from discovery unless it is shown to be otherwise available by the exercise of reasonable diligence. *Southwest Cmty. Health Servs. v. Smith*, 1988-NMSC-035, 107 N.M. 196, 755 P.2d 40.

To effectuate discovery of peer review materials in a credentialing case, New Mexico discovery law requires a privilege log that contains sufficient specificity to meet this burden. A privilege log that specifically identifies the contents of documents withheld as purportedly ROIA immune is essential in order for plaintiffs and the Court to conduct informed discovery motion practice. Without a sufficiently detailed privilege log that identifies the actual contents the hospital seeks to protect, the patient and the Court cannot determine if they in fact meet the definition of ROIA as "exclusively generated for peer review and no other purpose" or as items from other sources, used for other purposes than peer review that should be compelled produced by the Court. Without a sufficiently detailed privilege log, the Court cannot determine what items to order and conduct an *in camera* review of. Additionally, New Mexico's ROIA statute and interpretive case law permit a Court to order production of documents that are critical to the claims and defenses of a case, even if they are properly defined as ROIA (generated exclusively for peer review). Without a sufficiently detailed privilege log, the Court cannot determine what items to review *in camera* for criticality.

Judges are extremely busy with dockets of sometimes thousands of cases. The suggested revisions to the Rule would relax privilege log requirements so much that it would render them effectively useless to the litigants or the Court. A party asserting a privilege or immunity such as ROIA has the burden to prove it and cannot do so by stating only general categories of documents. If adopted, the proposed changes to Rule 26((B)(5)(A) would effectively give the party asserting a privilege or immunity a pass from meeting its burden of proving the privilege or immunity it asserts. Moreover, lists of general "categories" of documents by their nature thwart the very purpose of requiring a privilege log at all. In point of fact, this

is one of the most problematic types of discovery motions patients file in these cases. My firm is presently engaged in discovery in several cases where we have received privilege logs that list only general categories of documents and information rather than specifically identifying them. When this happens, we are unable to sufficiently challenge the privilege or immunity the hospital claims. We are not able to tell if each document was generated exclusively for peer review (ROIA) or came from another source (not ROIA). Without time consuming in camera review, Courts are not able to tell, either.

New Mexico's Court of Appeals has concluded that a party who fails to produce a sufficient privilege log can be found to have waived its right to assert that privilege or immunity. This makes far more sense than shifting the burden of proving a privilege or immunity to the Court because the hospital corporation failed to sufficiently assert what documents exist and why they should remain immune as privileged or immune.

There should be a presumption of good faith by all parties in discovery. But there has to be a way for parties to be accountable to that. The practice of permitting any party who asserts a privilege to state it generally and categorically will encourage more discovery abuses by those lawyers and litigants who can get by with it. Our courts should not ever encourage a rule that permits litigants to obscure or hide evidence under the categorical assertion that it is secret, privileged or immune. That would be contrary to the principle of transparency in discovering evidence to support claims and defenses. And lack of transparency rarely serves the interests of justice under the law. For these reasons, I urge the Committee to reject the suggested revisions to this Rule regarding Privilege Log Practice. Thank you.

Yours Very Truly

Lori M. Bencoe
Attachment

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41-9-5. Confidentiality of records of review organization.

A. Except as provided in Subsection B of this section, all data and information acquired by a review organization in the exercise of its duties and functions shall be held in confidence and shall not be disclosed to anyone except to the extent necessary to carry out one or more of the purposes of the review organization or in a judicial appeal from the action of the review organization. No person described in Section 41-9-4 NMSA 1978 shall disclose what transpired at a meeting of a review organization except to the extent necessary to carry out one or more of the purposes of the review organization, in a judicial appeal from the action of the review organization or when subpoenaed by the New Mexico medical board. Information, documents or records otherwise available from original sources shall not be immune from discovery or use in any civil action merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of a review organization be prevented from testifying as to matters within the person's knowledge, but a witness cannot be asked about opinions formed by the witness as a result of the review organization's hearings.

B. Information, documents or records that were not generated exclusively for, but were presented during, proceedings of a review organization shall be produced to the New Mexico medical board by the review organization or any other person possessing the information, documents or records in response to an investigative subpoena issued pursuant to Section 61-6-23 NMSA 1978 and shall be held in confidence by the New Mexico medical board pursuant to 61-6-34 NMSA 1978. Nothing in this section shall be construed to permit the New Mexico medical board to issue subpoenas requesting that any person appear to testify regarding what transpired at a meeting of a review organization or opinions formed as a result of review organization proceedings.

History: Laws 1979, ch. 169, § 5; 2011, ch. 121, § 1.

ANNOTATIONS

The 2011 amendment, effective June 17, 2011, required health care review organizations to respond to subpoenas issued by the medical board for non-testimonial information, documents and records presented at proceedings of the organization.

Implied private right of action. — In determining whether a statute implies a private right of action, three factors to consider are (1) whether the statute was enacted for the special benefit of a class of which the plaintiff is a member, (2) whether there is any indication of legislative intent, explicit or implicit, to create or deny a private remedy, and (3) whether a private remedy would frustrate or assist the underlying purpose of the legislative scheme. *Yedidag v. Roswell Clinic Corp.*, 2015-NMSC-012, *aff'g* 2013-NMCA-096, 314 P.3d 243.

Where plaintiff, an employee-physician of employer medical center (employer), participated in a peer review of another employee-physician of employer, employer utilized confidential peer review information to justify terminating plaintiff; this section of the Review Organization Immunity Act (ROIA) [41-9-1 to 41-9-7 NMSA 1978] provided plaintiff with a private right of action because (1) this section provides a blanket confidentiality provision for peer review proceedings, and therefore plaintiff, as a peer reviewer, is a member of the protected class, (2) the legislature intended to create an implied cause of action because violating the statute is a wrongful act, and where the violation results in damage to a member of the protected class, the right to recover damages is implied, and (3) an implied cause of action furthers the purpose of the statute because upholding the peer review integrity under ROIA is best accomplished with an implied civil cause of action for violations of peer review confidentiality. *Yedidag v. Roswell Clinic Corp.*, 2015-NMSC-012, *aff'g* 2013-NMCA-096, 314 P.3d 243.

Mandatory rule of law. — By its plain language, this section is a mandatory rule of law, stating that no person shall disclose what transpired at a meeting of a review organization except for the purposes listed in the statute; as a mandatory rule of law, the provision is incorporated into physician-reviewer employment contracts and parties are precluded from contractually avoiding application of the rule. *Yedidag v. Roswell Clinic Corp.*, 2015-NMSC-012, *aff'g* 2013-NMCA-096, 314 P.3d 243.

Where plaintiff, an employee-physician of employer medical center (employer), participated in a peer review of another employee-physician of employer, employer utilized confidential peer review information to justify terminating plaintiff; this section provided a basis to imply, as a matter of law, that there would not be any adverse consequences to plaintiff's employment resulting from his actions during the peer review process. *Yedidag v. Roswell Clinic Corp.*, 2015-NMSC-012, *aff'g* 2013-NMCA-096, 314 P.3d 243.

Private right of action. — A member of a peer review organization can bring a private cause of action for an alleged violation of the confidentiality provisions of 41-9-5 NMSA 1978. *Yedidag v. Roswell Clinic Corp.*, 2013-NMCA-096, cert. granted, 2013-NMCERT-009.

Where plaintiff, who was employed as a surgeon by defendant, attended a peer review meeting together with other physicians and members of defendant's administration and management staff; during the meeting, plaintiff participated in the review of a colleague's surgical care and treatment of a patient; plaintiff questioned the colleague about the surgical treatment of the patient and the events that led to the patient's death; after the meeting ended, two members of defendant's staff who were present at the meeting reported to members of defendant's administration and management staff who where not present at the meeting that plaintiff had engaged in unprofessional and aggressive behavior at the meeting by verbally attacking the colleague whose case was under review and engaging in disruptive behavior; and two days after the meeting, defendant terminated plaintiff for unprofessional behavior and language and disruptive behavior, plaintiff had a private cause of action against defendant for the alleged violation of 41-9-5 NMSA 1978. *Yedidag v. Roswell Clinic Corp.*, 2013-NMCA-096, cert. granted, 2013-NMCERT-009.

Trial court is required to make a finding on exclusivity. — Where the defendant showed that credentialing and quality management documents were acquired by a review organization in the exercise of its duties and functions, and the district court, following an in camera review of the documents, found that the documents were "innocuous and routine", the court's finding was insufficient to support the court's determination that the defendant had failed to satisfy its burden of proof that the documents were generated exclusively for peer review and for no other purpose. *Chavez v. Lovelace Sandia Health Sys.*, 2008-NMCA-104, 144 N.M. 578, 189 P.3d 711.

Criticality not shown. — Where credentialing and quality management documents that were acquired by a review organization in the exercise of its duties and functions were not harmful to the defendant on the issue of liability and contained information that the plaintiff could obtain from discoverable hospital and personnel records, the plaintiff failed to satisfy his burden of showing that the documents were critical to his cause of action. *Chavez v. Lovelace Sandia Health Sys.*, 2008-NMCA-104, 144 N.M. 578, 189 P.3d 711.

Immunity from discovery. — Where a party seeks to immunize from discovery data or information acquired by a review organization in the exercise of its duties and functions, and opinions formed as a result of the review organization's hearings, the burden rests upon that party to prove that the data or information was generated exclusively for peer review and for no other purpose, and that opinions were formed exclusively as a result of peer review deliberations. If the evidence was neither generated nor formed exclusively for or as a result of peer review, it shall not be immune from discovery unless it is shown to be otherwise available by the exercise of reasonable diligence. *Southwest Cmty. Health Servs. v. Smith*, 1988-NMSC-035, 107 N.M. 196, 755 P.2d 40.

Under the doctrine of "self-critical analysis" immunity, as contemplated by this section, records relating to a morbidity and mortality review are confidential and not subject to discovery in a medical malpractice action. *Weekoty v. United States*, 30 F. Supp. 2d 1343 (D.N.M. 1998).

Production of confidential information. — Where information is ruled confidential and the party seeking access satisfies the trial court that the information is critical to the cause of action or defense, the trial court shall compel production of such evidence. *Southwest Cmty. Health Servs. v. Smith*, 1988-NMSC-035, 107 N.M. 196, 755 P.2d 40.

This section does not create an evidentiary privilege in civil litigation, and thus does not come into direct conflict with Rule 11-501 NMRA. *Southwest Cmty. Health Servs. v. Smith*, 1988-NMSC-035, 107 N.M. 196, 755 P.2d 40.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of voluntary disclosure of privileged proceedings of hospital medical review or doctor evaluation processes, 60 A.L.R.4th 1273.

Scope and extent of protection from disclosure of medical peer review proceedings relating to claim in medical malpractice action, 69 A.L.R.5th 559.

From: D.J. Young, III
To: RulesCommittee Secretary
Subject: Comment on Rule 26(b)(5)(A) - Privilege Logs
Date: Friday, July 16, 2021 9:21:00 AM

Dear Judicial Conference Advisory Committee on Civil Rules,

I am an attorney representing the interests of injured and deceased plaintiffs in cases against interstate trucking companies. It is my experience that these companies lack internal and external sources of accountability. It is my experience that their insurance carriers benefit from this lack of accountability. Being singularly profit-motivated (as they are required to be by state corporation laws), for them there is nothing morally wrong with violating discovery rules and hiding documents. Indeed, if hiding documents increases profitability, then these companies must hide the documents because they owe their shareholders the maximum amount of profits no matter what, even if is illegal or immoral to do so. As long as no individual person at the corporation is likely ever to be criminally sanctioned, there will be no meaningful accountability for hiding documents. These companies can hide documents by the hundreds for decades without ever being caught. To them, it is a simple cost-benefit analysis. The benefits of hiding documents far outweigh the risks because sanctions for doing so are rare and, when imposed, generally are small or inconsequential.

This is not to say that commercial transportation companies serve no valuable purposes. They do. People and goods must be transported. A handful of these companies give back to their communities by way of charitable donations. Yet, just because they are large and employ lots of people, that is not a license for them to hide evidence in various ways, including behind privilege logs, to escape the consequences of placing profits above safety. While government regulators can and do police some negative corporate behavior, the reality is that we need exponentially more regulators to properly police what goes on behind the closed doors of large corporations. An alternative route to policing corporate misconduct is through litigation, in which judges are in the best position to pry open the doors of a corporation's document warehouse, to bring the truth to light—to bring justice to an unfortunate situation.

Given how easy it is for corporations to hide their systemic corporate misconduct behind layers of departments and committees, all of which diffuse and obfuscate responsibility, I urge you not to make it even easier for corporations to escape accountability. If you do anything to the privilege log rules, please make it harder for defendants and their attorneys to hide discoverable documents in privilege logs. Thank you.

Very truly yours,

D. J. Young, III, Partner
The Law Firm for Truck Safety LLP
Cleveland, Toledo, Columbus, Nashville, Oklahoma City

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Injustice anywhere is a threat to justice everywhere.
– MARTIN LUTHER KING JR.Letter from Birmingham Jail, April 16, 1963

July 16, 2021

Rules Committee Staff
Office of the General Counsel
Administrative Office of the US Courts
One Columbus Circle NE, Room 7-300
Washington, DC 20544

Re: Comment on Privilege Log Practice

To Whom It May Concern:

Thank you for allowing me to comment on this very important issue. We all live in a world where the majority of communication is done electronically via emails and text as well as other electronic methods. As such, it is important that the rules of discovery follow suit. I **do not** believe lumping all the documents into a category of documents is best. As a seasoned litigator I have seen firsthand emails that would have been discoverable lumped into a category and then I must ask the court to do an in camera inspection. Our courts are already over worked, and we must make the rules so that they take pressure off the courts and require the litigators to do the work, whether Plaintiff/Prosecution or Defense counsel. I believe it is important to list each document with great specificity and clarity so that the Courts are not burdened and so that the goal of litigation is consistent with truth and transparency. Please feel free to contact me with any questions.

Sincerely,

/S/ Frances Carpenter

Frances C. Carpenter

From: Samantha Heuring
To: RulesCommittee Secretary
Subject: Comment on Privilege Log Practice
Date: Friday, July 16, 2021 2:25:48 PM

I write today in response to the invitation for comments on privilege log practice and to inform the Committee that I oppose the proposed changes to Fed. R. Civ. Pro. 26.

For context, I am a plaintiffs' lawyer practicing in the areas of employment discrimination, civil rights, and personal injury. In my practice, the documents supporting my clients' claims are almost always in the exclusive possession of the other side and are documents that my client cannot access. This would prevent my clients from having equal access to justice. Allowing parties to avoid a document by document description of the withheld documents, in favor of allowing a mere category of documents to be identified, would be to the unfair advantage of plaintiffs like my clients. It would effectively allow the defendants to "hide the ball" by including documents in broad categories that, although the document might be appropriately labeled in that category, the document should be disclosed.

Here are some specific examples of the problems that the proposed rule changes would cause:

- This example is based on a real case. Client is sexually assaulted by her supervisor and reports it. Employer hires independent law firm to conduct investigation. Law firm generates an engagement letter describing the scope of work to be performed in the investigation. At conclusion of investigation, law firm generates a report documenting its findings. If the employer was permitted to withhold documents and identify the documents only by category, the employer could withhold both the engagement letter and the investigative report as privileged documents. Without a document by document description, the client has no way of knowing that an engagement letter (which courts have ruled are NOT privileged) even exists. Moreover, this non-privileged engagement letter would tell the client whether the investigation was (1) conducted for the purpose of rendering legal advice to the employer, which IS privileged, or (2) for the purpose of investigating the veracity of the client's claims, which fact-based investigation is NOT privileged. However, without knowing exactly which documents were withheld as privileged, the client has no way of arguing that the employer improperly withheld either the engagement letter or the report as privileged.

- Take this hypothetical example: an employee complained of racial discrimination in the workplace via his work email address and, shortly thereafter, was terminated purportedly for poor performance despite that no evidence supporting the poor performance exists. Upon the employee's termination, the employer blocks his access to his email account. The employee files a suit for retaliatory termination based on his reporting, and the employer defends by arguing that the employee never put the

employer on notice of racial discrimination in the workplace. The employee thus needs the email that he sent complaining of racial discrimination, but the employer withholds the document in discovery. Here, the employer could withhold the email in a massive category of documents designated as "proprietary documents of employer," without indicating on the privilege log that the "proprietary documents" category included the employee's emails.

To provide all parties with equal access to justice under the law, parties must know precisely what documents are being withheld in the discovery process. Otherwise, the withholding party can "hide the ball" in a manner that deprives litigants of relief that they are entitled to under law.

Best regards,

Samantha Heuring, Esq.
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14 South Street, Suite 5
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Comments on Privilege Log Practice

The following comments are in response to the "Invitation for Comment on Privilege Log Practice" (June 2021).

Commenter's Background

I am submitting these comments as an attorney licensed in the State of Minnesota who practices intellectual property litigation in federal courts and before administrative courts that follow the FRCP. I handle primarily patent and trademark litigation, for both plaintiffs and defendants. I represent individuals, small and medium sized businesses, and large businesses, though in litigation matters I have generally *not* represented extra-large businesses (though I have represented clients against such entities). Throughout my career of nearly 20 years I have worked at small-to-medium sized intellectual property boutique firms.

Comments on Problems Experienced Under Current Rule

In my experience, preparation of a document-by-document log under Rule 26(b)(5)(A) has not presented any major difficulties. Rule 1 and Rule 26(a)(1) and 26(b)(1), for instance, present greater issues in typical cases. Shortly before the pandemic I attended a CLE in which a presenter suggested that large corporate defendants adopt a "papering over" defense strategy in civil litigation, by which he meant contravening Rule 1's instruction "to secure the just, speedy, and inexpensive determination of every action and proceeding" by intentionally outspending a smaller plaintiff to try to win by attrition rather than on the merits. Also, law firms tend to make money handling discovery disputes and therefore have a vested interest to engage in them. In my experience, these problems arise somewhat regularly through excessive and/or overly broad discovery requests, or, alternatively, through excessive disputes over trivial discovery matters. But those concerns are not specific to Rule 26(b)(5)(A).

Yet Rule 26(b)(5)(A) is not without some problems. In my experience, the most typical problems are (a) over-designation of privilege or work-product grounds to withhold discoverable materials, which is reflected in privilege log entries; (b) vague or generic descriptions on privilege logs for particular entries that do not allow for meaningful evaluation of the privilege claims; and (c) different standards applied by different district courts. Points (a) and (b) are closely related. Parties making a good faith effort to comply with the rules, with regard to document-by-document privilege logs in particular, can be at a disadvantage in relation to parties who approach those issues in bad faith or in a negligent manner. It seems to me that the FRCP should facilitate and encourage good faith behavior and should not incentivize bad faith or negligent behavior. Specifying penalties for non-compliance in a more explicit way might resolve this problem, because in many ways rules are only as effective as their enforcement and there seems to be a reluctance to penalize noncompliance with Rule 26.

Point (a). Extensive privilege logs are a symptom not a cause of problems in many situations. In a case I was recently involved with, the magistrate judge issued an order that stated, "The undersigned's experience with past *in camera* reviews of purportedly privileged documents suggests that lawyers, for a variety of reasons, tend to be far too aggressive with their privilege assertions – seldom are more than 20% of those documents actually entitled to protection." *Sudenga Inds. Inc. v. Global Inds., Inc.*, No. 2:18-cv-02498, at pp. 25-26 (D.Kan., May 15, 2020). To me, this sentiment is generally correct, though I cannot speak to the exact percentage figure given by the judge regarding *in camera* reviews. A document-by-document privilege log is <u>*crucial*</u> for the requesting party to evaluate privilege assertions, particularly because privilege assertions are often suspect or overbroad. In my experience, some of the most valuable information contained in produced documents tends to be found in internal company emails that contradict testimony or legal arguments by that party, for which a spurious privilege assertion is sometimes made in order to try to avoid revealing such damaging (nonprivileged) email materials. *See, e.g., N.M. Oncology & Hematology Consultants v. Presbyterian Healthcare Servs.,* 2017 U.S. Dist. LEXIS 130959 (D.N.M., Aug. 16, 2017); *In re Google Inc.,* 462 F. App'x 975, 976-79 (Fed. Cir. 2012) (No. 2012-M106). In the absence of a privilege log, it would simply be easier for parties to lie or take contradictory or hypocritical positions—though I will add that such issues sometimes arise not because of intentional lying or fraud or even negligence but from *disavowal*. But looked at another way, document-by-document privilege logs would not be so burdensome if parties stopped making inappropriate privilege assertions in the first place. In this respect, the "burden" of document-by-document privilege logs provides a useful—if somewhat minor—benefit to the administration of justice by gently discouraging voluminous but inappropriate privilege assertions.

Point (b). Vague or generic descriptions of documents on privilege logs are sometimes, but not always, a problem in my experience. Though such issues are often inseparable from underlying issues involving inappropriate assertions of privilege. *See, e.g., United States v. Louisiana,* 2015 U.S. Dist. LEXIS 100238, *6-18 (M.D. La., July 31, 2015). Vagueness can sometimes be resolved through discussions between counsel, though usually not in instances in which the withholding party is making a baseless assertion of privilege.

Point (c). Another problem I encounter when practicing in a variety of federal district courts is that the requirements for privilege logs vary too much from district to district. In my experience, when counsel overlook unusual local requirements, such issues have been able to be worked out through discussions between counsel. Some areas where significant district-to-district variations arise have to do with electronically-stored information (ESI), particularly how to designate natively or near-natively produced ESI on a privilege log versus ones produced on paper or in PDF format, how to list attachments to emails or documents bundled in a *.zip file or the like, and how to address redacted production on privilege logs. If the Rule addressed minimum (and perhaps maximum) privilege log requirements in a way that was nationally uniform that would seem to promote justice and the efficient resolution of cases.

As an addendum to my comments above about problems encountered, it seems that extra-large businesses complain about discovery burdens that are a function of their size. But it is important to recognize that this is akin to "coming to the nuisance". That is, businesses that *choose* to become very large are on notice that this creates a set of difficulties associated with bigness that can be *avoided* by limiting or reducing corporate size, in much the same way that law firms becoming large creates avoidable conflict of interest difficulties. To the extent that such extra-large entities are the sort of parties more often involved in "large document" cases the FRCP should not give them preferential treatment based on their *choice to remain large*. I think it is useful here to reference an article by Will Young, "How Corporate Lawyers Made It Harder to Punish Companies That Destroy Electronic Evidence" *Pro Publica* (Jan. 27, 2020) at <https://www.propublica.org/article/how-corporate-lawyers-made-it-harder-to-punish-companies-that-destroy-electronic-evidence> that includes salient criticisms of 2015 FRCP amendments that the article portrays as unfairly catering to extra-large corporate entities to the detriment to the fair administration of justice.

Comments on Possible Rule Changes

The following are comments about possible rule changes, including comments on specific example proposals outlined in the invitation for comments.

In general, a helpful revision to Rule 26(b)(5)(A) would be to include some explicit statement that a document-by-document log is normally required, and perhaps outlining the minimum requirements for log entries, but also that the parties can agree or the court may order more general descriptions of categories of documents (which may be useful in "small" cases). If instead of document-by-document logs parties listed only "categories" (I have never had anyone attempt to do this in my experience) there would seem to be too much of an incentive to "hide" something in a broad category that does not belong there—and there would be no practical way to know if an opposing party is inappropriately "hiding" something in a broad category if there is no document-by-document log.

One exception that is routinely agreed to by parties in cases I have been involved in is to exempt post-commencement communications from privilege logging requirements. Unless there are unusual circumstances and a good faith showing of need is established (e.g., litigation misconduct becomes an issue), there seems to be no reason to log privileged materials that were created after litigation begins because there is usually a voluminous number of such communications related to the litigation but those materials often have little legitimate legal value to the requesting party. Such a default exception to document-by-document logging requirements might be considered in any rule amendments to lessen burdens.

A revision to Rule 26(b)(5)(A) indicating that a document-by-document listing is not routinely required, perhaps referring in the rule to the possibility of describing categories of documents.

I am opposed to such a rule change. As explained above, a common problem is inappropriate privilege assertions. To me, a better revision would be some explicit statement that a document-by-document log is normally required but the parties can agree or the court may order more general descriptions of categories of documents. Additionally, or in the alternative, post-commencement communications could be exempted from privilege logging requirements.

A revision to Rule 26(f)(3)(D) directing the parties to discuss the method for complying with Rule 26(b)(5)(A) when preparing their discovery plan, and a revision to Rule 16 inviting the court to include provisions about that method in its scheduling order.

I am opposed to such a rule change. As explained above, a common problem is inappropriate privilege assertions. To me, a better revision would be some explicit statement that a document-by-document log is normally required but the parties can agree or the court may order more general descriptions of categories of documents. That would be similar to this proposal, but I believe that a document-by-document privilege log should be the default requirement. Though I recognize that, in some cases, descriptions of categories might be appropriate, provided that the requesting party is still able to adequately evaluate claims of privilege.

A revision to Rule 26(b)(5)(A) to specify that it only requires parties to identify "categories" of documents. Alternatively or additionally, a revision to the rule might enumerate "categories" of documents that need not be identified.

I am opposed to such a rule change. As explained above, a common (and larger) problem is inappropriate privilege assertions. To me, a better revision would be some explicit statement that a document-by-document log is normally required but the parties can agree or the court may order more general descriptions of categories of documents. I believe that a document-by-document privilege log should be the default requirement, rather than "categories". I am not sure I understand the second part of this proposal entirely. But as far as I understand the second part, it seems impossible on a practical level to enumerate categories of documents that need not be identified in such a way that would be workable across all the many different types of federal civil cases. Though post-commencement communications might be exempted from identification requirements (unless good cause is shown to require identification).

From:	Austen Zuege
To:	RulesCommittee Secretary
Subject:	Comment on Privilege Log Practice
Date:	Friday, July 16, 2021 7:12:37 PM
Attachments:	Comment on Privilege Log Practice.pdf

Please find attached comments on privilege log practice.

---------- Forwarded message ---------
From: **U.S. Courts** <uscourts@updates.uscourts.gov>
Date: Thu, Jun 10, 2021 at 3:57 PM
Subject: Federal Rules: Request for Comment on Privilege Log Practice
To: <azuege@wck.com>

uscourts.gov

U.S. Courts News
uscourts.gov | news | court locator

Request for Comment on Privilege Log Practice

The Committee on Rules of Practice and Procedure and its Advisory Committee on Civil Rules invite public input on privilege log practice. Specifically, the Advisory Committee would like to determine:

- the difficulties encountered in complying with Civil Rule 26(b)(5)(A); and
- whether those difficulties could be solved by rule amendments.

Read more.

From: Brandon Peak
To: RulesCommittee Secretary
Subject: Comment on Privilege Log Practice
Date: Sunday, July 18, 2021 11:25:45 AM

I write to express my strong opposition to the proposed changes to privilege log practice. My firm and I routinely handle large, document-intensive cases. I have seen on numerous occasions how parties attempt to evade legitimate discovery by claiming privilege or protection for documents that are neither protected nor privileged. Requiring parties to log the documents they contend are privileged or protected on a privilege log many times facially reveals that the documents are clearly not privileged or protected because they have been, for instance, shared with non-lawyers or third parties outside of the litigation. Changing this rule will undoubtedly cause more discovery obfuscation by allowing parties to illegitimately withhold discoverable documents by falsely claiming that they fall into a "category" of privileged documents.

Another problem with the proposed change is that the job of making privilege determinations usually falls on young lawyers or contract lawyers with little experience or knowledge of the respective law. A senior lawyer then reviews the log and many times removes documents from the log and produces them because the log reveals that the documents are not privileged. This will not happen if the junior lawyers are permitted to make privilege or work product decisions without logging them and merely contending they wrongly fall into a "category" of privileged documents.

There is nothing wrong with the current rule. It is a fair, even-handed rule, which discourages discovery misconduct by requiring lawyers to log documents on a privilege log. Making this change will create more litigation and work for the courts, who will be tasked with reviewing numerous documents that purportedly fall into broad "categories" of privilege or protection rather than a targeted questions about specific documents logged on a privilege log.

Please do not change this rule.

Brandon Peak

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From: Gene Brooks
To: RulesCommittee Secretary
Subject: Privilege log requirement
Date: Monday, July 19, 2021 9:21:50 AM

I write in support of the privilege log requirement in Rule 26. This requirement is necessary for prevention of non-production of relevant documents. Often, I will receive a host of objections to Requests for Documents. The non-production of relevant documents are camouflaged by the numerous objections, particularly when a large amount of documents are requested. There is no way for me, as Plaintiffs' counsel, to know what has been withheld, or even to know which of the numerous objections are being asserted for any particular document. The only way to know what documents the objections apply to is with a privilege log. I have recently had this exact experience in state court. Once the privilege log was produced, we knew what objections applied to which of the documents for which privilege was claimed. Then the Court was able to perform an incamera inspection of the documents. Without the privilege log, there would not have been a procedure for determining what documents were being withheld based on which asserted objection.

Gene Brooks
PO Box 9545
Savannah, Ga.
912-233-9696
gbrooks@brooks-law.com

From: Jasper Abbott
To: RulesCommittee Secretary
Subject: FRCP 26 changes
Date: Monday, July 19, 2021 4:27:35 PM
Attachments: 1c. D Nationwides Privilege Log (12-3-20).pdf

To whom it may concern:

My name is Jasper Abbott. I am an attorney in Atlanta, Georgia. I am licensed in Oklahoma and Georgia. I wanted to reach out to provide comments on proposed changes to FRCP 26. My understanding is that the committee is considering softening the privilege log requirements so that simply listing "categories" of documents is sufficient. Such a privilege log would not provide any useful information to challenge a privilege claim. It would only increase the likelihood of motion practice whenever privilege claims are asserted. I have attached an example of a "category" privilege log I received in a case. This log resulted in multiple hearings with the court, forced the court to do an in-camera review of documents, and increased the cost of litigation for all parties. A document-by-document log would have prevented such costs. So, I respectfully request that the committee not change the privilege log standard. Thank you.

--

Jasper Abbott

Attorney

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IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

KAREN ZACHARY, AS NEXT OF KIN, AND DULY APPOINTED ADMINISTRATOR TO THE ESTATE OF RHODA GLENN, DECEASED,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	FILE NO. 19A73768
RONALD MASON; KEYSTONE PETROLEUM TRANSPORT, LLC; AND NATIONWIDE AGRIBUSINESS INSURANCE COMPANY,	)	
Defendants.	)	

NATIONWIDE AGRIBUSINESS INSURANCE COMPANY'S PRIVILEGE LOG

Defendant began to anticipate litigation in this matter on October 5, 2018 when the claim was reported by its insured Keystone Petroleum Transport, LLC.

Date	Document Description	Privilege/Objection
10/5/2018-present	Claim File Notes regarding Claim 990637-GH; including internal legal correspondence, correspondence with insured, correspondence with excess carrier, and correspondence with outside Defense Counsel	Confidential proprietary information; Work product prepared in anticipation of litigation; Attorney-Client Privilege; Trial Prep
10/5/2018-present	Communications between Nationwide and the Insured	Trial Prep; Work Product prepared in anticipation of litigation
10/5/2018-present	Internal communications within Nationwide	Trial Prep; Work Product prepared in anticipation of litigation
10/5/2018-present	Communications between Nationwide and Excess Carriers	Trial Prep; Work Product prepared in anticipation of litigation
10/5/2018-present	Communications between Nationwide and Defense Counsel	Trial Prep; Work Product prepared in anticipation of litigation; Attorney-Client Privilege
10/5/2018-present	Copies of documents, photos and tangible things from Defense Counsel	Confidential proprietary information; Work product prepared in anticipation of litigation; Attorney-

		client Privilege

From: Robert W. Cobbs
To: RulesCommittee Secretary
Subject: Comment regarding privilege log practice
Date: Tuesday, July 20, 2021 2:03:17 PM

Dear Reporter:

I am an associate with Cohen Milstein Sellers and Toll, a 100+ lawyer plaintiffs' firm. My practice is focused on antitrust class actions. I joined Cohen Milstein after graduating from Yale Law School and clerking for judges in the United States Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of Texas. I understand you are collecting comments regarding purported problems attorneys have in "large document" cases preparing privilege logs that meet the requirements of Rule 25(b)(5)(A).

In my experience with "large document" cases like the antitrust class actions I litigate on a daily basis, defense counsel routinely assert claims of privilege over documents where such a claim is indefensible. It is no secret in such cases that defense-side privilege reviews are typically performed by contract attorneys operating on short-term contracts with loose oversight and only vague incentives to code correctly. Reviewing attorneys are encouraged to over-designate, and the staff attorneys and associates who manage teams of contract attorneys likewise have incentives to err on the side of claiming privilege. These incentives also lead attorneys to designate entire documents rather than redact privileged portions of mixed privileged/nonprivileged material.

Plaintiffs' attorneys can often catch the most obvious errors, such as where no attorney is listed on the "privileged" communication or where outside parties are listed as recipients. But most often, plaintiffs must rely on the descriptions of the privileged documents to assess whether a claim of privilege is legitimate. Grouping privilege claims into categories eliminates plaintiffs' ability to assess the claim, because it necessarily describes the claim in so general a way as to apply to a broad swathe of documents. Moreover, allowing reviewers and their supervisors to advert to a preapproved list of descriptions encourages them to mischaracterize documents to fit into approved safe harbor categories.

I urge you to resist any change to the rules that would allow counsel to articulate the grounds for their claim of privilege without enough specificity to assess the claim.

Thank you for considering my comment.

Best,

Rob Cobbs

Robert W. Cobbs
Associate

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DomnickCunningham&Whalen

July 21, 2021

Re: Amendment to Rule 26(b)(5)(A)

To the Discovery Subcommittee of the Advisory Committee on Civil Rules:

Thank you for the opportunity to comment on the issue of Privilege Logs. My practice primarily involves the representation of people who have suffered Catastrophic injuries due to the negligence of others, including large corporations. I believe that the purpose of a privilege log is to allow the opposing party to have sufficient information about a particular document to make a determination on whether to challenge the designation or not. Allowing for categories of information to be listed rather than the specific documents will frustrate that purpose. It will make it more difficult to identify what is truly privileged and will allow wrongdoers to be more able to hide relevant, damaging materials.

Having the parties discuss compliance with the rule seems an odd requirement when the existing rule is clear on its face as to obligations of the parties. I also believe that enumerating categories of documents that do not need to be identified, is a one size fits all solution for issues that are often very case unique.

All of these proposals, under the guise of making it less burdensome for the producing party, in my opinion, will simply make it easier for a party who wants to hide documents, to do so. Unfortunately, there is a long history of efforts to evade discovery responsibilities and we should not be making it easier to accomplish that. The small gains in time are going to be way offset by the ability to frustrate the discovery of relevant documents that a party wishes to hide.
By way of example, I have handled cases in which requests were made for documents, the responses were vague and general, with categories defined, rather than specific documents. Ultimately, when specific documents were required to be named, we determined that many of them were not privileged and were key documents. The general category statements, if they had not been forced to reveal the specific documents, would have successfully hidden these documents from discovery.

For the above reasons, I would ask that the Subcommittee report that it is unnecessary to amend Rule 26(b)(5)(A).

Sincerely,

Sean C. Domnick
SD/jmd

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National Police Accountability Project

A Project of the National Lawyers Guild

Executive Director
Rachel A. Pickens

July 21, 2021

Via Email: RulesCommittee_Secretary@ao.uscourts.gov
Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle NE, Suite 7-300
Washington, DC 20544

RE: Comment on Privilege Log Practice

The National Police Accountability Project ("NPAP") is a nonprofit organization dedicated to holding law enforcement and corrections officers accountable to constitutional and professional standards. NPAP has approximately six hundred attorney members representing plaintiffs in civil rights cases in every region of the United States. Every year, NPAP members litigate thousands of egregious cases of law enforcement abuse that do not make news headlines, as well as the cases that capture national attention. We strongly urge the Discovery Subcommittee of the Advisory Committee on Civil Rules ("the committee") to reject proposed changes to current privilege log requirements.

Federal Civil Rule of Procedure ("FRCP") 26(b)(5)(A) sets forth the process for a party to withhold otherwise discoverable information under the claim of privilege. The rule requires the party claiming privilege to describe the documents and other information being withheld in enough detail for the opposing party to determine whether the claim of privilege is appropriate.

The question of whether a particular privilege should apply is often nuanced and fact-intensive.[1] Accordingly, even a party acting in good faith can incorrectly invoke privilege for information that should be disclosed. The opportunity to assess details of each specific document ensures the requesting party can challenge incorrect claims of privilege. The rule also empowers a requesting party to quickly identify and challenge bad faith invocations of privilege. The committee is contemplating changing FRCP 26(b)(5)(A) so that a party would be able to simply note the categories of withheld information rather than providing a description for each document that was not disclosed.

[1] *See Eg. Valero Energy Corp. v. U.S.*, 569 F.3d 626, 630 (7th Cir. 2009)(noting questions of privilege are "fact-intensive, case-specific questions"); *United States v. Doyle*, 2018 U.S. Dist. LEXIS 66980 at *20 (Apr. 19, 2018).

This change, if adopted, will make it much more difficult for litigants, and particularly civil rights plaintiffs, to obtain information they need to support their case. In the context of civil rights cases against law enforcement, a detailed privilege log is necessary to engage in the case-specific and fact-specific balancing of interests essential to determining whether information should be disclosed.[2]

Claims of privilege are a persistent feature of discovery in police misconduct cases. Police defendants being sued for civil rights violations will often claim privilege to shield internal affairs records, use of force policies, or other information critical to a plaintiff's case. In particular, police defendants commonly invoke governmental privileges such as deliberative process privilege, executive privilege, and confidential informer privilege. The propriety of each of these privileges would rarely be obvious from a categorical description and would turn on the high-level detailed description of the specific document.[3] Standard privileges such as attorney-client privilege may also apply and cannot always be assessed from a categorical label. Without the benefit of a document-by-document description, plaintiffs have no way to know which claims of privilege are improper and would be deprived of crucial information needed to advocate for disclosure.

In addition to the critical role discovery plays in supporting a plaintiff's claims, it is also essential to advancing police transparency and often the only method through which communities and grieving families can obtain accurate information about incidents of police brutality. State confidentiality laws severely restrict public access to accurate information about officer involved shootings and other critical incidents. Civil rights lawsuits and the evidence that comes to light in the course of discovery help expose officer misconduct and uncover abusive cultures of policing. Permitting blanket claims of privilege will undermine the police transparency goals that discovery promotes.

NPAP is deeply concerned that the contemplated changes would significantly undercut the ability of civil rights plaintiffs to obtain relief through the federal courts and increase police secrecy. We urge the committee to reject any change that would reduce information a party must currently provide to withhold documents pursuant to a claim of privilege.

Sincerely,

Lauren Bonds
Legal Director
National Police Accountability Project

---

[2] *Kelly v. City of San Jose*, 114 F.R.D. 653, 667-69 (N.D. Cal. 1987).

[3] *Providence Journal Co. v. U.S. Dept. of Army*, 981 F.2d 552 (1st Cir. 1992)(explaining that agency must show the specific decision to which document correlates to assist agency official prior to final decision to properly claim deliberative process privilege); *U.S. Dept. of Justice v. Landano*, 508 U.S. 165 (1994)(outlining the multi-factor considerations necessary to determine whether informer privilege was properly invoked).

ANDRUS ANDERSON LLP

July 22, 2021

Via E-Mail: RulesCommittee_Secretary@ao.courts.gov

MEMBERS OF THE JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

Re: *F.R.C.P. 26(b)(5)(A) – Privilege Logs*

To the Members of the Advisory Committee on Civil Rules:

Since graduating law school more than 20 years ago, I have been a plaintiffs' lawyer. My firm handles a broad range of complex cases. We litigate class actions of all descriptions (including employment, consumer, and product defect matters), and also represent plaintiffs in mass torts. Having lectured and written extensively on privilege logs over the years, I welcome the opportunity to comment on this important subject.

I do not advocate any change to Federal Rule of Civil Procedure 26(b)(5)(A) (the "Rule"). If the Committee were to consider any changes, I would support the addition of a requirement that the parties negotiate the scope, format and timing of the exchange of privilege logs as a part of the requirements set forth in Rule 26(f)(3)(D).

The importance of a detailed privilege log cannot be understated. In complex cases, where defendants may produce millions of pages of documents, corporations inevitably withhold thousands, or even tens of thousands, of documents based on assertions of privilege or work product protection. In my experience, however, once plaintiffs scrutinize the privilege log, and challenge improper privilege assertions, scores of documents that were improperly withheld get produced.

The reasons for improper withholding can range. Law firms tasked with reviewing a large universe of documents for responsiveness and privilege often rely on low-level associates. Their inexperience, or lack of training, may make them overly cautious, and result in excessive privilege claims. Additionally, the application of privilege is not always straightforward: judgment calls must often be made. Some lawyers tend to be more aggressive in their interpretation of the principles justifying privilege, and, certainly, a team of lawyers may not apply those principles uniformly. Unless the resulting privilege log is sufficiently detailed, the opposing party (and the court) will be unable to identify whether the decision to withhold any particular document could be the result overzealous lawyering, inconsistent application of the privilege, sloppiness, inexperience or some other factor.

The privilege log dispute that played out in the mass tort *In re Avandia Marketing Sales Practices and Products Liability Litigation*, MDL No. 1871 in the Eastern District of Pennsylvania, provides a good example of the abuses that occur, and the massive effort required by the parties and the courts to address them when they do. In that case, the pharmaceutical defendant produced a privilege log on a rolling basis. Eventually, that log grew to nearly 100,000 withheld documents. The privilege

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log in the *Avandia* case was particularly egregious. More than 3,500 purportedly privileged documents had third parties as recipients (such that any existing privilege had been waived). Nearly 6,000 entries showed that an attorney was merely "cc'd" on the communication. Another 5,700 documents had no attorney involvement whatsoever in the withheld communication.

Plaintiffs' Counsel convened a team, on which I served, to review the privilege log, to seek clarification on entries with insufficient information, and to challenge entries that improperly invoked a privilege. In our first challenge, the Special Discovery Master reviewed, *in camera*, 120 documents that Plaintiffs believed to be improperly withheld. Based on that review, he ruled that 95 of the 120 documents were not privileged. When the Article III judge considered his ruling (and reviewed the documents herself), she went even further: 20 additional documents were determined not to be privileged and five were determined to be discoverable with redactions. After multiple rounds of challenges, the defendant was eventually ordered to completely re-do its privilege review, produce improperly withheld documents, and revise its privilege log accordingly. Right prevailed, but only with a diligent fight, active participation by the court, and, most importantly, the recognition that privilege logs must be detailed to enable scrutiny.

Privilege logs are not merely an administrative exercise, nor are they a valid basis to complain about the rising costs of discovery. They are an exceptionally potent tool for burying evidence. As the *Avandia* case demonstrate, without proper oversight, tens of thousands of documents can be withheld from discovery. To avoid abuses of this nature, robust policing of privilege logs is necessary. Without detailed logs, defendants ask the court to "take our word for it," with no accountability.

Given the importance of this issue, then, it is incumbent on the parties to come to agreement early in every case on the scope, timing and format of privilege logs. Without such negotiation, costly disputes will arise later. Privilege logs should be produced early, and on a rolling basis. They should be produced in a useable electronic format (like Excel, not a fixed/unsearchable PDF). They should include a sufficient number of columns, negotiated by the parties, such that a proper evaluation of the log can be conducted by the opposing party and the court.[1]

Under no circumstances should the Rule be changed to indicate that categorical privilege logs are sufficient. Categorical logs tend to "obscure[] rather than illuminate the nature of the materials withheld." *Chevron Corp. v. Salazar*, No. 11 Civ. 3718(LAK(JCP), 2011 WL 4388326, * 1 (S.D.N.Y. Sept. 20, 2011). In cases where a party can substantiate that creating a document-by-document log would present a disproportionate burden, that party can seek relief through a protective order under subdivision Rule 26(c). Even where a party can satisfy the requirement of showing that its burden outweighs the need for a document-by-document privilege log, categorical logs must still provide "sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure." *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d. Cir. 1996). Further, any categorical log still must identify particular dates, recipients, sources,

[1] For example, I always insist that the "from, "cc" and "bcc" information be broken out into separate columns in the log. If all recipients are lumped into a single column, it is impossible to tell whether a lawyer was merely cc'd (potentially invalidating a claim of privilege). I also ask defendants to identify counsel and any third parties with an asterisk or other typographical indicator so that those individuals' status as someone who may justify the privilege (a lawyer)—or may waive the privilege (a third party)—is obvious on the face of the privilege log.

and a detailed description of the reasoning underlying the application of the privilege. For these reasons, categorical logs really only conserve resources when they skimp on such details, an all-too-common phenomenon.[2] Formally recognizing categorical logs in the Rule would encourage those desiring a minimalist approach (for economic reasons or for the added benefit of avoiding scrutiny when withholding evidence) and make it harder for improperly withheld documents to be identified, all the while increasing the work required by all parties and the court.

Sincerely,

Lori E. Andrus

[2] Categorical privilege logs have proved inadequate, and unwarranted, time after time. *See, e.g., Companion Prop. And Casualty Ins. Co.*, Civil Action No. 3:15-cv-01300-JMC, 2016 WL 6539344 (D.S.C. Nov. 3, 2016) (categorical log "does not allow a realistic determination of the applicability of a privilege"); *Tyco Healthcare Group LP, et al. v. Mutual Pharm. Co.*, Civil Action No. 07-1299 (SRO)(MAS), 2012 WL 1585335 (D.N.J. May 4, 2012) (defendant failed to substantiate the burden of creating a document-by-document log); *First Horizon Nat'l Corp. v. Houston Casualty Co.*, No. 2:15-cv-2235-SHL-dkv, 2016 WL 5867268 (W.D. Tenn. Oct. 5, 2016) (categorical log would be too "minimal and vague and would prevent the court from evaluating the privilege claimed") (listing cases); *Norton v. Town of Islip*, CV 04-3079 (PKC) (SIL), 2017 WL 943927 (E.D.N.Y. Mar. 9, 2017 ("skeletal" descriptions in categorical log insufficient to evaluate the privilege). In each of these instances, the parties and the court would have been saved much time and effort had a document-by-document log been provided in the first place. *See, e.g., Bethea v. Mecrhants Comm. Bank*, Civil Action No. 11-51, 2012 WL 5359536 (D.V.I. Oct. 31, 2012) (detailed privilege log conserves judicial resources).

PRIV-0021

From: Maria Diamond
To: RulesCommittee Secretary
Subject: Privilege Log Practice
Date: Thursday, July 22, 2021 2:38:39 PM
Attachments:

Dear Members of the Advisory Committee on Civil Rules:

Since graduating from law school 38 years ago, I have been a plaintiff's civil litigation attorney. My practice includes product liability, medical negligence, general personal injury and insurance cases.

I do not advocate any changes to Fed. R. Civ. P. 26(b)(5)(A) governing privilege logs. Over the years that I have practiced, I have been involved in a number of privilege log disputes, most frequently in the area of product liability. In complex products cases, it is not uncommon for defendants to produce many thousands and even millions of pages of documents, invariably withholding a substantial number based on claims or privilege or work product protection. However, once plaintiff's counsel carefully reviews the privilege logs and challenges improper privilege claims, many documents that were improperly withheld by the defense get produced.

It is already very challenging for plaintiffs to obtain relevant documents that defendants seek to hide under the guise of privilege. Changing the rule to allow categorical privilege logs will only exacerbate these challenges by obscuring instead of illuminating the nature of the documents withheld. I can think of multiple cases, including a surgical stapler product liability case in which I am currently involved, where documents relevant to plaintiff's liability claims would not have been discovered and ultimately produced but for the current requirement that individual documents be described. Furthermore, changing the rule will lead to increased motions practice.

Thank you for your consideration of my comments.

Respectfully submitted,

Maria S. Diamond

It is not the critic who counts; not the man [or woman] who points out how the strong man [or woman] stumbles or where the doer of deeds could have done them better. The credit belongs to the man [or woman] who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errors, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself [or herself] in a worthy cause; who at best knows in the end the triumph of high achievement, and who at the worst, if he [or she] fails, at least fails while daring greatly.

—Theodore Roosevelt

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From: Narine Mkrtchyan
To: RulesCommittee Secretary
Subject: Privilege log rule changes proposal
Date: Thursday, July 22, 2021 5:08:13 PM

To whom it may concern :

As a civil rights attorney I vehemently oppose this proposal to change the rule requiring specific description of the documents withheld on the privilege log. In most cases the city withholds many documents that are subject to disclosure on grounds of privileges that are normally overruled . However , if they are allowed not to specify the documents withheld and provide only a generic description of records, it will help them to suppress material records from disclosure and we would never learn what responsive records exist. I have had this experience in a recent case where the city provided only a generic description of records which didn't allow the assigned magistrate decide what records exist and how to rule on our requests. As a result we didn't get records that we know exist in the agency.

I sincerely request this proposal to be rejected as it would greatly undermine discovery in police misconduct litigation.

Thanks.

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July 22, 2021

VIA EMAIL ONLY

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle NE, Suite 7-300
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

RE: Comment on Privilege Log Practice

To the Committee:

I am a plaintiff's civil rights attorney and have practiced in the federal courts for forty years. Through practical experience, I have seen how often a civil rights case hinges on the information held by the defendants, and which must be pried out of their grasp, through the discovery process - and all too often through successful motions to compel discovery in the wake of the production of a privilege log - so that the plaintiff has the information needed to prove his or her case.

While the proposed changes to current privilege log requirements in the Federal Rules of Civil Procedure might make some sense in commercial litigation, a matter on which I cannot offer an opinion, those proposed changes will profoundly undermine the goal of liberal discovery afforded the litigants in civil cases, including civil rights cases, in the federal courts.

As a result, I urge the Discovery Subcommittee of the Advisory Committee on Civil Rules ("the committee") to reject proposed changes to current privilege log requirements.

The question of whether privilege applies is almost always fact-specific. Without the opportunity to assess pertinent information regarding a particular document, the ability of the requesting party to challenge a claim of privilege is nil. If adopted, then this change will make it virtually impossible for litigants, and particularly civil rights plaintiffs, to learn in discovery critical information necessary to support their case.

Police defendants sued for civil rights violations often claim privilege to shield internal affairs records, use of force policies, and other information critical to a plaintiff's case. The propriety of the claimed privilege will rarely be obvious from a categorical description as opposed to the detailed description of the specific document currently required under the discovery rules.

Civil rights cases and the evidence that is discovered in them serve to expose police – and other government officials' -- misconduct. The proposed changes will significantly impair the ability of civil rights plaintiffs, who serve as private attorneys general, to obtain justice in the federal courts for themselves and a safer environment for their communities.

The committee should reject these changes that will without a doubt allow parties seeking to hide inculpatory documents from the discovery process, which is precisely contrary to what the Rules intend, and for good reason.

Thank you for your consideration.

Sincerely,

Philip B. Davis

PBD:kmt

From: Ian Bratlie
To: RulesCommittee Secretary
Subject: Privilege log changes
Date: Friday, July 23, 2021 12:12:34 PM

Dear committee,

I am greatly concerned about the proposed changes to the privilege rule changes in that they will greatly impact police litigation in a negative way. Victims of police abuses - more often than not, people of color - will be disproportionately impacted by the proposed rule change. Police litigation is already strongly tilted against plaintiffs and this rule change would make it even harder for victims to prove their claims in court. I assume the committee did not consider the impact of this rule on people of color when it proposed it and I am hopeful that, once you review this concern, you will not adopt the proposed rule change.

Sincerely,

Ian Bratlie

TURNER & ASSOCIATES, P.A.
Attorneys at Law

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Tab Turner
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July 23, 2021

VIA CERTIFIED MAIL

The Hon. John D. Bates
The Hon. Robert M. Dow, Jr.
Chairs Advisory Committee Rules
Committee Rules of Practice and Procedure of the Judicial Conference of the United States
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov.

Re: *Comment on Rule 26(b)(5)(A)*

Dear Judges Bates and Dow:

The following comments are provided in response to the invitation for comments about privilege log practice and the suggestion to amend Fed. R. Civ. P. 26(b)(5)(A), including the consideration of switching to categorical logging.

I have spent close to 40 years in civil litigation, starting as an associate at a large defense firm, and then in my own firm. I would ask that the proposed change be rejected because, in my experience, clearly defined rules on logging privilege specifics aid in efficiency and fairness, while categorical logging does not save resources, adds to the disputes, and aids in the broad withholding of relevant non-privileged documents.

As we have all experienced, document productions have grown exponentially over the years. A document-by-document listing of alleged privileged materials, with specificity, has been the rule, not the exception. Requiring a party to define the type of document; the general subject matter of the document; the date of the document; and such other information as is sufficient to identify the document, including, where appropriate,

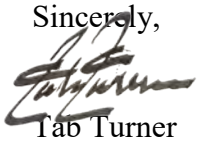
the author, addressee, custodian, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other helps, does not hurt the process. It defines the issues for the parties and narrows disputes. Changing these rules will create needless arguments, litigation, and expense.

Concerns about the costs or diversion of time to create these logs are self-serving and simply inaccurate. Switching to categorical logging will further complicate discovery in already complex cases, increase potential privilege disputes, and create confusion and inefficiency.

I urge you to reject this push for change.

Thank you for this opportunity to comment on this important topic.

Sincerely,



Tab Turner

CTT/ts

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July 23, 2021

Dear Rules Committee,

I am a partner at Nelson & Fraenkel LLP, a small (5-10 attorney) plaintiff's litigation firm located in Los Angeles and San Francisco, CA. I personally focus heavily on products liability cases, particularly aviation related matters. My cases are venued nationwide, in both state and federal courts. I have litigated a significant number of wrongful death and personal injury matters arising out of plane crashes which were caused by product defects including but not limited to failed engines and their components, fuel systems and their components, avionics, GPS systems, autopilots, etc. I regularly litigate against large and small manufacturers of aviation products including Boeing, Honeywell, Lycoming, Airbus and Eurocopter, to name a few. I also handle non-aviation matters that involve product defects such as biking and trucking incidents, among others.

I am writing to give my input on the proposed changes to Rule 26(b)(5)(A) concerning privilege log requirements. Claims of privilege are pervasive in products liability cases, particularly by the aviation products manufacturers I deal with on a regular basis. Almost every case I handle involves a defendant proposing a confidentiality agreement / protective order. Because such agreements involve a lengthy process and often require a court order, the interim discovery process typically involves claims of privilege for documents that defendants claim contain trade secrets and proprietary business information, among other confidential information.

It has been my experience that, in response to written discovery concerning claims focused on product design, manufacture, and failures, defendants routinely assert claims of privilege and confidentiality as a reason to withhold information and documents. In the rare scenarios where defendants actually provide a privilege log to accompany those objections on the first go-around, such privilege logs rarely comply with the requirements of Rule 26(b)(5)(A) to "expressly" demonstrate the basis for the privilege or provide enough information for us to properly evaluate the basis for the claims. They are merely categorical claims of privilege to justify boilerplate objections.

The result of the current rule, and how it is followed in practice, is lengthy meet and confer scenarios often followed by expensive and time-consuming motion practice. I have found that, if the matters ever do make it to a judge or discovery master, the arbiter will typically just try to compromise, "spit the baby" and placate both sides. Ultimately, I am usually left in the situation where I truly don't know what is being withheld, and it seems as though defendants could find a loophole to justify withholding of any particular damaging document if they truly wanted.

Thus, if anything, Rule 26(b)(5)(A) should only be amended in a way that will more adequately explain the claiming party's duty to expressly state its privileges. I am strongly opposed to rule changes that will either 1) indicate that a document-by-document listing is *not* routinely required, or 2) specify that the claiming party need only identify "categories" of documents under privilege. As to the latter, this language would unquestionably only result in more protracted meet and confer sessions followed by almost inevitable motion practice and unnecessary use of the court's resources. I can easily imagine, in

my practice, manufacturer defendants taking unfair advantage of such a rule and routinely listing categories such as “financial documents applicable to the model fuel pump” or “revisions to design drawings for the model crankshaft”. Such categories would be incredibly vague and leave the opposing party with very little basis to evaluate the claims.

In sum, loosening the requirements or integrating less specific duties on parties claiming privilege would be unduly prejudicial to plaintiffs who are seeking relevant and discoverable material related to products claims. As it stands, parties claiming privilege already skirt around the requirements and provide little specificity.

Thank you for your time and consideration of these comments. Please feel free to contact me if you want any further input in this matter.

Regards,

Nicole C. Andersen

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Submitted via Email: RulesCommittee_Secretary@ao.uscourts.gov

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Room 7-300
Washington, D.C. 20544

Attention: Honorable David G. Campbell – Chair
Professor Catherine T. Struve – Reporter

Re: Response to the Request for Input on the Components and Procedures for Privilege Logs in Civil Litigation

Dear Rules Secretary:

The Federation of Defense & Corporate Counsel (FDCC) is a not-for-profit corporation with national and international membership of 1,477 defense and corporate counsel working in private practice or as in-house counsel, and as insurance claims representatives. FDCC members practice in the trial and appellate courts of the United States and of all 50 states. The FDCC's efforts center on affording unfettered access to justice for all while also working to protect and advance the rule of law.

Since 1936, its members have established a consistent and strong legacy of representing the interests of civil litigants, including publicly and privately-owned businesses, public entities, and individual defendants. The FDCC seeks to assist courts and related entities in addressing issues of importance to the profession generally and its membership specifically that concern the fair and predictable administration of justice.

With that mission in mind, FDCC writes to support reforms to the privilege log component of Federal Rule of Civil Procedure 26(b)(5)(A). Our members are familiar with the burden of privilege logs as they regularly utilize the provisions of the Rules in their practice. The Rule provides:

> When 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.

While the 1993 Comments to the Rule make it explicit that the Rule is not intended to "define for each case what information must be provided when a party asserts a claim of privilege or work product protection," in practice what has developed in some jurisdictions is a very strict protocol for logging each and every document with details surrounding the claims. Yet in other jurisdictions, the protocol may be much more relaxed. Often, the protocols are unwritten and more of a localized practice. Accordingly, there is confusion across the federal courts and parties as to what is required in order to comply with the Rule, and a concern that doing the wrong thing will waive a privilege or result in sanctions. Compare for example the holdings of *Johnson v. Ford Motor Co*., 309 F.R.D. 226, 233 (S.D. W.Va. 2015) (granting a motion to compel and ordering a more detailed privilege log but denying a request to find a waiver of privilege); *Green v. Suzlon Wind Energy Corp*., 2011 WL 13177733 at*1 (W.D. Okla. 2011) (holding the privilege log was inadequate but granting 15 days to amend the log) with *Williams v. Taser Int'l, Inc*., 274 F.R.D. 694, 698 (N.D. Ga. 2008) (holding attorney-client privilege and work product doctrine claims were waived); *A.I.A. Holdings S.A. v. Lehman Bros*, 2002 WL 31385724 at *8 (S.D.N.Y. 2002) ("failure to list privileged documents on the required log of withheld documents in a timely and proper manner operates as a waiver of any applicable privilege. . . ."). A lack of uniformity in the federal system has resulted.

Adding to that confusion, increases in technology and a tenfold increase in the amount of electronically stored information since the provision was enacted in 1993 can result in a substantial burden and expense on the parties. In some cases, the amount of data is such that it is not reasonable—or even possible—to insist upon a document by document identification in a log. The Chief Judge of the Commercial Division of the New York State Supreme Court's Task Force on Commercial Litigation stated in 2012 that:

> Creation of privilege logs has become a substantial expense in complex commercial litigation matters. Often, the cost outweighs their value because the logs are not reviewed or used in any way by the courts. There is demonstratable need to limit unnecessary costs and delay in the creation of these logs while preserving the ability of the parties and court to police unwarranted withholding or redaction of documents in discovery.

Report and Recommendations to the Chief Judge of the State of New York, The Chief Judge's Task Force on Commercial Litigation in the 21st Century, June 2012 (Report and Recommendations), p. 17, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115510 (last visited July 21, 2021).

Thus, the problems with the privilege log provision are well-documented. FDDC supports practical solutions to these problems, in keeping with Rule 26's demand for proportionality. Specifically, FDCC supports the following practical, common sense approaches:

- Categorical, rather than document-by-document, logging of claims;
- Not requiring parties to include documents that satisfy the privilege or work product requirements prepared after the date the lawsuit was filed;
- Not requiring parties to include communications with its trial counsel or work product of its trial counsel;
- Not requiring parties to include documents produced with redactions with the redaction rationale clearly marked;
- Requiring Rule 16(f) discussions about the entry of privilege non-waiver orders or other protection under FRE 502(d) as well as the timing of privilege logs. A good discussion examples can be found in *The Protection Order Toolkit: Protecting Privilege with Federal Rule of Evidence 502*, Patrick L. Out, THE SEDONA CONFERENCE JOURNAL (2009); and
- Explicitly encouraging the availability of cost-shifting where electronic stored information makes the demands of certain logging burdensome.

FDCC thanks the Committee in advance for its hard work in considering the issues involved in the privilege log requirements and for the opportunity to provide comment. For the reasons stated herein, FDCC encourages practical reform to ensure that the provision is complied with uniformly across all federal courts in a way that does not substantially burden the parties but instead is proportional to the needs of the case. We and our members are available to respond to any particular questions, or requests for additional information the Committee may have, and look forward to working with the Committee going forward.

Respectfully submitted,

Michael T. Glascott
President

PRIV-0028

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July 23, 2021

VIA EMAIL - RulesCommittee_Secretary@ao.uscourts.gov

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

RE: Invitation for Comment on Privilege Log Practice

Dear Members of the Committee:

I write on behalf of the law firm of Fine, Kaplan and Black in response to the Invitation for Comment on Privilege Log Practice. Fine Kaplan believes that document-by-document privilege logs are an essential discovery tool, and any amendment to Federal Rule 26(b)(5)(A) is unnecessary and unwarranted.

Fine Kaplan is a nationally recognized law firm that devotes its practice entirely to litigation, with particular emphasis on antitrust, class actions, complex commercial litigation, consumer protection, and white-collar criminal defense. We represent both plaintiffs and defendants, including Fortune 500 companies.

In our firm's experience, over-designation for privilege is a significant problem, and document-by-document privilege logs are the only way to root out improperly designated documents. Document-specific information often enables opposing counsel to determine that certain documents are not actually privileged. *i.e.*, the communication included a third party; the lawyer was merely copied on a non-privileged communication sent to multiple non-attorneys; no lawyer was included on a particular communication; the attachment is unlikely to be privileged; the subject matter appears to be business-related, not legal, etc. Privilege logs in alternative formats, such as categorical privilege logs, are incapable of providing that level of specificity and thus do not allow a party or a court to meaningfully assess the legitimacy of the claim of privilege. Therefore, courts have generally insisted upon detailed document-by-document privilege logs. *See, e.g., Valley Forge Ins. Co. v. Hartford Iron & Metal, Inc.*, No.

114CV00006RLMSLC, 2016 WL 11033846, at *4 (N.D. Ind. Nov. 4, 2016) ("Here, Hartford Iron's privilege logs assert a blanket claim of privilege as to categories of correspondence or communications by date. This is insufficient, as '[t]he claim of privilege cannot be a blanket claim; it must be made and sustained on a question-by-question or document-by-document basis.'") (citations omitted); *First Horizon Nat'l Corp. v. Houston Cas. Co*., No. 2:15-CV-2235-SHL-DKV, 2016 WL 5867268, at *7 (W.D. Tenn. Oct. 5, 2016) ("In sum, in the absence of a document-by-document log, the court or the Defendants cannot assess whether the privilege claim is well grounded."); *Cobb Elec. Membership Corp. v. Zurich Am. Ins. Co*., No. 1:09-CV-0675-CAP-WEJ, 2010 WL 11500063, at *6 (N.D. Ga. Mar. 29, 2010) ("Blanket assertions of privilege, not specifically asserted with respect to particular documents, 'disable the court and the adversary party from testing the merits of the claim of privilege.' The party asserting the privilege bears the burden of establishing that the documents it refuses to produce are privileged. It is difficult to comprehend how a party could satisfy that burden with respect to any document that it identifies only by 'generic' category.") (internal citations omitted); *Coltec Indus., Inc. v. Am. Motorists Ins. Co.*, 197 F.R.D. 368, 371 (N.D. Ill. 2000) ("A claim of privilege cannot be a blanket claim, but must be made and established on a document-by-document basis. The scope of the privilege is narrow, because it is a 'derogation of the search for truth.' We stress that each of these elements must be established as to each document, as the mere existence of an attorney-client relationship is not sufficient to cloak all communications with the privilege.").

The tendency to over-designate for privilege is especially prevalent with respect to email communications. For example, it is not uncommon for some attorneys to broadly designate an entire email chain as privileged simply because a lawyer is involved in one or more of the emails in the chain. Such chains often include non-privileged, purely factual emails between non-lawyers that are later forwarded to a lawyer, and privilege is improperly asserted over the entire email chain. If each email is logged separately, it becomes clear that there is no proper claim of privilege over the entire chain. Loosening the specificity requirements for privilege logs would only exacerbate the over-designation problem and lead to the concealment of relevant, non-privileged documents.

Further, the burden of preparing privilege logs is often self-imposed. Multiple mechanisms are already available to reduce the burden and cost of privilege review and privilege log preparation. For example, in large document cases, experienced counsel frequently agree in advance to a privilege log protocol. The stipulated protocol approved by the court in *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, MDL No. 2724 (E.D. Pa.), gave Defendants the option to either (i) log every lesser-included email in a chain, or alternatively, (ii) log a single entry for the entire chain and produce a redacted version of the entire email chain.[1] Not one of the forty corporate defendants elected to use the latter alternative, which would have enabled them to avoid logging every email in a chain while still

[1] *See* Pretrial Order No. 95 ¶ 11.1 (ECF 1045).

providing the plaintiffs with sufficient information to evaluate the claim of privilege. Further, F.R.E. 502(d) clawback agreements, which our firm routinely enters into with opposing counsel, including in the *Generic Pharmaceuticals Pricing Antitrust Litigation*,[2] are available to reduce the burden of privilege review and privilege log preparation.

It appears that the primary proponent of an amendment to Rule 26(b)(5)(A) is Lawyers for Civil Justice. In their August 4, 2020 "Suggestion for Rulemaking," they argued in their Introduction (p. 1) that "the modern privilege log [is] as expensive to produce as it is useless." (quoting *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 99 (D.D.C 2012)). However, they fail to note that the privilege log in that case was deemed "useless" by the court because it contained "generic," "boilerplate" descriptions of the subject matter of the communication claimed to be privileged. *Id.* at 99.

In our view, the *Chevron* case actually supports our position that more detail, not less, should be provided in privilege logs. Also, the assertion by Lawyers for Civil Justice that there is a widespread belief on the part of the judiciary, parties, and litigators that there is a need for amendment to Rule 26(b)(5)(A) to require less specificity in privilege logs is simply unfounded. Moreover, adoption of the Lawyers for Civil Justice's proposal to afford parties greater latitude in designating entire categories of documents as privileged would invariably lead to more "satellite litigation" about claims of privilege because the receiving party would not have sufficient information to verify that the claim of privilege is warranted.

In sum, Fine Kaplan believes that the courts are acting properly under Rule 26(b)(5)(A) by generally requiring detailed document-by-document privilege logs in order to facilitate a meaningful analysis of asserted privileges and guard against over-designation. Parties may use existing tools, such as clawback agreements, to lessen the burden of privilege log preparation. Amending Rule 26(b)(5)(A) is unnecessary and unwise.

Respectfully submitted,

/s/ Roberta D. Liebenberg

Roberta D. Liebenberg

[2] *See* Pretrial Order No. 53 ¶ 11.3 (ECF 697).

From: Drew Ashby
To: RulesCommittee Secretary
Cc: Seth Lowry
Subject: Proposed Amendment to Fed. R. Civ. P. 26(b)(5)(A)
Date: Friday, July 23, 2021 5:26:12 PM
Attachments:

Dear Committee,

I represent plaintiffs in serious injury cases. I have been in practice for 14 years; 7.5 of which were on the defense side. I am writing to encourage the Committee to keep the rule as is, without an additional allowing for logging documents or data by category.

Thankfully, my experience with categorical logging has been limited to one matter. I say thankfully because it was a bad experience for everyone involved. Interestingly, categorical logging in this case came up organically. It was never discussed, but the corporate defendant chose to go this route anyway. The challenges with this method became quickly apparent when I wanted to know more about certain documents; particularly communications that were purportedly protected by the attorney-client privilege. When meet-and-confers with opposing counsel failed to produce any additional information about the communications, we noticed a 30(b)(6) deposition to discuss the communications. That 30(b)(6) designee ultimately knew nothing about the communications, or who was on them, claiming that there were far too many communications for them to testify intelligently about them. So, after trying numerous different approaches to get the information I needed to determine whether the asserted privileges were legitimate, I was back at square one; with nothing, and having wasted months of my client's discovery window, and having no additional information despite the substantial time and expense I had spent on the issue.

Frustrated, and with no good options, I filed a Motion to Compel seeking that the purportedly privileged documents be produced. Keep in mind, I had to do so with virtually no knowledge about whether the communications were privileged. This was merely my only tool left, since I could somewhat shift the burden of proving the privilege to the corporate defendant. When forced to finally do so in front of the Court, the corporate defendant's submission confirmed that their claims of privilege were functionally baseless. We won the privilege fight on over 98% of the challenges that we made.

It's tempting for anyone reading or hearing this story to believe it a success story. It's not. It's a story of how a broken process forced the plaintiffs to do needless work to obtain what they were already entitled to. And the defendant likely would have gotten away with it if we had not pursued the matter so intently. Think of how many lawyers may not have followed-up! Like it or not, many parties (plaintiffs and defendants alike, I'm sure) use privilege logs to hide documents that likely aren't privileged, but which they want to avoid producing. The receiving party's only check against that is the ability to obtain information to determine whether the privilege is valid. With categorical logging, this will be hampered even more than it already is.

When you make new rules, or revise old ones, you must always consider the ways in which the language of the rule (1) can be manipulated by parties who are unscrupulous or who believe they should push all available boundaries, and (2) creates incentives or disincentives for certain actions. Given that categorical logging can arguably take less time, any revision allowing it will automatically make it the norm. Given that it will be easier to hide

documents and data that are not technically privileged among categories in a log, changing the rule will incentivize this conduct.

Discovery should not be a game of cat and mouse, yet there are already so many broken parts of the system that allow for it to be as such. Explicitly allowing for categorical logging would make it worse, and it would disproportionately impact individual plaintiffs whose counsel does not have the resources afforded to large corporate defendants.

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PRIV-0030

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July 26, 2021

Discovery Subcommittee
Advisory Committee on Civil Rules

Dear Committee Members:

I submit these comments in response to the request for public comment on Privilege Log Practice. For the reasons set forth below, these comments support further consideration of Privilege Log Practice by the Advisory Committee to advance the goals of just, speedy, and inexpensive resolution of litigation and to reduce the costs and burdens of discovery practice.

The comment request asks for identifying information on my practice. I chair my firm's class action defense practice, and I also specialize in complex business litigation. In the latter type of cases, I am as frequently on the Plaintiff's side as on the defense side. In a recent case on the Plaintiff's side, fighting for discovery took the case to the New Jersey Supreme Court over discovery rulings. I am also co-chair of the ABA Section of Litigation Federal Practice Task Force, and the views expressed herein are shared by some of the other co-chairs and individual members, but are offered solely as my own views and not of the views of my firm, the ABA, the Section of Litigation, or the Task Force. As the Committee is aware, the Section of Litigation Federal Practice Task Force members have been active participants in expressing views as individuals with regard to past discovery projects of the Advisory Committee, and if the Committee decides to look at these issues further, I am sure the Task Force members will continue to be of assistance with further comments and to provide any help that is requested.

The request for comment correctly points out that neither the current language of Rule 26(b)(5), nor the Comment, expressly requires the creation of privilege logs on an item-by-item basis, but in any case involving documents of any size, courts believe they are required and the parties accordingly believe they are expected to provide them. This is true in both Federal and State cases. New Jersey's discovery rule, N.J. Court Rule 4:10-2(e)(1), is the same as the Federal

Rule on this point. Yet, I have never had a party claim a detailed privileged log was not required in either court. That said, the creation of these logs is burdensome and in many cases lead to further disputes regarding the extent of the information furnished to determine whether the privilege is properly invoked. Parties routinely fight over privilege designations even when it is clear that the document may have no relevance to the central issues in the case. These collateral disputes unnecessarily drive up the costs of litigation. There is no easy solution.

As you may know, the NY State Court Commercial Division adopted Rule 11-b of Section 202.70(g) establishing a preference for categorical privilege logs. It also provides for the possibility of cost-shifting where one party insists on a document-by-document log when a categorical log would be more appropriate. The New York City Bar prepared a guidance document regarding categorical privilege logs. It attempts to provide guidance on what a court might deem adequate (form/substance) in a categorical log and draws from the Local Civil Rule 26.2 of the SDNY/EDNY. For example, the guidance notes that a categorical log may only be appropriate in cases where the privilege designations are voluminous (page 3 – noting that document-by-document privilege log of 3,000 documents was not unduly burdensome requiring categorical privilege log). Further, the guidance notes that parties are required under Rule 11-b to discuss the scope of the privilege review and details of the log in a meet and confer at the outset of the case. I note that while a discussion at the outset may be helpful, it may be too early to do so before the parties have served their discovery requests and refined the critical issues in the case.

One solution that would be helpful is to identify the categories of documents that can be excluded from any privilege log requirement. In most cases, it should not be necessary to log communications with litigation counsel and the client both before and after the commencement of the litigation. The parties may also be able to agree that documents beyond a given date range need not be logged. Another area that should be excluded from a log are documents produced in redacted form, although at present the need to log such documents is a common subject of dispute between counsel. These documents should not need to be logged because the receiving party will usually receive, in that instance, more information regarding the document than simply the To, From, Date, and Subject Matter that a log normally provides.

One type of efficient privilege log used is a metadata privilege log created through the ESI review process by tagging documents with specific privilege designations and then exporting certain metadata fields from the ESI review platform to create a log of those documents. The log would include metadata fields such as date, from, to, cc, bcc, subject, and basis for privilege. Such logs are only available when using outside vendors or sophisticated document review platforms.

Another area causing disputes and relating to logs is the issue of redactions of documents that may have some discoverable information, but are otherwise not relevant to the claims or defenses. Some cases say that if a document has responsive information, and a protective order is

in place, the entire document must be produced and cannot be redacted by the producing party. On the other hand, there are strong arguments that when a lengthy document discusses many subjects and only one is relevant, there is no right for the adverse party to see the rest. One example would be minutes of confidential meetings of a Board that discuss may topics, only one of which is responsive to the document request. Sometimes parties resolve the issue by preparing redaction logs, possibly providing titles to the other sections, or otherwise identifying the subject matters of the items redacted. Again, further disputes are generated by these issues.

We understand that consideration of these issues is at an early stage, and no specific solutions are being considered as formal rule changes. We encourage the Discovery Subcommittee to look further into these questions in the hope of lessening the costs and burdens that they present to litigants. We would welcome the opportunity to provide further comments after we have more of an opportunity to gather additional input and to consider further ideas being explored by the Subcommittee.

Respectfully,

JEFFREY J. GREENBAUM

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July 26, 2021

VIA EMAIL ONLY

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle NE, Suite 7-300
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RulesCommittee_Secretary@ao.uscourts.gov

RE: Comment on Privilege Log Practice

To the Committee:

I am a plaintiff's civil rights attorney and have practiced in the federal courts for seven years. Through my cases I have seen that a civil rights case nearly always hinges on the information held by the defendants. Defendants do not give that information over easily and only through the discovery process – and all too often through successful motions to compel discovery in the wake of the production of a privilege log – so that the plaintiff has the information needed to prove their case.

While the proposed changes to current privilege log requirements in the Federal Rules of Civil Procedure might make some sense in commercial litigation, a matter on which I cannot offer an opinion, those proposed changes will profoundly undermine the goal of liberal discovery afforded the litigants in civil cases, including civil rights cases, in the federal courts.

As a result, I urge the Discovery Subcommittee of the Advisory Committee on Civil Rules ("the committee") to reject proposed changes to current privilege log requirements.

The question of whether privilege applies is almost always fact-specific. Without the opportunity to assess pertinent information regarding a particular document, the ability of the requesting party to challenge a claim of privilege is nil. If adopted, then this change will make it virtually impossible for litigants, and particularly civil rights plaintiffs, to learn in discovery critical information necessary to support their case.

Police defendants sued for civil rights violations often claim privilege to shield internal affairs records, use of force policies, and other information critical to a plaintiff's case. The propriety of the claimed privilege will rarely be obvious from a categorical description as opposed to the detailed description of the specific document currently required under the discovery rules.

Civil rights cases and the evidence that is discovered in them serve to expose police – and other government officials' – misconduct. The proposed changes will significantly impair the ability of civil rights plaintiffs, who serve as private attorneys general, to obtain justice in the federal courts for themselves and a safer environment for their communities.

The committee should reject these changes that will without a doubt allow parties seeking to hide inculpatory documents from the discovery process, which is precisely contrary to what the Rules intend, and for good reason.

Thank you for your consideration.

Sincerely,

Nicholas T. Davis

NTD:kmt

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PRIV-0032

July 26, 2021

Via email: RulesCommittee_Secretary@ao.uscourts.gov
Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle NE, Suite 7-300
Washington, DC 20544

Re: Comment on Privilege Log rule changes

Dear Committee on Rules of Practice and Procedure:

I have been practicing civil rights law in Massachusetts for over 40 years. I am deeply concerned about the proposed changes to current privilege log requirements.

Plaintiffs in civil rights cases rely on documents obtained through discovery to prove their cases. Defendants frequently respond to discovery requests with boiler-plate objections that the requests are overbroad and burdensome, even when the requests are narrowly tailored. Defendants also frequently claim privileges, sometimes without even providing a privilege log of documents they have withheld or redactions they have made. I have had numerous cases where I needed to remind defendants' counsel to provide a privilege log and I have had to file motions to compel privilege logs.

Privilege logs are an important tool to promote transparency and ethical discovery in civil rights cases. The current rule regarding privilege logs, FRCP26(b)(5)(A), was recently updated to broaden the content of privilege logs. The rule requires that the party claiming privilege must describe the documents and other information being withheld in enough detail for the opposing party to determine whether the claim of privilege is appropriate. When parties follow this rule, it works. I have received proper privilege logs that contain enough information to assure me that the withheld information is, indeed, privileged. I have also received privilege logs that show documents

or information is being improperly withheld. For example, defendants have claimed attorney-client privilege for an email which was sent to a third party. Most of the time, I can resolve issues by having a conversation with defendants' counsel. Without a proper privilege log, I would not know enough to begin this conversation.

Without details about what information is being withheld, and if defendants merely describe "categories" of documents, I would not be able to tell if documents were improperly designated as privileged. The proposed changes would make more work for our courts. Vague descriptions of documents would mean judges would need to view more documents in camera to determine if they are privileged.

The proposed changes would harm civil rights plaintiffs in an area of law that already favors government agencies and corporations. I hope the Committee will not change this rule, which protects transparency and promotes confidence that all parties are playing fair.

Sincerely,

Howard Friedman

Hf:cgk

From: Rob Snyder
To: RulesCommittee Secretary
Subject: Invitation for Comment on Privilege Log Practice
Date: Monday, July 26, 2021 3:37:13 PM

I write to provide comments about the Discovery Subcommittee's consideration of possible changes to Federal Rule 26(b)(5). My experience spans representing plaintiffs and defendants and working in federal court as a judicial law clerk. I am a partner in the Atlanta office of Butler Wooten & Peak, LLP. My practice is split primarily between representing plaintiffs in product liability, major personal injury and wrongful death cases, and whistleblower cases under the federal False Claims Act. About half of my current practice is in federal court. Before joining my current firm, I primarily represented defendants in business litigation and securities cases in federal and state court. Before entering private practice, I spent two years as a judicial law clerk to the Honorable Harold L. Murphy, United States District Court Judge for the Northern District of Georgia.

I write to urge the Subcommittee not to change Federal Rule 26(b)(5). The Rule in its current form requires any party, plaintiff or defendant, seeking to withhold documents based on a privilege to "expressly make the claim" and to "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." Fed. R. Civ. P. 26(b)(5). By requiring parties seeking to withhold documents to explicitly describe the withheld documents, the Rules provide an efficient and fair procedure for parties and the court to assess potential claims of privilege.

A detailed privilege log that identifies each document withheld is the best way for parties and Courts to assess claims of privilege and to make targeted challenges to privilege assertions. A few recent examples from my practice prove this point. In a recent False Claims Act case handled by my firm, the Court ordered the defendant Wells Fargo to produce a document that the company contended were protected by the attorney-client privilege. After we challenged several claims of privilege made by Wells Fargo, the Court ultimately ruled that one of the documents were not protected by any privilege because the document was not sent by or to an attorney. *United States ex rel. Bibby v. Wells Fargo Bank, N.A.*, 165 F. Supp. 3d 1319, 1329 (N.D. Ga. 2015) (rejecting and accepting privilege challenges based on targeted motion to compel). The document the court ordered produced was related to a Wells Fargo internal investigation.

In another case, *Reichwaldt v. GM*, the District Court ruled that a number of documents identified on GM's privilege log were not protected by any applicable privileges. Order of

February 10, 2020, *Reichwaldt v. GM*, Case no. 1:16-cv-02171-TWT, U.S.D.C. N.D. Ga., Dkt. No. 178. The court concluded that the documents were not created by or sent to an attorney but were instead design documents protected by no applicable privilege.

In both cases, we were only able to make a proper and targeted challenge because the defendants had provided detailed privilege logs that allowed us to review the claims of privilege and assess whether the documents on their face appeared to meet the legal requirement for application of the privilege. If the defendants had simply listed categories of documents withheld, by saying "documents related to internal investigation" or "documents related to legal investigation of design defect claims" our ability to challenge the withheld documents would have been greatly diminished. Faced with a categorical log in our cases, I feel certain that we would be forced to seek in camera review of all documents withheld by the defendants in most cases.

I also believe that the claims of those seeking changes to the Rule that privilege logs are burdensome in large document cases are overblown. Our firm frequently handles cases in which the defendants produce millions of pages of materials. Not once in my experience has any defendant contended that providing a document by document privilege log was excessively burdensome. But if that were the case the Federal Rules already provide several means for the parties to attempt to reach agreement on any privilege issues before discovery starts. *See, e.g.*, Fed. R. Civ. P. 26(f)(3)(D) (requiring parties to confer and include in their discovery plan "any issues about claims of privilege or of protection as trial-preparation materials."). Failing agreement, the court can resolve disputes about privilege logs before discovery starts. *Id.* Recently, reaching agreement about the format of privilege logs has become part of our discussion of ESI protocols in our initial planning conferences. In a recent federal court ESI protocol I worked on we reached an express agreement that any party seeking to withhold documents based on a privilege would provide a log separately setting forth for every document withheld: the nature of the privilege, the type of document; the authors; the date; the general subject matter; the Bates number; and any other information required by the Local Rules or the Federal Rules. *See* Agreed ESI Protocol, *Winston Hencely v. Fluor Corporation, et al.*, U.S.D.C. D. S.C., Case No. 6:19-cv-00489-BHH, Dkt. No. 35-1. We reached that agreement during the initial planning conference.

In addition, the meet and confer and initial planning conference process in federal court is sufficient to handle any request by a party that express categories be excluded from logging. It is not my experience that parties request that their opponents provide a log that lists communications with outside counsel or outside counsel's work product related to the case. My firm's form instructions for discovery requests expressly state that the receiving party need not log communications with outside counsel or any work-product related to the case. If a party insisted on such documents being logged, it is my strong suspicion that, barring any indication of the crime-fraud exception, any federal judge would look on that request with

great skepticism since those documents are shielded from discovery in the vast majority of cases.

Finally, to the extent that those seeking changes to the Rule claim that a fear about waiver is what drives the need for burdensome logging, that concern is also greatly overblown. Initially, the Rules already provide an express claw back mechanism that allows parties to retrieve documents that are produced inadvertently. The Wells Fargo order referenced above came about after Wells Fargo clawed back documents it contended were inadvertently produced. The Court ultimately agreed with Wells Fargo that those documents were shielded from protection. *United States ex rel. Bibby*, 165 F. Supp. 3d 1319, 1328. But aside from any claw back issues, it is not my experience that federal judges are quick to find a waiver of privilege even in those instances where a party produces no privilege log at all. Instead, in my experience federal judges are far more likely to first order a party to produce a compliant privilege log, and it is only when a party fails to comply with an order to produce a log that the court considers ordering production of the materials. In my experience, courts are very hesitant to find a waiver of any privilege.

I respectfully request that the Committee leave Rule 26(b)(5) as it is currently written.

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RAPOPORT WEISBERG & SIMS P.C.
TRIAL ATTORNEYS

July 27, 2021

Re: Judicial Conference Advisory Committee on Rule 26(b)(5)(A)

Dear Rules Committee,

My name is Matthew Sims and I am a partner at Rapoport Weisberg & Sims, P.C., a small law firm located in Chicago that represents plaintiffs in catastrophic and complex matters, such as aviation disasters, industrial explosions, product liability cases, trucking accidents, pharmaceutical cases, medical devices, and medical malpractice. I personally focus my practice extensively on product liability cases and my practice takes me to courthouses throughout the country, both state and federal. Oftentimes, our work has us litigating against well-known corporations, such as Boeing, Honeywell, Johnson & Johnson, John Deere, Lycoming, Bridgestone, Medtronic, and many other common household names.

I write today to provide my input on the proposed changes to Rule 26(b)(5)(A) concerning privilege log requirements. In document intensive cases – such as product liability cases – claims of privilege are omnipresent. Already, far too much is shielded from the public regarding the nature and legal consequences of wrongful conduct, which should be publicly known.

Writing for the Supreme Court of the United States in 1966, Justice Clark observed: "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo American distrust for secret trials."

More broadly, President John F. Kennedy once explained: "The very word 'secrecy' is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it."

Allowing sweeping categorizations of privilege logs will only continue to undermine the basic American principle that our courts serve not just private litigants, but the public as a whole.

It has been my experience that defendants routinely assert claims of privilege and confidentiality as a reason to withhold information and documents. Invariably, when we pursue and succeed on a challenge to privilege, we find damning documents of the highest order that were improperly withheld. Already under the current rule, a cat-and-mouse game seems to exist where great efforts are expended trying to conceal the most relevant documents through what are often specious claims and legal hair-splitting, many times involving improperly invoked claims of privilege. The proposal to the rules will only serve to worsen this scenario.

Claims of privilege are, and must be, qualitative, meaning that a trained attorney should have looked at a document and made a subjective call on whether a document satisfies a claim of privilege, and then, if so, whether any exception may apply (e.g. waiver, crime-fraud, etc.). If a document must go through this process for the assertion of privilege to occur, then the minimal amount of time-savings from permitting wide-categorization of categories of documents is hardly worth the temptation for pervasive and wide-spread abuse that will come with categorical assertions of privilege. In simpler terms, if an attorney is necessarily assessing whether the components exist to claim privilege, that attorney has already consciously looked at everything that would need to go into a privilege log anyways.

As such, I strongly oppose any rule changes that will eliminate a need for document-by-document listing, or otherwise permits a litigant to sweepingly claim broad categories of documents under claims of privilege. While some may argue the proposed rule change may potentially advance the "speedy and inexpensive determination[1]" of actions, those considerations should not take precedence over the necessarily "just" determination of actions.

Thank you for your time and consideration of these comments. Please feel free to contact me if you want any further input in this matter.

Very truly yours,

Matthew S. Sims

[1] Arguably, the rule change would be counterproductive in the speedy or inexpensive determination of actions, as it will undoubtedly require significantly more "meeting and conferring" in order to determine which documents exist within any given category of documents.

PRIV-0035

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July 25, 2021

Judicial Conference Advisory Committee on Civil Rules
RulesCommittee_Secretary@ao.uscourts.gov

Dear Rules Committee,

I write regarding current Rule 26(b)(5)(A). I represent plaintiffs in a variety of asbestos, employment, civil rights and personal injury actions in Delaware. Our rules of civil procedure in state court are modeled after the federal rules.

Privilege log disputes have tended to arise in larger cases such as asbestos cases where the Defendant is a large corporation with many documents and the request for production spans a long length of time. In my experience parties have been able to resolve issues themselves and judicial involvement not necessary.

I think that requiring categories of documents rather than a document by document description of each document would increase judicial intervention because parties would be more likely to ask the Judge for in camera reviews.

In my opinion no changes are needed and parties have worked to get issues resolved without judicial intervention.

Very truly yours,

/s/Raeann Warner

Raeann Warner

JOHNSTONE CARROLL
COMPASSIONATE. CONFIDENT. COMMITTED.

July 26, 2021

VIA E-MAIL
RulesCommittee_Secretary@ao.uscourts.gov

RE: proposed rule change relating to difficulties in complying with Rule 26(b)(5)(A)

To the Committee,

We have not experienced difficulties in complying with Rule 26(b)(5)(A). We are a small firm practicing mainly litigation representing individuals who have been injured, insurance policyholders, consumers, and small businesses. We handle both smaller, simple cases and some large document cases, including class actions.

The biggest problems we see in connection with the claiming of privilege are the over-claiming of privilege and the failure to provide sufficient information in a privilege log to make a determination as to whether something is privileged or not. In cases involving a large number of documents, candor and full disclosure of withheld documents is very important because in these cases the likelihood is reduced that withheld documents would otherwise come to light, for instance through the taking of depositions. We do not see a need for an lessening of the current rule.

.

Very Truly Yours,

s/ F Inge Johnstone

F. Inge Johnstone

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PRIV-0037

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July 27, 2021

VIA E-MAIL: RulesCommittee_Secretary@ao.uscourts.gov

MEMBERS OF THE JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

Re: Fed. R. Civ. P. 26(b)(5)(A) – Privilege Logs

To the Members of the Advisory Committee on Civil Rules:

I have been lawyering since 1986, mostly representing plaintiffs in cases involving pharmaceutical, medical device or product liability multidistrict litigations. Many changes have occurred in federal practice since I graduated law school. One of the biggest changes in my practice involves notice pleading. When I first started, I never considered *Conley v. Gibson* to be controversial until the Supreme Court read a plausibility standard into the text of Rule 8. Now, some judges are erroneously saying that federal court is a fact pleading system. Many other changes have occurred over time as documented by the then reporter to the Federal Rules Advisory Committee, Professor Arthur Miller, in his article *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?* 43 Tex. Tech. L. Rev. 587 (2010-2011).

But one of the bedrock principles that I learned in law school was that that the attorney client privilege is sacrosanct because we want to encourage candid truthful communications of clients seeking legal advice from their counsel. I also learned though that the attorney client privilege is an exception to the general rule that the law is entitled to every man's evidence. As an exception to the rule, it is to be construed narrowly and the burden of demonstrating the applicability of the privilege rests on the party who invokes it. These principles should be immutable.

In my experience, many lawyers misunderstand or misapply the privilege, if they do not outright abuse its assertion in discovery proceedings. The notion that this Committee is considering relaxing the standard by which privilege logs are ordinarily drafted to countenance the use of categorizing documents withheld as privilege invites mischief, if not abuse. I disagree with any such change to Rule 26(b)(5)(A). Only through detailed document-by-document privilege logs are opposing counsel able to divine even the barest of understandings of documents whose content it is the job of well-heeled lawyers to purposely obscure in a privilege log, often because the content of their client's documents is incriminating. Examples abound where counsel have attempted to attribute to a relevant and discoverable document attorney client privilege status through false or improperly applied criteria. The only means to hold in check the ability of opposing counsel to abuse the assertion of the privilege is to require fundamental information in a detailed privilege log.

Vioxx Products Liability Litigation, MDL 1657 (E.D. La.), provides an excellent example to demonstrate the on-going need for a document-by-document privilege log. In that case, Merck was represented by several nationally prominent law firms. It produced over 2.3 million documents and a separate privilege log listing 30,000 documents. Plaintiffs challenged the adequacy of the privilege log. In response, the district court ordered all 30,000 documents designated as privileged to be produced for *in camera* inspection. Incredibly, after an exhaustive personal inspection, the court found **only 491** of the 30,000 documents to be privileged (just under a 99% reporting error) and ordered the improperly designated documents to be produced. Some of the documents that were claimed privileged included promotional overviews, press releases, studies already in evidence, sales meetings, etc. Merck sought mandamus review at the Fifth Circuit. Although it denied the petition, the circuit court gave instructions suggesting that a different review protocol be employed. *Vioxx Prod. Liab. Litig. Steering Comm. v. Merck & Co., Inc.*, No. 06-30378, 2006 WL 1726675 (5th Cir. May 26, 2006). Adhering to the Court of Appeal's advice, the district court appointed Professor Paul R. Rice as a special master to evaluate the privilege dispute. Professor Rice evaluated a representative sample of 2,000 documents and again found widespread overuse of the privilege. He pointed out that the privilege is only designed to protect communications seeking and rendering legal advice, that legal advice must be the primary purpose of the communication, that when the role of legal counsel changes from *legal advisor* to corporate *decision-maker*, the privilege ends. He also noted that "[s]imply because technology has made it possible to physically link ... separate communications does not justify them as one communication and denying the demanding party a fair opportunity to evaluate privilege claims raised by the producing party." *In re Vioxx Prod. Liab. Litig.*, 501 F.Supp.2d 789, 804 (E.D. La. 2007). In so doing, Professor Rice criticized as both "inappropriate and unfair" privilege logs that categorize documents or allow email strings (not individual emails) to be identified. *Id.* at 812, fn. 33. The district court adopted this reasoning.

Other courts agree that categorical logging is inadequate because the logs are not "sufficiently articulated to permit the opposing party to assess the claims of privilege or work product protection." *Companion Property and Casualty Ins. Co. v. U.S. Bank Nat'l Ass'n.*, 2016 WL 6539344 (D.S.C. Nov. 3, 2016). By requiring each document to be separately logged, whole swaths or categories of documents cannot be swept under the privilege log rug. In this sense, the Fifth Circuit was prescient regarding this Committee's current consideration of categorization: "Traditional procedural protections are not limitlessly malleable. If staying within those traditional constraints takes more time than jumping their traces, that is not justification for doing so. The time it takes is the time it takes." *Vioxx Prod. Liab. Litig. Steering Comm.*, 2006 WL 1726675, at *3.

I ask that the Committee maintain the integrity of Rule 26(b)(5)(A) as is. Justice Brandeis's adage that electric sunlight is the greatest disinfectant still holds true. Changing the Rule to limit the wattage to that of a dimly lit bulb is not aligned with the basic principles of our system of justice.

Respectfully,

FREDERICK S. LONGER

/mmh

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July 27, 2021

Via Email Only

Judicial Conference of the United States
Advisory Committee on Civil Rules
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov.

Re: *Comment on Potential Change to Rule 26(b)(5)(A) on Privilege Log Practices*

Dear Members of the Committee:

I write at your invitation for comment regarding privilege log practice and a suggestion to amend Fed. R. Civ. P. 26(b)(5)(A), including the possibility of categorical logging. I have spent 23 years in civil litigation, starting as an associate at a large defense firm, and as a partner in a plaintiffs'-side class action firm. In my experience, clear rules on privilege logging aid in efficiency and fairness, while categorical logging does not save resources, creates additional disputes, and facilitates the broad withholding of relevant non-privileged documents.

Nearly all the cases I am involved with constitute the kind of "large document" cases described in the invitation to comment. See, https://www.uscourts.gov/sites/default/files/invitation_for_comment_on_privilege_log_practice_0.pdf at 2. In my cases, a document-by-document listing on privilege logs is routinely required. For example, the District of Maryland has local practice guidelines appended to it local rules that set out what a privilege log should contain:

> (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

See https://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf at App. A, p. 120. Judge Waxse set out another classic and useful template for adequate privilege logs almost 20 years ago. The log must provide: 1) a description of the document; 2) the general subject matter of the document; 3) the date of the document; 4) the author of the document, whom s/he works for, their title and whether they are counsel; 5) each recipient of the document, their employer, titles, and whether they are counsel; 6) the purpose of preparing the document; 7) the number of pages of the document; 8) the specific basis for withholding the document; and 9) any other pertinent information necessary to establish the elements of the asserted privilege. *Hill v. McHenry*, 2002 U.S. Dist. LEXIS 6637, at *6, 8 (D. Kan. Apr. 10, 2002). *See also Ruran v. Beth El Temple of West Hartford, Inc.*, 226 F.R.D. 165, 168-69 (D. Conn. 2005). This kind of guidance avoids boilerplate entries and allows the receiving party to reasonably assess assertions of attorney-client privilege or attorney work product claims, saving the court and litigants time and resources.

Concerns about the costs or diversion of time to create these logs are diminished due to the claw back rights in Fed. R. Evid. 502(d). The producing party can produce first and then claw back and create logs as needed. Further, in large document cases producing parties can run search terms through the electronically stored information to capture documents with counsel's names, or "privilege", as well as to de-duplicate and thread emails, making it easier to automate these logs. Further, legitimately privileged documents usually comprise only a small number of responsive documents.

I have also been involved in ligation where categorical logging was attempted and found it inefficient and ineffective. In *in re Marriott International Customer Data Sec. Breach Litig*., MDL No., 19-md-2870, the parties have been aided by retired Magistrate Judge John Facciola as a Special Master. Judge Facciola has written on the topic of categorical logging. "Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework," *The Federal Courts Review*, Vo. 4, No. 1 (2009). The parties met and conferred on categorical logging for months, unable to agree on the scope and descriptions. After months of disagreement on how the categories should be defined, Special Master Facciola suggested the parties just proceed with traditional logging. Between March and July of 2021—supposedly after the bulk of documents had been produced and several depositions had already been taken—Marriott produced over 13,000 "de-privileged" documents. These included incident timelines, risk assessments, and non-lawyer emails that Plaintiffs relied on in their recently filed class certification brief. These documents would have likely remained unproduced, having fallen within the broad categories suggested for logging. The late production necessitated creativity between the parties through interrogatories or 30(b)(6) depositions, to avoid re-depositions. The experience convinced me that categorical logging only complicates discovery in already complex cases, pushing potential privilege fights to the end. Worse, if there are not honest adversaries or a diligent special master or magistrate judge, materials may be wrongly shielded, with little chance that the receiving party can discover misassigned privileges.

Categorical logging would likely only add further opacity to the discovery process, invite satellite litigation on privilege, and sew further suspicions in large-stakes cases. Instead, to improve federal practice, preempt fights about the sufficiency of privilege logs, and ensure those creating logs seriously assess the bona fides of a claimed privilege, I suggest the Committee incorporate the District of Maryland's guidance cited herein.

Thank you for this opportunity to comment on this important topic.

Sincerely,

Douglas J. McNamara

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July 27, 2021

Via E-Mail: RulesCommittee_Secretary@ao.uscourts.gov

MEMBERS OF THE JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

Re: *F.R.C.P. 26(b)(5)(A) – Privilege Logs*

To the Members of the Advisory Committee on Civil Rules:

I serve as E-Discovery Counsel at Stueve Siegel Hanson LLP, a 30-attorney law firm based in Kansas City, Missouri that primarily represents plaintiffs in complex litigation, including businesses, individuals, and class action representatives. My electronic discovery practice includes negotiating privilege log agreements and assessing and challenging the adequacy of privilege logs in privacy and consumer class action litigation in state and federal courts across the country.

I write this letter to strongly encourage the members of the Judicial Conference Advisory Committee on Civil Rules to leave Fed. R. Civ. P. 26(b)(5)(A) ("the Rule") unchanged. The Rule currently requires parties claiming privilege to provide information sufficient for the requesting party to assess, and if necessary, challenge the asserted privilege of withheld information. In many of the federal cases my firm has litigated, the Rule has served to protect my clients against frequent unjustified assertions of privilege by defendants attempting to avoid disclosure of important and relevant information and documents.

My firm litigates privacy and consumer class action cases against large corporations with attorney-employees who serve in a business capacity. Business communications are frequently sent and received by employees with law degrees who work in business positions where legal advice is not requested or provided to non-attorney employees. My firm has successfully challenged parties who have withheld such communications on the basis of attorney-client privilege. Had Fed. R. Civ. P. 26(b)(5)(A) not required these parties to provide document-by-document logging of documents being withheld on the basis of privilege, we would not have been able to assess and successfully challenge these unfounded privilege assertions. Documents produced by the withholding party after a successful privilege challenge have often been critical to proving our client's case.

While litigating against large corporations, I have found that management often directs employees to copy corporate counsel on every communication, even when legal advice is not requested or provided. Corporations use this technique to try and avoid discovery of internal business communications in the event a lawsuit is brought against the company. Because the Rules require that a producing party provide information (authors, recipients, dates, subject matter, etc.) necessary to assess the privilege, my firm has successfully compelled the production of case-critical documents that were prepared for a business purpose rather than a legal one, and that were improperly withheld because counsel was merely copied on a communication.

I often see a push from defense counsel in various types of cases to move from traditional privilege logs to "categorical" privilege logs. Defense counsel attempts to create broad categories of documents which they argue should be treated as presumptively privileged and thus excluded from traditional document-by-document logging requirements. Broad categories of documents should not be excluded from the traditional privilege logging requirement. Withholding entire categories of documents without providing document-level information (authors, senders, recipients, subject matter, asserted privilege) provides an opportunity for parties to avoid producing case-critical non-privileged documents by sweeping them into withheld categories. This robs the requesting party of the ability to assess the privilege asserted for each document and challenge abusive discovery practices. Document-by-document logging must remain the standard requirement to keep parties honest in the assertion of privilege in discovery.

Parties frequently claim that the traditional privilege logging process is "too burdensome" and "outdated" under the proportionality requirements. In fact, the assertion of privilege and associated logging of documents is not a "burden," but a responsibility associated with withholding privileged documents from discovery. Requiring the exchange of a traditional privilege log provides essential accountability to the requesting party.

In my experience, parties who complain of "burden" tend to wildly over-designate documents as privileged. My firm often receives privilege logs containing thousands of entries. We carefully review the withholding party's privilege log(s), and we must challenge many entries because the parties to the communication(s) are not attorneys and/or the documents do not appear to be attorney-client subject-matter or work product. Most of the time, after a secondary review, the withholding party de-designates a large percentage of logged documents as non-privileged and produces the originally withheld documents. If withholding parties are concerned about the amount of time spent creating privilege logs, they should institute a strict privilege review process. Such a process would decrease the size of privilege logs by ensuring that only truly privileged documents are withheld and logged.

In addition to implementing a strict privilege review process, parties can also leverage technology to reduce the work of privilege logging. Parties can easily use document management software to automate and export most privilege-log content. This content includes insightful metadata such as authors, dates, email senders and recipients, file names and email subject lines.

Combining automation with a strict approach to the application of privilege would greatly reduce a party's time spent fulfilling their privilege logging responsibility.

Without the accountability of document-by-document privilege logs, parties would be free to over-designate and sweep thousands of responsive, non-privileged documents into theoretically privileged "categories" with no requirement to prove their privilege claims. A change from traditional logging to simply describing categories of documents would disrupt the balance created by the Federal Rules and tip the scales in favor of withholding parties.

As currently drafted, Fed. R. Civ. P. 26(b)(5)(A) serves as a critical check against the strategic withholding of key litigation documents on the basis of questionable privilege designations. To maintain accountability and honesty in the discovery process, I urge the Advisory Committee to leave the Rule unchanged.

Sincerely,

Stephanie A. Walters

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PRIV-0040

July 27, 2021

VIA EMAIL
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Re: Comment on Privilege Log Practice

To the Committee:

We are civil rights lawyers who bring claims on behalf of individuals who suffer constitutional deprivations at the hands of law enforcement, corrections officers, and correctional medical providers. At the start of each case the parties, with relatively few exceptions, are situated as follows: (i) a state actor and/or municipality who controls almost the entire universe of relevant documents and data and (ii) an individual who sometimes does not even have immediate access to their own medical records or statements, much less any information that will aid them in prevailing against the governmental entity. We frequently face challenges to disclosure of information cast in terms of proportionality, confidentiality, and outright refusal to disseminate information that might make it easier to build or prove claims. This occurs, in particular, in the context of discovery geared toward developing municipal custom, pattern and practice claims – referred to as Monell claims – against municipalities who fail to train, discipline or enforce rules to prevent repeated constitutional deprivations in these contexts.

Often, internal documentation regarding the occurrences giving rise to our claims will be subject to claims of "investigative" privilege or "self-evaluative" privilege, where state, municipal and/or corporate actors will attempt to shield truthful and complete records of these incidents through claims that information should be excluded from disclosure because an in-house lawyer, investigative division, criminal prosecutor, or medical review panel happened to consider it. We find that these "investigations" are often cursory self-exoneration and, at worst, deliberate attempts to conceal information. Consequently, permitting these defendants to utilize broad, non-descript categorical privilege log disclosure only serves to further imbalance a discovery process that is already heavily weighted in favor of

these governmental and associated corporate defendants. Specific and detailed logs are essential to allow individuals who have been harmed in these settings an opportunity to effectively use the discovery process to identify essential documents and information that are being withheld, and to engage the courts to aid the individuals in compelling disclosure of these documents. Broad categorical disclosure would effectively eliminate the opportunity for individuals to balance the discovery playing field and make what is already an uphill battle for most individuals who seek to survive summary judgment on difficult legal issues nearly impossible in many claims.

Presently the American public demands increased transparency by police, municipalities, and other government actors. Therefore, we cannot change privilege log disclosure to a categorical model that would further obscure the facts behind circumstances of police misconduct or correctional mistreatment. Limited transparency created by camera footage that reveals the truth behind encounters has led to public outcry for *more* information and *more* transparency. For decades, entities have intentionally withheld facts related to law enforcement and correctional misconduct. Individuals who seek fair access to information exclusively in the control of these entities should not be handicapped by procedural rules that serve to aid only the defendants in these cases by permitting them to sweep the *existence* of information under the rug of broad, vague categorical disclosures.

For these reasons, we strongly urge the committee to reject these changes and to protect the right of individuals to overcome the informational imbalance in these cases.

Sincerely,

Seth R. Carroll, Esq. Mark D. Dix, Esq.

From: Mike Adkins
To: RulesCommittee Secretary
Subject: Comment on proposed changes to Rule 26(b)(5)(A)
Date: Thursday, July 29, 2021 10:38:09 AM

Chair:

The vast majority of cases have no privilege issues of a nature that would require a privilege log. For those that do, the present rule is not unreasonable nor burdensome in my experience. The number of documents actually protected by privilege is usually not large, and going with categories only would actually increase the burden in those cases as it would require more steps to identify the documents involved as most judges will actually try to get the parties to resolve the disputes before conducting an in camera review.

Identifying by category alone would allow too much to be hidden and allow mischaracterization opportunity both intentional and accidental.

I think it would be a mistake to make the proposed change.

Sincerely,

Michael S. Adkins

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Michele S. Stephan: FL, M.D.Fla., S.D.Fla, W.D.Mich.
Danielle A. Strait: CA, DC, WA, Fed.Cl.
Anne Carrión Toale: FL, M.D.Fla., Fed.Cl., Fed.Cir., 11th Cir.
Christina E. Unkel: DC, FL, M.D.Fla., D.P.R., Fed.Cl.
Kehl Van Winkle: OR, WA, Sauk-Suiattle
Joseph A. Vuckovich: DC, D.D.C., D.Md., Fed.Cl.

July 29, 2021

Discovery Subcommittee of the Advisory Committee on Civil Rules
VIA EMAIL ONLY: RulesCommittee_Secretary@ao.uscourts.gov

Re: Invitation to Comment on Privilege Logs Practice

Dear Discovery Subcommittee:

For over twenty years I have represented plaintiffs in product liability litigation where discovery was of paramount importance to the very ability to pursue the case. Without adequate discovery, my clients would often not be able to prove defect and thus not survive summary judgment. With adequate discovery, summary judgment would not be an issue and instead my clients would often be able to pursue punitive damages.

Over the years, privilege logs have played an increasingly crucial role in obtaining essential discovery. Certain large corporate defendants have become increasingly brazen about evading production of problematic documents. However, one clue to the existence of those documents is often found in privilege logs. Document dates, recipients, and subject lines can provide important clues that documents were improperly withheld and worth the discovery battle necessary to obtain. While far from perfect, the limited specificity required of privilege logs by caselaw, developed slowly over time, is a crucial tool. In my cases, this crucial tool has been repeatedly used to find and show that producing parties have been withholding the most important "smoking gun" documents.

Allowing producing parties to lump documents into categories in privilege logs will defeat the very utility of privilege logs. Additional court intervention will be necessary to require the specificity within categories to allow for meaningful analysis. This further step will lead to increased litigation and delay.

Automatically excluding categories of documents from privilege logs is a further recipe for abuse. For example, many large corporations have attorneys working in all aspects of the business. If the category of attorney-client privileged documents were to be excluded from inclusion in privilege logs, documents that are not righteously in that category will almost certainly be excluded as a matter of rote. Documents involving business decisions made by attorneys will be swept up into the exclusion, never to see the light of day. It will be difficult, if not impossible, to ever locate these documents. The

disappearance of these crucial documents will likely not result in increased litigation, just increased injustice.

I have also been very involved in the production of discovery. Most document review and production platforms today make generating and producing privilege logs incredibly quick and efficient - done at the touch of a button. With the use of metadata for document sets coupled with essential document review, most of the necessary information for the privilege log is already there, and the system simply uses it to generate the logs. The quotes and citations in the "Suggestion for Rulemaking" used to support the proposition that privilege logs are burdensome and costly are extremely dated and focus on privilege logs from a decade past.[1]

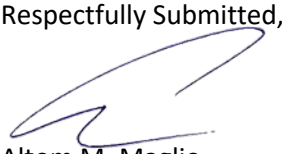
In light of the increasing ease with which privilege logs are maintained, generated, and produced, it is perplexing as to why this has even been raised to the Discovery Subcommittee as an issue. Could it be that this is less about the production costs posed by privilege logs, and more about further limiting the specificity and utility of privilege logs and thus their value?

Unfortunately, this attack on discovery using the rule-making process seems to be an increasing trend by certain well-funded, agenda-driven organizations. Rather than gutting discovery, as if getting to the truth is just too difficult and too expensive, I would instead urge the Discovery Subcommittee to consider strengthening discovery. How do we ensure that parties comply with the purpose and spirit of discovery in preparing privilege logs? What happened to initial disclosures actually disclosing anything? Can we make parties efficiently produce requested relevant discovery without protracted litigation and the necessity of constant judicial intervention? Do we increase penalties for improperly withholding discovery? Do we encourage judges to treat discovery obstruction as fraud upon the court and strike claims or defenses? Can we help attorneys remember that they are officers of the court and not accomplices?

Discovery underpins the rule of law. Without discovery we cannot get to the truth. Without truth there is no rule of law.

I submit this comment on my personal behalf and not on behalf of the firm. Neither my firm nor I received any compensation or other payment for the drafting and submission of this comment.

Respectfully Submitted,



Altom M. Maglio
amm@mctlaw.com

[1]The quote in *Chevron Corp. v. Weinberg Group,* 286 F.R.D. 95, 99 (D.D.C 2012), cited in an extremely limited fashion in the "Suggestion for Rulemaking" reads in context: "For entry after entry, one part of the description for a particular category is exactly the same. This raises the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive to produce as it is useless."

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July 29, 2021

Via E-Mail: RulesCommittee_Secretary@ao.courts.gov

MEMBERS OF THE JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

Re: F.R.C.P. 26(b)(5)(A) – Privilege Logs

To the Distinguished Members of the Advisory Committee on Civil Rules:

I began my legal career over 28 years ago as the Law Clerk to the Honorable Barry Ted Moskowitz, Magistrate Judge, United States District Court, Southern District of California. In that role, I reviewed, analyzed and summarized motions to compel documents. To this day, I distinctly recall hard fought battles over privilege log entries that, to the greatest extent possible, obscured the relevancy and propriety of the purported privilege designations. In particular, I distinctly recall one banking case that took an enormous amount of the district court's time to resolve. That matter included several hearings, supplemental briefing, and in the end, resulted in most of the privilege log entries for claimed privilege being entirely misplaced or unfounded, intended only to resist the production of highly relevant and probative documents in the case.

Today, I am the principal of Arbogast Law, a predominantly plaintiff's oriented practice involving a wide variety of disciplines, from antitrust, banking, lending and business torts, to complex cases involving defective products, consumer fraud, and catastrophic injury. My firm handles complex cases in all four federal district courts in California and I have appeared in numerous cases throughout the United States. I am admitted to both the Ninth and Second Circuit Courts of Appeal and have authored briefs in numerous other Circuits, including the United States Supreme Court. Invariably, with at least respect to appellate matters concerning summary judgment, it is the evidence produced in discovery, and whether it is sufficient to carry the plaintiff's burden that is at issue in each case. Unquestionably, discovery plays an important role in our system of jurisprudence that has, over the years, attempted to achieve an equilibrium or balance.

Specifically, I write this letter to urge the distinguished members of the Judicial Conference Advisory Committee on Civil Rules to leave Fed. R. Civ. P. 26(b)(5)(A) ("the Rule") unchanged. As it is drafted the Rule forces parties who claim privilege to disclose sufficient information regarding the withheld documents or information so as to allow the party seeking disclosure to challenge the purported privilege and, importantly, permit the Court to evaluate the propriety of the alleged confidential designation. As the Law Clerk to a federal Magistrate Judge, evaluating and ruling on privilege designations, and as a practitioner challenging purported confidential designations, the
Rule has performed an important function in guarding against improper designations, typically by defendants, in an attempt to avoid full and complete disclosure of highly relevant, and many times, damaging documents and information, the disclosure of which typically resolves cases.

In fact, in most cases that have resolved before trial, it was the law and motion work to obtain the damaging documents in the case which propelled settlement discussions. For example, in a defective auto – parking brake case, it was the internal memorandum acknowledging the existence of the dangerous defect, and subsequent "profits over safety" decision internally that it was cheaper to pay the lawsuits than it was to fix the problem. As is common, the key documents were withheld and buried in a privilege log. Only through law and motion practice under the current rule was the obfuscation uncovered.

In another example among many, in banking and lending cases, loan disclosures documents are vital so that borrowers can make an informed decision as to credit. Internal drafts which improved disclosures to consumers but made it less likely the loan products were sold, if produced, invariably propel settlement discussions, or at the very least, simplify and streamline the case for trial. However, most, if not all key documents in complex cases are rarely, if ever, produced without a motion to compel being filed and argued. And, for purported privileged documents, it would make it convenient for the defense to bury the key hot documents in a pile which it could provide a blanket summarized description, avoiding discovery altogether.

The same is true for the numerous catastrophic injury cases I have litigated. Invariably, the defense attempts to bury the most critical of "hot" documents in a pile of purportedly privileged materials to avoid being held accountable. Providing a convenient hiding place for the defense to hide, in plain sight, key documents and information and, at the same time, making it extremely difficult or impossible for the Courts to ferret through a proposed blanket entry would entirely upset the current balance, leaning the scales heavily to the defense. Indeed, I have encountered numerous occasions where only a cover memorandum from an attorney is allegedly privileged but then, attached to it, is an extensive

memorandum or the like that itself are clearly discoverable but withheld from discovery because of an purported privilege. Only by challenging the individual designations can the truth come to light. Even then, it is currently a cat-and-mouse game of challenging the right line entry on a privilege log because, not all entries can ever be realistically challenged given today's court congestion. Thus, as it stands, the defense or producing party is at a huge advantage. It knows where the bodies are buried, and has ample opportunity, under the current draft of the rule for mischief. Increasing the opportunity for mischief makes no sense.

In sum, a detailed privilege log is a vital component of the discovery process and adequate trial preparation. Alarmingly too often, the defense attempts to withhold documents on a purported basis of privilege that, when challenged, turn out not to be privileged at all but clearly discoverable. In each of those cases that I have encountered, if the defense or responding party had not been required to disclose in a log the critical features of each withheld document (the date, type of document, author(s), recipient(s), general subject-matter of the document, and the privilege being claimed [e.g., attorney-client]), in each case, I would have been prevented from challenging the privilege designations and, in turn, I would have been prevented from obtaining the evidence that either settled the matter or was a key piece of evidence used at trial.

The Rule, as it is drafted, is vital to access to justice. Any proposed change to make it easier for a producing party to hide and resist discovery will promote mischief and gamesmanship to such a great extent that it will be impossible to challenge any purported privilege designation. The ability of the parties to "assess the claim" of privilege on a document-by-document basis as the current Rule allows is essential. Accordingly, I urge the Advisory Committee to leave the Rule unchanged. As it is written, Fed. R. Civ. P. 26(b)(5)(A) is an extremely important device for litigants, and the Courts alike to evaluate the propriety of purported privilege claims and the concomitant withholding of highly probative documents and information.

Respectfully submitted,

ARBOGAST LAW

David M. Arbogast

From: Demian I. Oksenendler
To: RulesCommittee Secretary
Subject: Invitation for Comment on Privilege Log Practice
Date: Thursday, July 29, 2021 1:59:50 PM

Dear Rules Committee:

I write in response to the recent suggestion that there be changes to privilege log rules. The rules should not be changed.

In recent times, it seems that there has been a push toward streamlining discovery in our courts (see, e.g. changes to FRCP 26 regarding proportionality). While everyone certainly benefits from reducing the burden and expense of litigation, the proposed types of changes are not appropriate, necessary, or fair.

To begin with, there is no compelling reason to change the rule. One of the fundamental tenets of our system of justice is *stare decisis* – we respect the decisions of those who came before, and the law should remain as it is unless there is a compelling reason to change it. Here, that simply does not exist. For one example, the increase expense and volume of documents attributable to the use of electronic communication does not change the fundamental reasons for requiring detailed privilege logs: determining whether the privilege applies and protecting it where necessary. E-mails are just like letters in that regard. Just because there are more of them, that does not change their character or the purpose of the rule. For another example, the inaccuracies or deficiencies in software-generated logs does not undermine the purpose of the rule. A problem with the technology (which will only improve with time) is not a problem with the rule.

Additionally, the potential change in the rule is one-sided. It would benefit large corporations and insurance companies at the expense of individuals and class members. Allowing something like broad categorization of groups of documents does not end any debate over whether one or more documents is privileged. Instead, it places a burden on the party receiving the log (almost always the plaintiff which is often an individual or small business) to try to decipher it and/or to meet and confer with the party producing the log and obtain more detail. This does not solve any problems, and adds to the burden on the parties less equipped to bear it. Additionally, there is a significant likelihood that this kind of change will increase the burden on our judiciary. More ambiguity in privilege logs will naturally mean more disputes and more judicial intervention on an issue that did not previously require it. That is not a positive outcome.

Furthermore, a change to the FRCP is an overbroad and unnecessary solution to a limited problem. All of the tools needed to address the issues that have spurred the suggested rule change are already in place. Judges have wide discretion in how they manage their cases, and most have extensive standing orders addressing a wide variety of topics. Additionally, by way of analogy, many districts (including the Northern District of California, where I often appear) have model protective

orders for dealing with confidential documents. Parties that want to modify those terms can – and often do -- ask their assigned judge for relief. Additionally, the case management process in every case always includes discussion of discovery planning. There is no reason that the districts, or individual judges in individual cases, cannot or should not have control over this issue. For something that only affects a limited number of cases, and that even then requires fine-tuning, the most appropriate and sensible instruments for addressing it are at the judge and district levels. Changing the privilege log rules at the FRCP level is using a cannon to swat a fly.

Thank you for considering my input, and my request that the rules remain unchanged.

*****PLEASE NOTE OUR NEW ADDRESS *****

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July 29, 2021

VIA EMAIL

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: *Invitation for Comment on Privilege Log Practice From the Committee on Rules of Practice and Procedure*

Dear Members of the Committee:

I write in response to the Invitation for Comment on Privilege Log Practice, which requested comments addressing whether there are significant issues with the current privilege logging practice and whether changes to the federal rules would have a positive impact on that process.

In my practice, I focus on electronic discovery issues for one of the largest plaintiffs' law firms in the country. My firm primarily represents consumers and investors in complex class action litigation in the areas of securities fraud, antitrust, and consumer fraud. Our cases often require the review and production of millions of documents. I routinely assist in the firm's negotiation regarding the production of documents and electronically stored information. Although I have practiced at a plaintiffs' firm for over ten years, I spent my first three years as an attorney at a large corporate defense firm. I am on the board or advisory committee of several e-discovery organizations and conferences and routinely speak on discovery-related topics.

Based on my experience, only one of the three possible rule changes that the Committee outlined in its Invitation for Comment on Privilege Log Practice may have a positive impact. Although it is already common practice in large-scale litigation, it is often beneficial to have early discussions with opposing counsel regarding privilege logs. If the Committee concludes that revisions to Federal Rule of Civil Procedure ("Rule") 26(f)(3)(D) would encourage this practice in more cases, then this would be a welcomed change. However, based on my experience, the other suggested changes related to categorical logs are unnecessary and would be counter-productive.

Privilege Logging Under the Current Rule

As stated above, the cases in which I am involved would be considered "large document" cases. In my experience, the parties frequently address issues regarding privilege early on in the case, as required by Rule 26(f)(3)(D), including issues related to privilege logging. These discussions often arise during the negotiation of the ESI Protocol or Protective Order. The parties' agreement on the substance and format of the privilege log is often reflected in one of these documents, reflected in a stand-alone privilege log protocol, or are based on informal agreements.

Based upon a review of some of the recent ESI Protocols my firm has entered into, common agreements regarding privilege logs include:

- Categories of documents that do not need to be logged at all (*e.g.*, communications with trial counsel that post-date the filing of the complaint; internal communications in a law firm or exclusively within a legal department that post-date the filing of the complaint; communications and work product from related litigation).

- The specific fields that should be included in a privilege log (most of which correlate to metadata fields that the party is already collecting and producing in their regular document production and are able to be automatically extracted from the document metadata and put into a log).[1]

- The manner in which family documents should be logged.

- The timing of production of privilege logs.

- The manner in which email chains should be logged.

- The file type in which the privilege log should be produced (*e.g.*, Excel).

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[1] Commonly agreed-upon fields include: Unique ID; Sent Date (email); Date Created (document); Date Last Modified (document); Author (document); Addresser/Sent By; Recipient (separately listed To/CC/BCC for emails); Custodian; Last Edited By (document); Subject (email); File Name (document); Title (document); Document Type/File Extension; Privilege Asserted; Privilege Description.

- How counsel should be identified on the log (*e.g.*, list of names, use of asterisk).

- Whether or not redaction logs should be provided.

- Whether and what types of documents may be logged categorically.

It is important to highlight the current predominate practice regarding privilege logs because, in doing so, it should become clear that the document-by-document privilege log is not actually burdensome, even when there are a large number of documents that need to be logged. In my early years as an associate at a large defense firm, I manually created privilege logs and understand the significant effort that such a task requires. But the process is no longer manual. In fact, it has become easier since electronically stored information has become more commonly produced in litigation. In my experience over the last ten years, it is common practice for the parties to come to an agreement on fields to be included in the privilege log that can be auto-populated with corresponding metadata extracted from the document. The only fields that typically require "manual" input would be (1) Privilege Asserted, which is actually just a choice field (*e.g.*, Work Product or Attorney-Client Privilege) in a document review database that a reviewer would click on and then would be auto-populated into the privilege log, and (2) Privilege Description, which would typically be a one-sentence description of the nature and purpose of the document and general subject matter of the document, which a document review attorney would include in a free text field in the document review database, then be exported out, along with the metadata fields, to create the privilege log. The privilege description is one that can be created during the usual course of a privilege review in order to provide contemporaneous documentation as to why the document was withheld on privilege. If there are certain categories of privilege that are likely to be commonly used, those categories can also be provided in a drop down or choice field in the document review database that can be used repeatedly and consistently – the same way a categorical description would be used but with the added benefit of the document-by-document metadata. When presented in this manner, the entries for withheld documents can be sorted by category, date, sender, recipient, subject line, file name, etc. These mostly automated logs do not require any special functionality beyond what would typically be available in a document review database (*e.g.*, Relativity) used for any substantial document review. Although any privilege log would have to be reviewed for quality control and potentially supplemented if the metadata fields are plainly inadequate or inaccurate, the document metadata plus privilege description process usually suffices for most electronically stored documents.

Rule Changes to Resolve Potential Problems

A. Rule 26(f)(3)(D)

Parties conferring regarding privilege logs is not uncommon in complex litigation that requires substantial document review and production. In fact, Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) already encourage the court and the parties to address issues regarding privilege early in the discovery process, regardless of the practice area. These discussions are helpful in encouraging early agreements on privilege logging and avoiding potential disputes late in discovery. Although there are commonalities to the types of agreements that are made, there is certainly no one size fits all approach. In some cases, it may even be beneficial for the producing party to send a sample proposed privilege log to the receiving party so that all parties are on the same page as to what to expect when the privilege logs are produced. This type of discussion or exchange of information may not be necessary in every case, but there may be a benefit to amending Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) to further emphasize the benefits of having such discussions.

B. Rule 26(b)(5)(A)

Any proposal to amend Rule 26(b)(5)(A) to encourage or require categorical logs in lieu of document-by-document logs, regardless of the nature of the case, is unfounded. Encouraging the use of categorical logs would likely result in costly re-dos and unnecessary disputes. In fact, the submissions to the Committee that prompted this recent interest in privilege logging[2] do not ever articulate, much less substantiate, what exactly causes the burden of which they complain. Quite notably, LCJ's Introduction starts with a conclusion[3] and then just moves on from there, presupposing the burden, without ever providing any meaningful specifics. The submission speaks of "burdens" and "inefficiencies" [sic] related to privilege logs and how they are "expensive to produce" but never adequately articulates what exactly is so burdensome or expensive about this process.[4] Nor do the

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[2] Lawyers for Civil Justice ("LCJ") and Johnathan Redgrave Letters in the April 23, 2021 Advisory Committee on Civil Rules agenda book.

[3] "'The modern privilege log [is] as expensive to produce as it is useless.' This ***conclusion*** – widely shared by judges, litigants, and litigators – is based on common experience with producing, receiving, and ruling on 'document-by-document privilege logs." August 4, 2020 LCJ Submission at 1-2 (citations omitted; emphasis added).

[4] The Amendments to Federal Rule of Evidence ("FRE") 502(d) already addressed concerns regarding the burdens associated with privilege review by providing producing parties with an exemption from waiver if they obtain a FRE Rule 502(d) order, which was further emphasized by the

submissions describe how exactly categorical logs resolve their presupposed problem. The thrust of their arguments seems to be that because document-by-document logs fall short of providing information sufficient to meet the requirements of Rule 26(b)(5) they are useless and the bar should be set even lower – or removed entirely. This sort of logic is absurd. Indeed, a document-by-document log is often the most efficient way to provide the information necessary to assess the claim of privilege – which the producing party has the burden to demonstrate – without creating an undue burden on the parties or the court.

There is already a substantial body of case law, by judges who are well positioned to assess the particulars of the case, as to what is required by Rule 26(b)(5) and when categorical logs, or other alternative approaches, are appropriate. Courts have allowed categorical logs when a document-by-document log is unduly burdensome and when the information gleaned from a more detailed log would be of no material benefit in assessing whether the privilege claim is well founded. *See, e.g.*, *De Proteccion v. Diaz*, No. 16-21266-CIV-COOKE/TORRES, 2017 U.S. Dist. LEXIS 231062 (S.D. Fla. June 15, 2017); *First Horizon Nat'l Corp v. Houston Cas. Co*., No. 2:15-cv-2235-SHL-dkv, 2016 U.S. Dist. LEXIS 142332 (W.D. Tenn. Oct. 5, 2016). Proponents of changes to Rule 26(b)(5) seem to argue that document-by-document privilege logs are always unduly burdensome and that attorneys have done such a poor job on privilege logs that they are never of any material benefit. As stated above, the automated nature of document-by-document logs means that they should not be unduly burdensome. In addition, a document-by-document log provides far more useful information than a categorical log. The fact that some lawyers have failed to fully comply with the Rule should prompt further education as to how to craft more meaningful privilege logs, rather than a call to dilute the utility even further.

In my experience, categorical logs do not provide adequate information for a receiving party or a judge to assess the claim of privilege. By way of example, categorical logs were initially produced by one of the defendants in a case my law firm recently handled in the Southern District of New York.[5] The categorical log encompassed almost 30,000 withheld documents and contained the

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Advisory Committee to the Civil Rules in the 2015 Amendments to Rules 16 and 26. Advisory Committee Notes for Amendments to FRE 502(d) state that the use of a court order available through 502(d) "contemplates enforcement of 'claw-back' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. The rule provides a party with a predictable protection from a court order – predictability that is needed to allow the party to plan in advance and limited the prohibitive costs of privilege and work product review and retention." (Citation omitted.)

[5] *In re American Realty Capital Properties, Inc. Litigation*, No. 1:15-mc-00040-AKH (S.D.N.Y.).

following information: (1) categorical description similar to the one-sentence description on a document-by-document log; (2) date range of the documents within that category, which spanned over three years for some categories; (3) a list of authors of the documents that fall within each category, which included up to 50 authors for some categories, many of which were not attorneys and included third parties; (4) a list of the recipients of the documents that fall within the category, which included over 100 recipients for some categories, many of which were not attorneys and included third parties; (5) the type of privilege asserted, which included all three available privileges of Attorney Client, Work Product, and Common Interest for several categories. One of the categorical logs received in the same case included the number of documents withheld for each category, where several categories included over 1,000 documents. In addition, for any communication that was withheld as privileged, the attachment was automatically withheld on the same grounds but not logged and not included in the tally of documents withheld in each category.

A categorical privilege log of this nature would not provide sufficient information to assess the privilege claim for any individual document that was withheld, much less all of them. This type of log does not allow the receiving party to assess whether an attorney or a third party was actually on any given communication, let alone which attorney(s) were on which communications. There is no opportunity to discern which privilege was asserted for which document. There is no information provided that would assist the receiving party in narrowing the pool of documents for which privilege might be uncertain or subject to challenge. Not surprisingly, we did not find the categorical log to be sufficient, and the court agreed. The producing party then had to provide a document-by-document log. Notably, in the process of doing so, over 10,000 documents were removed from the log and subsequently produced as not privileged. Had the producing party not logged the documents on a document-by-document basis, those documents would have been improperly withheld with no basis to question or challenge the claim of privilege. When the document-by-document log was provided, the parties had sufficient information to focus on discrete substantive privilege disputes versus a dispute over the substance of the log.

Based on my experience, it is hard to understand how categorical logs address the presupposed problems associated with privilege logging. There is no basis to conclude that categorical logs would decrease the burden of privilege logging. The type of categorical log described above would still require a largely manual process. This type of log would not be something that could be automatically created by commonly used document review databases. At best, the categorical log would just withhold from the receiving party metadata fields and information about the asserted privilege that the producing party would have generated in order to determine which documents were privileged and what category they belonged in. The broad use of categorical logs would likely result in additional disputes, motion practice, and re-dos rather than resolving disputes regarding the sufficiency of privilege logs and would do nothing to decrease broad challenges to privilege. While it is possible that categorical logs could result in fewer challenges to discrete issues of privilege on a

document-by-document basis because there would be little basis for challenging the privilege of any specific document, this sort of opaque approach to privilege should not be entertained. Even if not introduced for improper purposes here, it may provide a tempting avenue for a sloppy approach to analyzing privilege or other inappropriate means of withholding relevant documents from production.

* * *

Thank you for the opportunity to provide comments while you consider whether any rule changes regarding privilege logging would be beneficial. I welcome any questions or requests for additional information on these issues.

Sincerely,

LEA MALANI BAYS

LMB:dcc

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July 22, 2021

MEMBERS OF THE JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

Re: Fed. R. Civ. P. 26(b)(5)(A) – Privilege Logs

To the Members of the Advisory Committee on Civil Rules:

I send this letter to express my opposition to the proposed rule changes regarding privilege logs. I have been practicing law for nearly 39 years. I have served as counsel for both defendants and plaintiffs. In recent years, my practice has been entirely devoted to representing plaintiffs in all types of litigation, aviation crashes, product liability cases involving vehicles and pharmaceutical products, medical negligence cases, truck and vehicular crash cases, and other catastrophic injury and death cases.

Over the past four decades, I have been required by courts to comply with protective orders. I have on many occasions gone through the process to identify the documents that are claimed to need protection. The first question on this topic is: should the court and counsel be complicit in a process that hides information which, if revealed, would provide protection to the public. When a product is dangerous or there is repeated wrongful conduct by a bad actor, shouldn't the public be made aware of it? In my experience, claims that documents are privileged or proprietary do not apply to most of the documents I have received. If the information in those documents is concealed, other members of the public are likely to be harmed in a similar way by the bad actor.

For example, I received thousands of documents under an extremely restrictive court order of protection in a case against a church and its pedophile employee who had harmed a child that was my client. The documents not only showed that the church knew of prior bad conduct by the pedophile employee, but that it knew about similar bad acts

by other clergy members who were not parties in the case. I was required by the Court to return the documents after they were reviewed. I was forbidden by the Court order to disclose any of the information in the documents without an additional order from the Court, which would be decided by the Court when the document was introduced into evidence.

The case settled, the documents were returned, I was never able to reveal what I had learned, and the church was able to continue to keep its secrets. In the nearly 2 decades that have passed since then, other children have been abused by these bad actors. So, I ask myself, could I have prevented the harm from coming to those children if I had just violated the Court order? Was I complicit in the subsequent harm by obeying it? Was the Court complicit in the subsequent harm by issuing the order in the first place?

The documents that were disclosed were with a log that designated all the information as confidential. I had to hire a large number of people to go through the documents because the list of documents provided was so generic. Also, if a list had been provided in detail, I would likely have been able to identify those documents most relevant to the claim. The church knew their documents better than I did, of course. Also, if a detailed list had been provided, the moral and ethical conundrum described above may not have occurred.

Another example, in a vehicular product liability case, the court issues a protective order which required the defendant to provide only broad categories for engineering documents—identified by year and department of the company generating the documents. When we got to see the documents, they were in a large room with numerous file cabinets. There were more than 10,000 documents. By doing the disclosure in this way, the defendant was able to hide the "needle in the haystack". We did not have enough information about where to look. After we returned home, and while trying to schedule another visit to complete the task, I received an anonymous package, apparently from an employee of the company, with the documents we sought. The note that came with the documents said that they had been removed from one of the file cabinets before we arrived for the inspection. Clearly, a detailed list of what was in each of the cabinets may have helped us to uncover this deceit. This occurred back when most information was actual paper, not digital data on a computer. Since there are computers available now, providing a detailed list is much easier than it was back then. Also, as it turned out, not one of the critical documents we received contained proprietary information, nor was the information privileged. While I suppose that some of the 10,000 documents may have contained privileged or proprietary information, based upon what I reviewed it was only a handful of documents. The defendants were able to use the protective order to make it difficult and potentially hide the important information.

I was able to get the judge to agree to vacate the protective order, but only after defeating a motion by the defense asking the Court to prohibit me from using the documents with the argument that I had acted unethically. The Court instead concluded that the Defendant had acted unethically. Ultimately, we resolved the case. The documents became public. The vehicle manufacturer was forced to make significant changes to remedy the defect in the product. I am happy to say that, to my knowledge, not one other

person has died or been injured by that problem since the manufacturer fixed it. This is how disclosure helps the public, and how letting a party hide the ball can hurt.

The rules should not be changed to make it more difficult to identify and find important information which may be critical to public safety. The proposed changes to the Rule will make it harder to access this important information and, in the long run, will hurt all of society.

I'm grateful for the opportunity to express my opinion on this topic and strongly urge this Committee to reject these proposed changes.

Sincerely,

Frank Verderame

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July 29, 2021

Discovery Subcommittee of the Advisory Committee on Civil Rules
RulesCommittee_Secretary@ao.uscourts.gov

Re: Comment on Privilege Log Practice

Dear Discovery Subcommittee:

Thank you for the opportunity to comment on the Subcommittee's potential review of privilege log practice under Rule 26(b)(5)(A). I have practiced for 22 years representing clients in federal district courts and before the 9th Circuit Court of Appeals. My law firm primarily represents plaintiffs in cases involving environmental torts, personal injury, insurance claims and defective products. My partners and I regularly serve as class counsel in class actions involving large corporate defendants. In the course of years of discovery practice, I have made some observations regarding the importance and function of the rules regarding privilege logs.

Today, most serious cases involving corporate misconduct are won or lost in discovery. When a regular person files a case against a powerful, well-healed corporation, whether the case makes it to a fair resolution on the merits almost always depends on whether the Plaintiff is allowed to make a rigorous inquiry into information held by the defendant. The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties that are essential to proper litigation. *Id.* The privilege log requirement in Rule26(b)(5(A) is a linchpin component of ensuring a fair, meaningful discovery process.

The critical requirement of Rule26(b)(5(A) is that a litigant withholding information from discovery production on the basis of privilege provide the opposing party sufficient information to evaluate the applicability of the privilege claimed. Without such a requirement, it is simply inescapable that zealous litigants will withhold critical evidence behind questionable privilege analyses. I have seen this time and again in serious cases, and as litigators, we have all felt the pull to keep harmful documents out of discovery, if there is a colorable argument for privilege and a likelihood that the opposing side will not have a meaningful opportunity to challenge the privilege claim. I would like to share one striking example from a set of medical device cases my firm recently handled.

My firm filed four cases in Montana State district court on behalf individuals hurt by a defective hip replacement product produced by a major international medical device manufacturer. The cases were not removable to the established multidistrict litigation for the hip product because plaintiffs sued a Montana distributor, but the cases proceeded parallel to the process in the federal MDL. The cases were defended by one of the Nation's most reputable defense firms. For the first three years of litigation, the Defendant refused to answer basic discovery requests regarding why it recalled the same hip product in countries other than the United States. This refusal included a fully-briefed writ petition by the Defendant to the Montana Supreme Court and approximately 6 successful discovery motions by Plaintiffs. When the Defendant finally produced the requested documents, it withheld 3,778 responsive documents behind an attorney-client privilege log.

Defendant's counsel swore to the district court and the Montana Supreme Court in formal, signed pleadings that the documents withheld under the privilege log were "thousands of privileged communications exchanged between [defendant] and its attorneys in the United States

and elsewhere for the purpose of securing legal advice..." However, this case was the rare case where the Defendant was ultimately forced to turn over the purportedly privileged documents for scrutiny by plaintiffs and the court. The district court went so far as to hire an esteemed civil procedure professor to evaluate the privilege assertions in the defendant's privilege log.

After comprehensive review, the Plaintiffs and Court learned that ninety-nine percent of the 3,778 documents withheld behind the defendant's privilege assertions were never actually privileged. Thousands of the documents were never generated for the purpose of obtaining legal advice. Many of the withheld the documents involved no communications with lawyers whatsoever. Many more documents had been shared with outside third parties such as governmental regulators so privilege was waived. Based largely on the independent discovery master's findings, the district court sanctioned the defendant for withholding thousands of documents behind fraudulent assertions of privilege for years. These cases were filed in state court, but the rigorous discovery resulted in hundreds or thousands of documents never discovered in the MDL being shared with the lawyers prosecuting cases in the federal MDL. State court privilege log issues are also important to this Committee's consideration of Rule 26(b)(5)(A), Fed.R.Civ.P., because most states adopt rules that mirror the federal rules and view federal court interpretations of the rules as persuasive in state court.

Without a requirement in the rules that litigants withholding documents provide sufficient information for the opposing party to evaluate the privilege assertions, such fraudulent withholding of critical, discoverable documents will become even more commonplace. For instance, it is important that litigants disclose who authored and received the documents withheld for privilege. Without such information, the opposing party cannot evaluate whether the documents were for the purpose of obtaining legal advice or whether the documents were sent to

third parties, waiving the privilege. It is also critical that information be provided for each individual document withheld. The analysis of whether privilege applies must be conducted on a document-by-document basis. Allowing parties to designate entire categories of documents that they contend are privileged, without identifying the specific documents in an adequate privilege log, would only facilitate parties' ability to conceal the most critical documents in a case by sandwiching them in with tens or hundreds of other documents in a purportedly privileged category of documents.

The current version of Rule 26(b)(5)(A) works most of the time. If any changes are contemplated, such changes should bolster the requirement that parties withholding evidence from discovery provide all the information necessary to evaluate the applicability of the claimed privileges for each individual document. Any changes weakening this requirement will undermine the ability of the courts to serve as a forum where both sides are allowed mutual knowledge of relevant facts and where cases are resolved on the merits.

Thank you for considering these comments and please do not hesitate to contact me, if I can be of any assistance as the Committee contemplates privilege log rules and practice.

Sincerely,

Jory C. Ruggiero

JCR:mro

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July 29, 2021

Discovery Subcommittee
Advisory Committee on Civil Rules
VIA EMAIL RulesCommittee_Secretary@ao.uscourts.gov

Re: Invitation to Comment on Privilege Logs Practice

Dear Discovery Subcommittee:

Thank you for the opportunity to submit comments on this important topic. In sum, my comments are strongly *against* the potential changes relating to categorical privilege designations.

A. My Background.

In my practice at Maglio Christopher & Toale, I represent plaintiffs injured by medical devices and pharmaceutical drugs. My firm has experience actively litigating these cases in Multi District Litigation as well as state courts, particularly with respect to discovery issues. We are fully involved in the electronic discovery process in these cases. This ranges from protocols and protective orders, to requests and related motion practice, to hosting independent databases to review millions of documents. We have extensive experience, therefore, in what the Committee calls these "large document" cases. Further, I am also a member of Working Group 1 of the Sedona Conference as well as a number of other organizations which focus on electronic discovery issues.

B. Introduction.

Rule 26(b)(5)(A) mandates that any claim of privilege describes the nature of the discovery *in a manner that will enable other parties to assess the claim*. Generally speaking, categorical designation of privilege obfuscates fact-finding because it hinders, rather than enables, parties to assess the claim of privilege. Any rule change which would standardize this hindrance invites injustice in the name of efficiency and must therefore be avoided.

Certainly, the Rule and the Advisory Committee Notes make clear that a document-by-document designation may not be called for in *every* circumstance. Discretion is allowed so that courts may

handle *exceptional* circumstances. However, the mere existence of exceptional circumstances is not justification to flip the script and treat the exception as the rule.

It can hardly be disputed that in current practice, privilege logs broadly suffer from substandard, boilerplate designations. The pressing problem with privilege logs in "large document" cases is not the burden of review on producing parties. It is the unreasonable withholding of discoverable information caused by a failure to adequately describe the basis for claimed privileges. The considered rule change will serve only to make this problem worse. We should not endeavor to cast shadows where facts may be hidden. Justice dies in the dark.

This is not to minimize producing parties' and counsels' legitimate gripes about the difficulty of privilege review. The medicine contemplated here – however – is worse than the disease. The solution is not a change to the rule. The solution must come from the parties, themselves. Corporate practices which lead to over-inclusive privilege logs must be addressed. Further, parties and courts must continue to utilize emerging technologies to make privilege review more efficient.

Rule 1 requires that all federal rules must be construed, administered and employed in a manner that is *just*, not simply speedy and inexpensive. Justice is a condition precedent. A rule change which serves only to hinder fact finding in an effort to make litigation more speedy or inexpensive serves an unjust purpose. The rule change must be rejected.

C. <u>Specific example of how improper categorical designations impacted a Florida case with ties to MDL Litigation.</u>

I submit to this Committee an example of a recent "large document" litigation in which my firm was involved and where the exact issue considered by this Committee was already addressed – categorical privilege designations of e-mail attachments.

The litigation involves the Biomet M2a metal on metal hip replacement systems and took place in Florida state court. The corporate defendant produced to my state-court client a large volume of discovery previously produced in an MDL years earlier. Along with this discovery, the defendant produced the same privilege logs from the MDL: **6,000 pages of privilege logs identifying over 73,000 purportedly privileged documents.** A long meet and confer process ensued, in which my client argued that the privilege logs were facially inadequate, regardless of whether the Federal or Florida rules applied. As a result of the meet and confers, the defendant agreed that it would wholesale revise its entire privilege logs from the MDL. However, points of disagreement remained as to what information would be provided in the new log as well as whether the defendant would continue designating e-mail *attachments* as privileged on account of the parent e-mail's purported privilege. Upon full briefing, the trial court issued its order on June 27, 2016.[1]

The court noted that Florida's rules on privilege logs "were modeled after" the Federal Rules and that Florida courts "[d]raw[] from federal court interpretation."[2] It held that a privilege log should:

> describe the document's subject matter, purpose for its production, and a specific explanation of why the document is privileged or immune from

[1] Attached as Exhibit 1.
[2] *Id.* at *2

> discovery. These categories, especially this last category, must be sufficiently detailed to allow the court to determine whether the discovery opponent has discharged its burden of establishing the requirements expounded upon in the foregoing discussion. Accordingly, descriptions such as 'letter re claim,' 'analysis of claim,' or 'report in anticipation of litigation'-with which we have grown all too familiar-will be insufficient. This may be burdensome, but it will provide a more accurate evaluation of a discovery opponent's claims and takes into consideration the fact that there are no presumptions operating in the discovery opponent's favor. Any failure to comply with these directions will result in a finding that the plaintiff-discovery opponents have failed to meet their burden of establish the applicability of the privilege. *Id.* at *2, citing *TIG Ins. Corp of Am. V. Johnson,* 799. So.2d 339, 341 (Fla. 4th DCA 2001) quoting *Abbott Laboratories v. Alpha Tharapeutic Corp.* 2000 WL 1863543 (N.D. Ill. Dec. 14, 2000).

The court *expressly* rejected the defendant's categorical designations of e-mail attachments. It noted that "the rule requires adequate identification of each document [which] usually includes, at a minimum, sender, recipients, title or type, date and subject matter." *Id*. at *3 citing *Bankers Sec. Ins. Co. v. Symons*, 889 So.2d 93, 96 (Fla. 5th DCA 2004). It "cautioned" that:

> Identification of documents in bulk or as a class such as "claims file" should be the exception. Even if the court agrees that a "claims file" is work product, it is not necessarily true that *every* document in a claim file is work product. Putting a document in a claim file doesn't make it immune; it is only immune if it *is* work product. *Id.* at *3, citing *Bankers Sec. Ins. Co*. 889 So.2d 96.

Applying this to the bulk designations proffered by the defendant, the court held as follows:

> Biomet's "Privilege Description" category merely parrots the privilege description offered for the email itself, prefaced with "attachment to." This is precisely the type of description that concerned the Fifth District in *Bankers*: attaching a document to a privileged email does not make the document immune; it is only immune if it *is* work product itself. A number of entries in the privilege log assert that the listed document is privileged simply because it is an attachment to a privileged email. This is an inadequate basis for asserting privilege. *Id.* at *3.

The court further held that:

> Biomet must establish an *independent* basis for the privilege asserted as to *each document*. Further Biomet must provide a general summary of the information contained in *each document*. Reference to the communication that a document is attached to is insufficient, both for purposes of asserting a privilege and describing the contents of the document. *Id*. at *4 (Emphasis in original).

Upon this ruling, the defendant was forced to readdress its prior insufficient and categorical designations. As a result of this review, where the defendant now had to individually account for each of the email attachments, the defendant produced **over 71,000 previously withheld documents**. Recall that there were 73,000 withheld documents to begin with. This means that 97% of the privilege designations, which went unchallenged in the MDL, were withdrawn once challenged. *Thousands* of federal litigants in the preceding years were improperly denied the right to these discoverable documents.

This is not unique to my experience. Other MDLs and "large document" cases are plagued by similar issues like over-inclusive privilege logs and lawyer-centric business practices which lead to self-inflicted difficulty assessing privilege protections.[3] In the face of these issues, it makes little sense to now consider a rule change which makes it *easier,* particularly for large corporate producing parties, to justify providing less information than required by Rule 26(b)(5).

D. Generally, a document-by-document review is required by cases applying Rule 26(b)(5)(A).

Generally, a document-by-document analysis of privilege is required under rule 26(b)(5)(A). See e.g., *United States v. Construction Products Research, Inc.,* 73 F.3d 464, 473 (2d Cir. 1996). A privilege log "should identify each document and the individuals on the communications to sufficiently allow the court to determine if the document is at least potentially" privileged. *Sampedro v. Silver Point Capital, L.P.*, 818 Fed.Appx. 14 (C.A.2 (Conn.), 2020). The burden under rule 26(b)(5) "is not, of course, discharged by mere conclusory or ipse dixit assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship, and any spurious claims could never be exposed." *Jansson v. Stamford Health, Inc.*, 312 F.Supp.3d 289, 294 (D.Conn., 2018). "[T]he rule states in mandatory terms a party's obligation to give prompt, specific and detailed notice of a claim of privilege." *Id.* "[T]he notice of claimed privilege a party is mandated to give should be as specific, detailed and informative as the circumstances allow." *Id.* Even if describing the protected materials in a log may be difficult to do without revealing the confidential nature of the documents, it is nevertheless the obligation of the [designating party] under Fed.R.Civ.P. 26(b)(5). *Estate of Manship v. U.S.*, 232 F.R.D. 552, 561 (M.D.La.,2005). "Although it may be time-consuming to specifically assert the attorney-client privilege in a document intensive litigation … courts nevertheless clearly require such specific identification." *Eureka Financial Corporation v. Hartford Accident and Indemnity Company,* 136 F.R.D. 179, 182–83 (E.D.Cal.1991).

E. In *exceptional* circumstances, the rules provide discretion for courts to allow categorical privilege logs.

As this Committee is aware, the advisory notes to Rule 26(b)(5) allow for categorical claims of privilege due to undue burden when voluminous documents are claimed to be privileged. This is

[3] See *In re Vioxx Products Liability Litigation*, 501 F.Supp.2d 789 (E.D. La., 2007)(Court embroiled in lengthy privilege log dispute leading to $400,000 in costs for review by two special masters and lengthy opinion discussing problems with Vioxx's privilege logs); *Meade v. General Motors*, LLC, 250 F.Supp.3d 1387 (N.D. Ga., 2017)(Court, after multiple warnings to defendant, found defendants' privilege assertions were made in bad faith and waived privilege); *U.S. v. KPMG LLP*, 237 F.Supp.2d 35, 48 (D.D.C., 2002)(Upon *in camera* review, court found only 13.3% of designated documents were actually privileged).

up to the discretion of the trial court. However, "[t]he level of detail required to identify the information being withheld on a claim of privilege without breaching the privilege is likely a matter that can only be determined on a case-by-case basis. *Cisneros v. Dollar Tree Stores, Inc.*, 2016 WL 11584849, at *3 (W.D.Tex., 2016). Accordingly, it would be unwise to attempt to craft a universally-applicable standard.

One of the seminal cases to discuss categorical privilege logs is *S.E.C. v. Thrasher*, 1996 WL 125661 (S.D.N.Y.,1996). There, the court recognized, "typically, a privilege log must identify **each document** and provide basic information, including the author, recipient, date and general nature of the document." *Id*. at *1 (Emphasis added). Nonetheless, the court also recognized that

> [I]n 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.*

However, to take from *Thrasher* and its progeny a lesson that categorical privilege designations should be allowed, generally, would wholly misunderstand the case-specific nature of how Rule 26(b)(5) has been applied in such cases. In *Thrasher*, the S.E.C. sought "production of all communications between defense counsel concerning" the lawsuit. *Id.* The court recognized that this request "seeks wholesale production of" ordinarily privileged information. *Id*. The Defendant represented without dispute that the volume of privileged information responsive to the request was large, and that "a document-by-document listing would be a long fairly expensive project." *Id.* Further, the "disclosure of the pattern" of the "attorney's consultations with other counsel might reveal" litigation strategy. *Id.* The court, therefore, ordered a specifically-tailored set of information to be provided, as a whole, regarding this substantive request. *Id.* Thus, the holding in *Thrasher* turned on the fact-specific *substance* of the documents requested, not just volume. Likewise, other cases in which categorical designations are allowed typically turn on requests which expressly call for wholesale production of facially privileged material.[4]

That categorical designations would be so fact-intensive is supported by the Advisory Committee Notes:

> **If a broad discovery request is made**--for example, for all documents of a particular type **during a twenty year period**--and the responding party believes in good faith that **production of documents for more than the past three years would be unduly burdensome**, it should make its **objection to the breadth of the request** and, with respect to the documents generated in that three year period, produce the unprivileged documents and

[4] See *Benson v. Rosenthal*, 2016 WL 1046126 (E.D.La., 2016)(While recognizing that privilege logs will typically require document-by-document review, categorical designations may be proper for requests which on their face call for wholesale production of items ordinarily covered by privilege.); *Teledyne Instruments, Inc. v. Cairns*, 2013 WL 5781274 (M.D. Fla., 2013)(While recognizing that privilege logs will typically require document-by-document review, categorical designations may be proper where request seeks pre- and post-filing attorney documents).

> describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged). FRCP Rule 26, Advisory Committee Notes

Clearly, the intent of the Advisory Committee was to allow discretion in exceptional circumstances based upon burdens associated with the *substance* of particular document requests. This makes sense, since the substantive context of the request itself would assist the parties in understanding why the category of discovery may be privileged, in the first place. This is especially important given that Rule 26(b)(5) mandates enough information be shared about the privilege to allow the parties to assess the claim.

Contrast this with objections to document-by-document designations due to burdens associated with a *technical* type of discovery requested, i.e.: emails. With no *substantive* thread tying this *technical* category of documents together, Rule 26(b)(5) would require a document-by-document log to ensure that the requesting party has enough knowledge regarding the substance of the designated e-mail in order to assess the applicability of the privilege. See *McNamee v. Clemens*, 2014 WL 1338720, at *3-4 (E.D.N.Y.,2014) (Court found unavailing Defendants' reliance on *Thrasher* for the argument that a "categorical log has been found appropriate when a large number of e-mails are the subject of a discovery dispute" and required document-by-document analysis); *Mosley v. Am. Home Assur. Co.*, 2013 WL 6190746 (S.D. Fla. Nov. 26, 2013) (emails and attachments must be described with detail, including dates, authors, and recipients, and the party must specify which privilege or grounds apply, and why, to the withholding of each); *Fojtasek v.NCL (Bahamas) Ltd.*, 262 F.R.D. 650, 660, 2009 U.S. Dist. LEXIS 107478, *29 (S.D. Fla. 2009) (providing that emails that are forwarded as attachments to privileged emails are not necessarily privileged simply because they are attached to a privileged communication).

F. <u>The Federal Rules already provide a mechanism for relief, where necessary.</u>

To the extent a party believes that a substantive concern exists in a particular case, and the burdens associated with that render document-by-document privilege designation unreasonable, such party already has a mechanism to request relief. In the event a party wishes to withhold privileged information, but believes providing the information required under Rule 26(b)(5) would be an unreasonable burden, the party may seek relief through a protective order under Rule 26(c). *Raymond v. Spirit AeroSystems Holdings, Inc.*, 319 F.R.D. 334, 338 (D.Kan., 2017). Subsection (c) allows the court, "for good cause, [to] issue an order to protect a party ... from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* The court then has broad discretion to utilize such a protective order. *Id*

G. <u>The solution lies with the parties, not this Committee.</u>

Producing parties decry the high cost of individualized review. As thoroughly discussed in the *In Re Vioxx Products Liability Litigation,* a considerable portion of this difficulty is self-inflicted. "The structure of [defendant's] enterprise, with its legal department having such broad powers, and the manner in which it circulates documents, has consequences that [defendant] must live with relative to its burden of persuasion when privilege is asserted." 501 F.Supp.2d at 805. Further, myriad technologies exist and continue to be developed which aid in efficiency for document

review – including privilege review. Parties and courts should continue to utilize existing and emerging technologies to make privilege review more efficient.

That individualized review of certain categories of documents is expensive or burdensome is not reason to change the rules to allow parties to *avoid it.* Categorical designations of privilege without individualized review obfuscate the fact-finding mission of discovery. While they may be appropriate in exceptional factual circumstances, they are not appropriate to consider for general application and should continue to be discouraged.

I greatly appreciate the opportunity to provide these comments, and strongly discourage this Committee from adopting any of the changes currently being considered with respect to privilege logs. I welcome this Committee to reach out to me to continue this discussion.

Respectfully Submitted,

Ilyas Sayeg
isayeg@mctlaw.com

EXHIBIT 1

EXHIBIT 1

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
MAJOR TRIAL DIVISION

IN RE: CASES CONSOLIDATED WITH **JOSEPH ZAREMBA,**	**Case Nos.:**	**2014-CA-1932 NC**
		2014-CA-1934 NC
		2014-CA-1936 NC
Plaintiffs,		**2015-CA-4171 NC**
v.		**2016-CA-0419 NC**
		2016-CA-0429 NC
BIOMET, INC. ***et al.*****,**		
Defendants.		

_____/

ORDER ON PLAINTIFFS' MOTION TO COMPEL ADEQUATE PRIVILEGE LOGS

THIS CAUSE came before the Court for hearing on June 14, 2016, on Combined Plaintiffs' Motion to Compel Biomet Defendants' Production of Adequate Privilege Logs, filed April 11, 2016, and Defendants' brief in opposition, filed June 6, 2016. The Court has carefully considered the motions, the arguments of the parties, the court files, and the applicable law, and finds as follows:

1. On June 12, 2015, in response to Plaintiffs' first request for production, Defendants Biomet, Inc., Biomet Orthopedics, LLC, Biomet U.S. Reconstruction, LLC, and Biomet Manufacturing, LLC (collectively "Biomet") provided 12 sets of privilege logs numbering over 6,000 pages.

2. Following disputes regarding the content of the privilege logs, Biomet agreed to review and update the privilege logs. On March 15, 2016, Plaintiffs specifically requested that the updated privilege logs contain the following information:

- Document ID number or Bates number;
- Name and job title or job capacity of the author or sender;
- Name and job title or job capacity for each recipient;
- Date created;
- Date communicated;
- Title;

- Document type;
- Custodian;
- Action taken;
- Subject matter;
- Basis of privilege;
- Whether the document has attachments;
- Identification of where to find those attachments on the privilege log;
- Reason for withholding or redacting; and
- *Deason*[1] facts.

3. Biomet subsequently provided Plaintiffs with a revised privilege log. Plaintiffs argue that the revised privilege log fails in two key respects. First, the revised privilege log fails to provide both the title *and* subject matter of the documents, often listing only the document's file name (e.g., "Sep27'00.doc"). Second, the revised privilege log fails to adequately describe the basis for the privilege asserted regarding email attachments.

4. In *TIG Ins. Corp. of Am. v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001), the Fourth District addressed the information that should be provided in a privilege log. Drawing from federal court interpretation of the Federal Rules of Civil Procedure, which Florida's rules were modeled after, the *TIG* court explained that a privilege log should:

> describe the document's subject matter, purpose for its production, and a specific explanation of why the document is privileged or immune from discovery. These categories, especially this last category, must be sufficiently detailed to allow the court to determine whether the discovery opponent has discharged its burden of establishing the requirements expounded upon in the foregoing discussion. Accordingly, descriptions such as 'letter re claim,' 'analysis of claim,' or 'report in anticipation of litigation'-with which we have grown all too familiar-will be insufficient. This may be burdensome, but it will provide a more accurate evaluation of a discovery opponent's claims and takes into consideration the fact that there are no presumptions operating in the discovery opponent's favor. Any failure to comply with these directions will result in a finding that the plaintiff-discovery opponents have failed to meet their burden of establish the applicability of the privilege.

1

Id. at 341 (quoting *Abbott Laboratories v. Alpha Tharapeutic Corp.*, 2000 WL 1863543 (N.D. Ill. Dec. 14, 2000)).

5. In *Bankers Sec. Ins. Co. v. Symons*, 889 So. 2d 93 (Fla. 5th DCA 2004), the Fifth District observed that "the rule requires adequate identification of each document," which "usually includes, at a minimum, sender, recipients, title or type, date and subject matter." *Id.* at 96. Importantly, the *Bankers* court cautioned:

> Identification of documents in bulk or as a class such as "claims file" should be the exception. Even if the court agrees that a "claims file" is work product, it is not necessarily true that *every* document in a claim file is work product. Putting a document in a claim file doesn't make it immune; it is only immune if it *is* work product. *Id.*

6. Here, Biomet certainly provides additional categories of information beyond that required under *TIG* and *Bankers*. However, for documents listed as email attachments, Biomet's "Privilege Description" category merely parrots the privilege description offered for the email itself, prefaced with "attachment to." This is precisely the type of description that concerned the Fifth District in *Bankers*: attaching a document to a privileged email does not make the document immune; it is only immune if it *is* work product itself. A number of entries in the privilege log assert that the listed document is privileged simply because it is an attachment to a privileged email. This is an inadequate basis for asserting privilege.

7. To the extent that Biomet's privilege log does not list the subject matter of the listed documents, such information is clear in many cases from the title of the document and the privilege description provided. On the other hand, for some privilege log entries, the general nature of the document's contents is unclear from the information provided. As an example, Biomet asserts a privilege regarding document BMT00002432, listed as a confidential communication conveying legal advice to Biomet employees regarding a paralegal draft pertaining to "JV Officers' Meeting." Biomet also asserts a privilege regarding several attachments to the email, including "Exhibit

A.xls," "Exhibit D.doc," "Exhibit E.xls," and "Exhibit B.xls." No other description of these attachments is provided, except to note that they are attachments to the email for which a privilege was asserted. Based on the information provided, the general content of these attachments is unclear.

8. To the extent that Plaintiffs rely on *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994), to receive additional information through Biomet's privilege logs, the Court notes that *Deason* did not address the type and detail of information that must be provided in a privilege log. Instead, the *Deason* court assessed whether to compel production of documents in light of the asserted privilege and related information provided. *Id.* at 1383-84. Thus, *Deason* is inapplicable in the instant context.

9. In its privilege log, Biomet must establish an *independent* basis for the privilege asserted as to *each document*. Further, Biomet must provide a general summary of the information contained in *each document*. Reference to the communication that a document is attached to is insufficient, both for purposes of asserting a privilege and describing the contents of the document.

It is, therefore,

ORDERED AND ADJUDGED that Plaintiffs' Motion to Compel is **GRANTED** in accordance with the terms of this order.

DONE AND ORDERED in Chambers, Bradenton, Manatee County, Florida, this 27 day of June 2016.

DIANA L. MORELAND
Circuit Judge

EXHIBIT 1

CERTIFICATE OF SERVICE

I certify that on this 27 day of June 2016, copies of the foregoing order were furnished by electronic mail to: **Ilyas Sayeg, Esq.**, isayeg@mctlawyers.com; **Altom M. Maglio, Esq., amm@mctlawyers.com; John D. LaDue, Esq.**, jladue@lck-law.com; and **Ronald E. Bush, Esq.**, eserve@bgrplaw.com.

By: _____
Judicial Assistant

TO: Judicial Conference Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States

FROM: Committee on Federal Courts, Litigation Section, California Lawyers Association

DATE: July 30, 2021

RE: Comments on Privilege Log Practice

The Committee on Federal Courts of the California Lawyers Association's Litigation Section respectfully submits the following in response to your Invitation for Comment on Privilege Log Practice.

Established when the State Bar of California was restructured in 2018, the California Lawyers Association ("CLA") is a nonprofit 501(c)(6) organization dedicated to the professional advancement of attorneys practicing law in California. CLA's mission is promoting excellence, diversity, and inclusion in the legal profession and fairness in the administration of justice and the rule of law. Our membership represents the diversity of California's legal community and the various areas of law practiced throughout the state. In particular, the Committee on Federal Courts consists of members who practice extensively in federal courts throughout the country, in civil and criminal matters.

The CLA Litigation Section's Survey on Privilege Log Practice

In response to your Invitation for Comment, the Committee on Federal Courts created and circulated a survey to CLA Litigation Section members. The survey asked general questions about their law practice including (1) the size of their practice, (2) the area(s) of law or subjects in which they practiced, (3) whether they typically represented plaintiffs or defendants, and (4) whether they typically represented individuals, corporate entities, or government entities.

Of those who responded to the survey, approximately 22% are solo practitioners, 32% practice in small firms (with 15 attorneys or fewer), 16% practice at mid-sized firms (16-350 attorneys), and 26% practice at large firms (over 350 attorneys). The remainder practice as in-house counsel or with governmental organizations. Their law practices involve a number of subject matters, including complex business litigation, labor and employment, intellectual property, insurance, class actions, and civil rights cases, among others. Approximately 66% of the total respondents stated that they typically represent defendants, and approximately 87% of the total respondents stated they typically represent corporate entities.

We surveyed members about their current experience with privilege logging under Federal Rule of Civil Procedure 26(b)(5)(A). When asked to rate how effective the current rules and practice of document-by-document privilege logs are at providing opposing counsel with the information they need to evaluate privilege claims, 7.9% responded "wholly ineffective," 39.5% responded "ineffective," 21.1% responded "neutral," 28.9% responded "effective," and 2.6% responded "very effective."

When asked to rate how burdensome the current rules and practice of document-by-document privilege logs are, 26.3% responded "unreasonably burdensome," 44.7% responded "burdensome," 13.2% responded "some burden," 13.2% responded "neutral," and 2.6% responded "no undue burden."

The survey also asked members to describe any issues they have had complying with Rule 26(b)(5)(A). A sample of the written comments we received includes the following:

- "In every complex case, [privilege logging] is a time-consuming and expensive process that is mostly governed by paralegals and litigation IT support professionals."

- "[Privilege logs] are fairly useless, and a very expensive, burdensome exercise;" this delays document production.

- Privilege logs are "inefficient and expensive" but "are almost always too vague to meaningfully allow challenge." Privilege logs are "not detailed enough."

- "Opposing counsel has withheld documents as privileged while providing little information as to the purportedly privileged information. This requires a litigant to 'trust' the opponent to hold a proper understanding of the scope of any purported privileges and to be forthright in providing non-privileged documents, which does not provide sufficient safeguards."

- Even when the process is run through a document review database, it is "still time-consuming and expensive to cross check, format[,] etc."

- "Opposing counsel [have insisted] on a privilege log for any and all communications between client and counsel, even though counsel was only retained after all events in dispute had already occurred."

Several respondents provided examples of how they have streamlined the production of privilege logs in their cases. For example, respondents stated that they have negotiated agreements to log certain categories of documents, such as pre-litigation communications only, or have categorically excluded communications solely between attorneys and their clients. Some respondents also stated that they use text macros, tagging, or other electronic discovery tools to help autogenerate privilege logs.

Suggestions for Revisions to the Federal Rules of Civil Procedure

When asked whether amendments to Rule 26(b)(5)(A) would streamline discovery in their cases, 62.2% responded "yes," 21.6% responded "maybe," and 16.2% responded "no."

The survey also queried members about whether any of the following rule changes would be helpful to their practice. The first three proposed revisions were taken verbatim from the Invitation for Comment. In the right-hand column below, we have included the total percentage of respondents who found the proposal helpful.

Possible Rule Revision	***Percentage of Total Respondents Who Believe the Possible Revision Would Be Helpful***
A revision to Rule 26(b)(5)(A) indicating that a document-by-document listing is not routinely required, perhaps referring in the rule to the possibility of describing categories of documents.	55.6
A revision to Rule 26(f)(3)(D) directing the parties to discuss the method for complying with Rule 26(b)(5)(A) when preparing their discovery plan, and a revision to Rule 16 inviting the court to include provisions about that method in its scheduling order.	52.8
A revision to Rule 26(b)(5)(A) to specify that it only requires parties to identify "categories" of documents. Alternatively or additionally, a revision to the rule might enumerate "categories" of documents that need not be identified.	52.8
Revisions to the Notes of the Advisory Committee to clarify that parties and courts should consider the needs of the case to establish methods for complying with Rule 26(b)(5)(A), so that compliance could include logging categories of documents.	58.3

Several respondents also provided written suggestions and comments on the possibility of rules changes, which include the following:

- Multiple respondents suggested that a beneficial rule change would be to state that parties need not provide privilege logs for any post-dispute communications between attorneys and their clients. One respondent noted, "Once a business dispute reaches the retention of litigation counsel, the communications with counsel will be self-evidently privileged. There is no point in creating a log."

- Some respondents also cautioned that rule revisions should be considered carefully to avoid creating other unforeseen issues. For example, the relative benefits and burdens on parties requesting and producing documents will need to be evaluated with any proposed rule revision.

- "There is an ongoing debate as to whether a log is required, and my view is that the rule should be the burden should be on the demanding party to establish a document by document log is truly necessary, versus being simply a tactic to drive up costs and create undue burden."

- "The field of privilege logs and the lack of clarity as to what is required versus what is subject to negotiation . . . [have] wasted time and money for years. Procedural amendments would be very helpful."

- "I think it is important that there be some method to require document-by-document review, if not logging, for any relevant documents that are not found in categories that have not been excluded for legitimate reasons, such as consent of the opposing party. Concerns about waiver tend to encourage attorneys to take extensive steps to avoid accidental production of privileged material, and a removal of the need for document-by-document review could encourage practices that lead to over-withholding of relevant evidence."

- "I think changes to the rules would help in getting the Judges to understand how incredibly expensive and burdensome it is to prepare privilege logs. Rulings sometimes do not comprehend the reality we face in big document cases where it's not unusual for privilege reviews to cost $1 million."

***

The Committee on Federal Courts thanks the Judicial Conference Advisory Committee on Civil Rules for the opportunity to provide these comments.

CONTACTS

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California Lawyers Association

Saul Bercovitch
Director of Governmental Affairs
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From: Robert Fink
To: RulesCommittee Secretary
Subject: comments on privilege log practice
Date: Friday, July 30, 2021 11:03:29 AM

Allowing for logs to categorize documents which are subject to claims of privilege would be an mistake. It would allow for easy abuse. Further, it does not allow opposing counsel to intelligently evaluate the claim to determine if any particular document is correctly subject to the claimed privilege. While certain documents within any category may be appropriately subject to the claim, others very well may not. Without addressing each specific claim, there will be no means to determine the propriety of the claim. This will undoubtedly result in parties filing additional requests for in camera review, which under the current rule would not be necessary. This will cause additional delay and add to already over burdened courts.

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KOSIERADZKI · SMITH LAW FIRM LLC

July 30, 2021

Re: "Invitation for Comment on Privilege Log Practice"

Dear Members of the Discovery Subcommittee of the Advisory Committee on Civil Rules:

I have practiced as a plaintiff personal injury attorney for 42 years. My practice includes representing injured persons throughout the United States in a variety of actions, including Medical Malpractice, Elder Abuse, Sexual Abuse, and Bad Faith. This Comment is respectfully submitted to the Subcommittee of the Advisory Committee on Civil Rules regarding considerations for amendment to Rule 26(b)(5)(A): Privilege log.

I write to express my concerns with any attempt to limit the requirement of providing the basis for the assertion of privilege of individual documents in a privilege log.

My concerns have been recognized and shared by several judges. For example, in *Allendale Mut. Ins. Co. v. Bull Data Systems, Inc*., 145 F.R.D. 84, 85 (N.D. Ill.1992), Magistrate Judge Bobrick recognized the misuse of the privilege doctrine in discovery:

> "some discovery opponents seem to use the doctrine to relieve themselves of the burden of producing factual information accumulated in what appears to be routine investigations."

Courts have recognized that the practice of blanket privilege objections has become commonplace:

> "All too often, the blanket privilege is asserted by counsel who have not carefully reviewed the pertinent documents for privilege. In an abundance of caution, counsel withholds documents that are not privileged, thus defeating the full and fair information disclosure that discovery requires."

Nevada Power Co. v. Monsanto Co.,151 F.R.D. 118, 121 (D.C. Nev. 1993) (citing *Eureka Financial Corp. v. Hartford Acc. & Indem. Co*. 136 F.R.D. 179, 183, n. 9 (E.D. Cal.1991)).

As a trial lawyer for more than four decades, it is my experience that notwithstanding the requirements of Rule 26(g)(1)(B), the use of boilerplate privilege objections is commonplace. I routinely encounter opponents who readily claim that requested evidence is privileged and entitled to secrecy.

Their objections and privilege claims are seldom accompanied by the required privilege log. This then requires extensive efforts under Rule 37(a)(1) to demand that a log be produced and to then determine if the privilege was improperly asserted. Once a log is finally provided, the disclosures

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often reveal that many of the materials included in large categories of materials are not privileged. For example:

- E-mails that were not privileged were buried or lumped into categories of attorney communications.

- Investigation reports generated in the ordinary course of business have been claimed to be in anticipation of litigation.

- Internal e-mails between employees of a defendant, generated long before any attorneys are retained, are claimed to be work product in anticipation of litigation.

- Non-privileged internal historical documents provided to an attorney after litigation is commenced are claimed to be protected by attorney-client privilege.

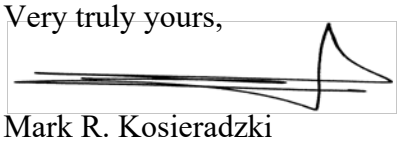
The jurisprudence has clearly established that these materials are not protected by the attorney-client privilege or the work product doctrine. Once I get the log which identifies the specific document, the author, when it was created, and who received the documents, I am able to get this evidence. However, if the detailed log for the individual documents was not required, I would never have identified what is often case critical evidence. In my experience, there is a high correlation between the evidence that my opponents attempt to conceal under the cloak of privilege and the importance of that evidence to the case.

In my opinion, allowing a broad designation of a category of documents as privileged without detail is ripe for abuse – it is an improper and wasteful exercise in gamesmanship mischaracterized as "zealous advocacy." We already have a problem of documents being improperly designated as privileged. Further limiting the duty to disclose will compound this problem.

I recommend against any further limitation in the duty to identify basis for claims of privilege and work product regarding individual documents.

Respectfully submitted,

Very truly yours,



Mark R. Kosieradzki
Attorney/Partner

From: Jonathan Feigenbaum
To: RulesCommittee Secretary
Subject: Re: Rule 26(b)(5)(A)
Date: Friday, July 30, 2021 1:01:55 PM

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Rule 26(b)(5)(A)

Dear Members of the Committee:

I have been practicing law for more 30 years. I concentrate in two areas: (1) representing individuals in ERISA claims and litigation; and (2) insurance policyholders, both individuals and corporations, in first-party actions against insurance companies.

Both areas can be fact intensive. Already the Federal Courts have imposed severe limits on discovery by plaintiffs in ERISA welfare-benefits litigation. Securing a few interrogatories, a few document requests can be very difficult. Even taking a single deposition is a hard task to convince a Federal Court to allow.

This has resulted in a great injustice as many worthy individuals who have lost their health, life and disability benefits, never achieve justice in the Federal Courts. Defendants are emboldened to engage in questionable business practices. If defendants know their behaviors are unlikely to surface through discovery, the defendants use the Federal Courts as part of their business plans. The Federal Courts become an extension of the claims department of an insurance company that insures an ERISA welfare-benefit plan.

As a result, some of these litigants end-up impoverished, or unable to access healthcare. The resulting societal burden falls on taxpaying citizens to cover the care and costs for those who have lost their employer provided, health, life and disability benefits. I fear the narrowing of discovery under the proposed rule changes will allow other culpable defendants to escape their responsibilities by hiding under the procedural rule changes.

Discovery's purpose under the Federal Rules of Civil Procedure is to provide a mechanism for making relevant information available to litigants. See generally Richard A. Posner, Economic Analysis of Law 571 (6th ed. 2003). In the end, most civil litigation is over money. So, making solid

economic choices is what litigants strive for most.

Discovery helps parties make good decisions. Discovery assists in preparing for trial. Discovery brings about settlements. Not every case needs to be tried or should be tried. That is a fact that litigants on both sides of the "V" can agree on. If discovery becomes too limited, why settle? Trying to make a rational economic decision regarding settling or proceeding to trial becomes too much of a guess.

Lawyers and litigants must believe that the Federal Rules of Civil Procedure are a neutral governing procedure and not favoring one party or another regarding the substance of the litigation. As I wrote above, the way that ERISA welfare-benefits litigation has evolved, the lack of discovery has a great impact on the substantive outcome. In this area, the lack of discovery undermines the civil justice system.

The proposed changes are one-sided, the changes favor defendants. Information asymmetry is the core reason that plaintiffs are materially disadvantaged when litigating in the Federal Courts. New limits on discovery will increase this disadvantage even more. When given the chance every defendant will remove litigation from a state forum to a Federal Court. The reason is that the Federal Courts enhance information asymmetry to the advantage to the defendant and at the cost to the plaintiff.

I note the committee is considering changing:

- A revision to Rule 26(b)(5)(A) indicating that a document-by-document listing is not routinely required, perhaps referring in the rule to the possibility of describing categories of documents.
- A revision to Rule 26(f)(3)(D) directing the parties to discuss the method for complying with Rule 26(b)(5)(A) when preparing their discovery plan, and a revision to Rule 16 inviting the court to include provisions about that method in its scheduling order.
- A revision to Rule 26(b)(5)(A) to specify that it only requires parties to identify "categories" of documents. Alternatively, or additionally, a revision to the rule might enumerate "categories" of documents that need not be identified

I urge the Committee not to adopt the changes. In my current practice, I have not encountered a problem. I have dealt with several defendants and don't even both producing privilege log until a motion to compel is filed. The proposed changes will bring about more motion practice. The proposal will be another chance for certain litigants to slow-down litigation and avoid producing discoverable documents.

If adopted, the following will happen. Defendant will provide categories of documents. The list will be opaque. Then, the lawyers need to schedule a meet and confer time. The conference will be held. Aggressive litigants will insist that the listing is adequate. The party seeking the documents will move to compel. Perhaps the Judge will order more detail. The aggressive litigant will barely comply. Now the adequacy of the privilege log is disputed. Repeat the meet and confer process and on and

on this process goes.

The proposed change will create more work for the judiciary in an area that is not productive for litigants; resolving another level of discovery disputes.

Kindly leave the rule “as is”

Thank you for your consideration.

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PRIV-0053

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August 2, 2021

Dear Rules Committee:

With regard to the proposed changes to the rules concerning privilege logs, I am a trial lawyer with nearly 30 years of experience as both plaintiff and defense counsel. My current practice is purely plaintiff and focuses on catastrophic injury cases typically involving a commercial motor carrier and driver. I am licensed in Kentucky and Florida, with my home office in Louisville, Ky. I am often in federal court and have practiced within our federal Courts for over 20 years.

The Rule is Used Abusively to Shield Discoverable Information.

In my experience, privilege logs have been used consistently to abuse the litigation process and keep potentially damaging and otherwise discoverable information from revelation. Abuses of the current rule consume tremendous judicial resources with the Court having to meticulously evaluate document after document. I am hired after cases have occurred of course, and often long after critical evidence has been evaluated by the trucking company's counsel and response team. This requires our addressing the work product, amongst other asserted privileges asserted to obstruct access to photographs, video, statements, etc. obtained by the defense during the active investigation of police. I have had evidence belonging to my client stolen from the scene of a crash, sent to a defense expert, and kept from me in litigation only to find this evidence was discussed in emails with the expert that were placed on a privilege log… Logs should require more information, not less… Having an adequate log helps me determine if the privilege requirements have been met, or if they have not been met. An inadequate privilege log requires the whole issue to be placed before the Court.

In a case I handled recently with Co-Counsel Morgan Adams, *Merriweather v. United Parcel Serv., Inc.,* 3:17-CV-349-CRS-LLK, 2018 WL 3572527, at *19 (W.D. Ky. July 25, 2018), we pierced work product and were able to obtain both party and witness statements from the Defendants as well as other materials that were critical to the case. The Court in *Merriweather* went on to address typical issues in inadequate privilege logs that require a Motion to Compel and the Court's time:

> The objecting party must be specific enough in its objections to support its privilege, but not too specific so as to divulge privileged information. Id. "In order to meet the requirements of the Federal Rules and justify a claim of privilege, therefore, a privilege log must contain sufficient factual content to allow the court to reach the conclusion that each element of that privilege is fulfilled." *Mafcote, Inc. v. Federal Ins. Co.,* No. 3:08-CV-11, 2010 WL 1929900, at *5 (W.D. Ky. May 12, 2010). Courts in this circuit and

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elsewhere have explained that privilege logs should include the following elements: "(a) The author(s) and all recipients (designated so as to be clear who is the sender and who the receiver), along with their capacities/roles/positions;

(b) The document's date;

(c) The purpose and subject matter of the document; and

(d) The nature of the privileged asserted, and why the particular document is believed to be privileged."

See *Polylok, Inc. v. Bear Onsite, LLC*, 2017 WL 1102698, at *6 (W.D. Ky. Mar. 23, 2017); *Madison v. Nationwide Mut. Ins. Co.,* No. 1:11-CV-157-R, 2012 U.S. Dist. LEXIS 141319, at *8 (W.D. Ky. Sep. 28, 2012); *Mafcote, Inc. v. Fed. Ins. Co.*, 2010 WL 1929900 (W.D. Ky. May 12, 2010); see also *Osborn v. Griffin*, No. 11-89-WOB-CJS, 2013 WL 5221663, at *2 (E.D. Ky. Sep. 17, 2013); *Brubaker v. Encompass Prop. & Cas. Co.*, 2008 U.S. Dist. LEXIS 40133, at *2 (E.D. Mich. May 19, 2008); *Jones v. Hamilton County Sheriff's Dep't,* 2003 WL 21383332, at *4 (S.D. Ind. June 12, 2003); *Allen v. Chicago Transit Auth.,* 198 F.R.D. 495, 498 n. 1 (N.D. Ill. 2001); *Allendale Mut. Ins. Co. v. Bull Data Sys.,* 145 F.R.D. 84, 88 (N.D. Ill. 1992); *Smith v. Logansport Cmty. Sch. Corp.,* 139 F.R.D. 637, 648-49 (N.D. Ind. 1991).

Here, while Defendant UPS' privilege log includes one receiver per document, it does not indicate whether it includes all of the receivers. Knowing the identity of each receiver of the document(s) is helpful in determining whether the documents are protected by privilege. See *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999) (quoting *Burkhead & Scott, Inc. v. City of Hopkinsville*, No. 5:12-CV-00198-TBR, 2014 WL 6751205, at *3, 2014 U.S. Dist. LEXIS 166374, at *7 (W.D. Ky. Dec. 1, 2014) (The attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties)).

*20 Additionally, the produced privilege log does not explain which documents correspond to each request to produce. Defendant UPS has asserted objections to a total of fourteen requests to produce (only five of which are at issue in this motion) based on attorney-client and/or work-product privilege, and has listed fourteen documents on the produced privilege log. Since the burden is on Defendant UPS to be "specific enough in its objections to support its privilege," it is incumbent on Defendant UPS to match the alleged privileged documents to the responses to requests to produce. See *Polylok, Inc. v. Bear Onsite, LLC*, 2017 WL 1102698, at *7 (W.D. Ky. Mar. 23, 2017) (citing United States v. Moss, 9 F.3d 543, 550 (6th Cir. 1993) (The burden to establish the applicability of the privilege is upon the defendants.)). Therefore, in addition to the revisions listed

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above, Defendant UPS should supplement the privilege log with the required information or produce the documents.

1. POSSIBLE RULE CHANGES TO SOLVE PROBLEMS

I do think the Court's should have a form privilege log. Currently everything is based on case law as to what information a privilege log should contain and must be researched jurisdiction by jurisdiction. What is and is not in a privilege log is often debated which ends up in court. There is no uniformity among the various jurisdictions. **A privilege log should be detailed enough, by document, that all parties and the Court can easily see whether the asserted privilege is appropriate.**

2. OTHER CONSIDERATIONS

Disclosing only broad categories of documents would further work injustice by shielding sufficient data from the recipient of the log enabling a reasonable determination of whether a motion to compel production would be appropriate. This broad and vague approach will be used to suppress evidence that should be disclosed. It will work to add expense to litigation potentially by diligent counsel suspecting abuse, forcing them to pay costs and fees under Rule 37 when an adequate privilege log would have prevented the Motion from being filed in the first place.

Sincerely,

Timothy D. Lange

NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
COMMENT ON PRIVILEGE LOG PRACTICE[1]

SUMMARY

The Discovery Subcommittee of the Judicial Conference Advisory Committee on Civil Rules has requested comments on possible rule changes to address any difficulties in complying with Federal Rule of Civil Procedure 26(b)(5)(A) concerning privilege logs. The invitation includes a request for comments regarding: (1) problems under the current rule; and (2) possible rule changes to solve the problems. The Commercial and Federal Litigation Section of the New York State Bar Association (the "Section") recommends that the Rule be revised to (1) allow for flexibility in the form and content of privilege logs depending on the needs of the parties in a particular case; (2) express a preference for metadata privilege logs,[2] categorical privilege logs,[3] or some other reasonable variation thereof rather than document-by-document privilege logs; and (3) detail the type of information that should typically be presented in the privilege log. This comment was prepared by the Section's Committee on eDiscovery and Committee on Federal Procedure.

COMMENT

I. OVERVIEW

The Section is comprised of a cross-section of practitioners, including members in the private and public sectors; solo practitioners; and members of small, mid-size, and large law firms, who actively litigate in state and federal courts in New York and adjacent states, and in national and international forums. It includes legal professionals familiar with the rapidly advancing development of electronic discovery law and practice. Thus, in offering the following comment, the Section is drawing on a broad range of experience.

A common complaint in both state and federal complex commercial litigation is that document-by-document privilege logs, which in some cases may have hundreds of thousands of entries, are both time consuming and expensive and can be a frequent subject of discovery disputes. On the other hand, in relatively straightforward, run-of-the-mill cases, document-by-document privilege logs may impose little burden to prepare. In many states, including New York, local rules address privilege logs at the federal and state court levels. As the amount of electronically stored information ("ESI") exchanged in litigation continues to rise and implicate more modern communication platforms, the cost and complexity associated with preparing privilege logs will also continue to increase. It is not uncommon for the total cost of producing a document-by-document privilege log—which many courts have read the Federal Rules to require—to dwarf its

[1] Opinions expressed in this memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the memorandum has been adopted by the Association's House of Delegates or Executive Committee.

[2] A *metadata* privilege log is a log consisting of certain electronically generated metadata fields for fully or partially withheld documents.

[3] A *categorical* privilege log is a log consisting of information about certain categories of fully or partially withheld documents. This may also include electronically generated metadata fields for the categories of documents identified on the log.

value to the recipient, particularly where the expense is a significant percentage of the amount in dispute.

There are multiple challenges in properly preparing a privilege log in accordance with Fed. R. Civ. P. 26(b)(5)(A) ("Rule 26(b)(5)(A)"). Parties asserting a privilege must provide sufficient detail for requesting parties to fairly assess the validity of a privilege claim without divulging so much detail that the asserted privilege is deemed waived. Moreover, it is not always entirely clear what information in a privilege log actually assists an adversary in properly assessing the validity of a privilege claim. For example, even if a party provides the date and parties privy to a communication, without divulging the actual contents of the communication, it may be not be possible to ascertain whether the actual communication at issue is, in fact, privileged. In addition, the preparation of privilege logs is often time-consuming and, consequently, prohibitively expensive. Even where advanced technologies purport to be able to automatically generate privilege logs, the reality is that—absent party agreement on purely metadata-driven logging—the output of those technologies invariably requires extensive review, cleanup, and supplementation before being suitable for production, largely offsetting any cost savings they might promise. The Section, therefore, supports revision of Rule 26(b)(5)(A) to reduce litigation costs and burden in a reasonable manner while at the same time ensuring that any claim of privilege can still be effectively evaluated by the requesting party.

While metadata or categorical privilege logs in complex cases involving significant volumes of ESI may make sense, these logs may not be necessary where the volume of ESI is negligible. Therefore, whether ESI is voluminous enough to call for a metadata or categorical log, as opposed to a document-by-document log, should be examined on a case-by-case basis.

Considering the challenges with crafting compliant privilege logs, the Section recommends clarifying in the Federal Rules that there is no presumption that document-by-document logs must be used. Instead, the Federal Rules should allow for flexibility in the form and content of privilege logs depending on the needs of the parties in a particular case. This approach would consider the respective resources of the parties and the amount in controversy, and would be consistent with the principles of proportionality that have become overwhelmingly important with the influx of ESI discovery.

Modifications to Rule 26(b)(5)(A) should permit litigants to meaningfully document claims of privilege while avoiding time-consuming and unduly granular document-by-document privilege logs. In "large document" cases, alternative methods of privilege log creation can provide all the information necessary to the parties and the court in a manner proportional to the size and scope of the individual case. As the Advisory Committee Notes to Rule 26 stated as part of the 1993 amendments:

> The rule does not attempt to define for each case what information must be provided when 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**" (emphasis added).

Nearly three decades later, this prescient observation has become more apposite than ever. While manually generated, document-by-document privilege logs may be necessary in some cases, they may also become the subject of discovery sideshows used by unscrupulous parties to delay or gain a tactical advantage. With the proliferation of data sources and expansion in volume of ESI, problems with document-by-document privilege logs will likely get worse without a reaffirmation of the role of proportionality in privilege logging.

The Section's views conform with a portion of the New York Commercial Division Rules. In the Commercial Division of the New York Supreme Court, which is designed to resolve high-stakes, complex commercial litigation, Commercial Division Rule 11-b, 22 N.Y.C.R.R. § 202.70(g), Rule 11-b(b), expresses a preference for categorical designations, and the parties are to meet and confer regarding the organization of the documents. Moreover, the Local Rules of the Southern and Eastern Districts of New York state 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." *See* SDNY/EDNY Local Civil Rule 26.2. Further, the New Jersey Complex Business Litigation Program, which is modeled on the New York Supreme Court Commercial Division, has adopted a very similar rule to Commercial Division Rule 11-b. *See* New Jersey Rules Governing Civil Practice in the Superior Court and Surrogate's Court, Rule 4:104-5(c).

At the outset, parties should meet and confer in a meaningful way about the scope of any privilege review, the manner in which privilege claims will be asserted, and what information should be included in a privilege log. The form and content of logs should be a topic in the parties' discussions when formulating their discovery plan under Fed. R. Civ. P. 26(f)(3)(D). There may be disagreement as to what "categories" should be subject to or included in a categorical privilege log, which fields should be included in a metadata log, or whether certain categories of documents should be excluded from the logging requirement altogether. As noted in the suggested revisions below, this may be accomplished in part through amendments to Fed. R. Civ. P. 16(b)(3) and 26(f)(3)(D) designed to encourage courts and parties to address privilege issues early in discovery. In many cases, especially in large, complex litigations, the parties may need to conduct multiple meet-and-confer sessions to reach consensus on a proportional mechanism for privilege assertion and to memorialize that agreement in a proposed order.

Parties working cooperatively and focusing on the needs of the case can use a variety of standardized and creative methods to satisfy their Rule 26(b)(5) obligations. These techniques can be used separately or in combination when appropriate. Some potential cost-efficient alternatives to a full document-by-document privilege log, each of which could be described in greater depth in the Advisory Committee Notes accompanying revisions to Rule 26, include:

- Categorical privilege logs using document categories agreed-upon by the parties, especially where more specific information is unnecessary to determine the privileged nature of the document, such as communications between the client and outside counsel after a litigation has been filed;
- Metadata logs that provide basic information about documents (e.g., sender, recipients, date and time, and email subject) but that do not require customization;

- Document-by-document privilege logs limited to a certain subset of privileged documents, such as a statistically valid random sample or documents from key custodians;
- Deferring privilege logs (especially in expedited cases) or requiring logs only for documents that are clawed back or involve third parties; or
- With respect to redacted documents, including a field in the production load file identifying redacted documents, or providing a list of redacted documents by Bates number.

While it may not be necessary to implement each of the above methods in all cases, the Advisory Committee Notes should encourage the parties to meet and confer early and as needed to consider alternatives to document-by-document privilege logs and to increase the level of attention on these issues throughout discovery.

II. SUGGESTED REVISIONS (new language **underlined in bold**)

The Section offers the following amendment to Rule 26(b)(5)(A):

> Rule 26(b)(5) *Claiming Privilege or Protecting Trial-Preparation Materials*.
>
> > (A) *Information Withheld*. When 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 **proportional to the needs of the case and** that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

In parallel to the suggested revision of Rule 26(b)(5(A), the Section recommends the following amendments to Rule 26(f)(3)(D) and Rule 16(b)(3):

> Rule 26(f)(3) *Discovery Plan*. A discovery plan must state the parties' views and proposals on:
>
> > (D) any issues about claims of privilege or of protection as trial-preparation materials, including **the scope of privilege review, the nature and amount of information to be included in the privilege log, the applicability of cost-effective privilege log variations, and**—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;
>
> Rule 16(b)(3) Scheduling.
>
> > (3) *Contents of the Order*.
> > (A) *Required Contents*. The scheduling order must limit the time to join other

parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents*. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) **define the scope of privilege review, the nature and amount of information to be included in any privilege log, and any cost-effective methodology to be used in any privilege log;**

(v) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502 **or that define the format of any privilege logs**;

(v**i**) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(vi**i**) set dates for pretrial conferences and for trial; and

(vii**i**) include other appropriate matters.

III. CONCLUSION

The Section suggests that revisions should be made to Rules 26(b)(5)(A), 26(f)(3), and 16(b)(3), along with guiding commentary within the Advisory Committee Notes, to encourage efficiencies in what (in some instances) has become one of the most tedious and costly elements of the discovery process. These changes will save time and money for parties exchanging privilege logs in appropriate cases and will also create efficiencies for the judiciary by reducing the time required to resolve disputes and conduct *in camera* reviews of documents identified on lengthy privilege logs.

Respectfully submitted,

New York State Bar Association — July 29, 2021
Commercial and Federal Litigation Section
Daniel K. Wiig, Section Chair

Approved by the Commercial & Federal Litigation Section Executive Committee, July 29, 2021

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PRIV-0055

July 30, 2021

Via Email (RulesCommittee_ Secretary@ao.uscourts.gov

MEMBERS OF THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES

RE: Comment on F.R.C.P. 26(b)(5)(A)—Privilege Logs

To the Members of the Advisory Committee on Civil Rules:

I am a partner of Henson Fuerst, P.A., a plaintiff's law firm that focuses on medical malpractice and nursing home abuse and neglect cases. I am writing to share my experience with the assertion of privileges in response to discovery, the importance of detailed privilege logs, and the dangers that I foresee if categorical logging is permitted.

The backdrop of this inquiry should be the stated purposes of discovery, as well as the Model Rules of Professional Conduct. It is axiomatic that the purpose of discovery is to make a trial "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent possible."[1] As such, the Model Rules of Professional Conduct prohibit lawyers from obstructing another party's access to evidence, and from concealing a document or material having potential evidentiary value.[2] A rule change that allows the categorical logging of claims of privilege will enable unscrupulous lawyers, or their clients, to easily conceal discoverable documents by falsely asserting unfounded claims of privilege. As Judge Grimm stated in *Mancia v. Mayflower Textile Services Co.,*:

> **A lawyer who** seeks excessive discovery given what is at stake in the litigation, or **who makes boilerplate objections to discovery requests without particularizing their basis, or which is evasive or incomplete in responding to discovery,** or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transactions costs, **or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is**, as Professor Fuller observes, hindering the adjudication process, and making the task of the deciding tribunal

[1] *United States v. Procter & Gamble,* 356 U.S. 677, 683, 78 S.Ct. 983, 987, 2 L.Ed.2d 1077 (1958); *see also Dollar v. Long Mfg., Inc.,* 561 F.2d 613, 616 (5th Cir.1977), cert. denied, 435 U.S. 996, 98 S.Ct. 1648, 56 L.Ed.2d 85 (1978).
[2] MODEL RULES OF PROF'L COND. 3.4 (AM. BAR. ASS'N 2016).

not easier, but more difficult, and violating his or her duty of loyalty to the procedures and institutions the adversary system is intended to serve.[3]

Categorical logging will promote the practice of evasive responses to discovery and will delay the completion of discovery while the parties attempt to work through the broad yet unsubstantiated claims of privilege. In ninety-five percent of nursing home abuse cases that I litigate, Defendants fail to produce relevant documents in discovery while making categorical statements in the body of the discovery response that the requested information is protected by a privilege (work product, peer review, quality assurance, medical review committee, and at times, privileges that do not legally exist in our state). In almost every case, they fail to produce a privilege log or provide the specific information necessary to allow opposing counsel to examine the veracity of the claims or privilege, pursuant to N.C.R.Civ.Pro. 26. In essence, lawyers already attempt to use a "categorical" method when responding to discovery despite jurisprudence requiring otherwise. This then then leads to multiple discussions and ultimately my demand that they produce a privilege log which is sufficient and detailed enough to allow me, or the Court if necessary, to assess the validity of the asserted privilege. Once we work through this process, this invariably results in the Defendants withdrawing many of their asserted privileges and producing relevant and discoverable documents that they were attempting to "hide" by including them in a broad claim of privilege, hoping that we would not push the envelope to require them to prove the privilege.

By way of more detailed example, in nursing home abuse cases, it is imperative that we discover incident reports and witness statements taken regarding how a patient was injured or killed, as those details normally are not documented in the patient's medical chart, by design (in fact, nursing homes oftentimes have written policies that prohibit their employees from including the details of how an injury occurred in the medical record. Those details are found in the statements and incident reports). However, nursing homes attempt to hide those documents by claiming quality assurance, medical or peer review privilege pursuant to N.C.G.S. § 131E-107. They make this claim, despite the fact that those witness statements or incident reports are prepared in the ordinary course of business by people who are not members of the peer review committee, and are not actually considered by the peer review committee, as is required in order for the privilege to apply.[4] To allow the Defendants to produce categorical logs instead of detailed privilege logs would allow them to lump the witness statements, incident reports or similar documents in with other documents that may actually be protected by the peer review privilege, making it impossible for plaintiff to discover documents regarding what actually happened to cause injury to a resident. This is just one example of many ways that categorical logging can and likely will be used to undermine the true purpose of discovery.

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[3] *Mancia v. Mayflower Textile Servs. Co.,* 253 F.R.D. 354, 362 (D. Md. 2008) (citation omitted)(emphasis added).
[4] *See* N.C.G.S. §131E-107.

As such, **I urge the Committee not to allow categorical logging of documents**. Instead, a more helpful change would be to include specific requirements as to what information must be included on a privilege log, so that the parties are allowed to assess the claims of privilege fully, fairly, and efficiently, without wasting counsel's time and the Court's time in assessing whether their privilege logs are sufficient.

Thank you for the opportunity to submit this Comment, and for your consideration in this important issue.

Sincerely,

HENSON FUERST, P.A.

Carma L. Henson

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July 30, 2021
(by email)

To the Rules Committee Secretary:

RE: Public Comments on Proposed Rule Changes to Privilege Issues in Rule 26

First, thank you for the opportunity to be heard on this issue prior to any changes being made on the Rule. My name is Ellis Boyle, and I am a partner in the firm of Knott & Boyle PLLC in Raleigh N.C. My practice consists primarily of personal injury and medical malpractice cases, but I am and have been involved in several federal court civil cases over the years. I have run into privilege issues frequently. This occurs in both my North Carolina state court practice and in the 3 United States District Court Districts in North Carolina. The N.C. Rules of Civil Procedure, Rule 26(b)(5) is basically the same as the Federal counterpart. Any changes to the Federal Rule will likely ripple through the system and impact the North Carolina Rule, too.

Often times in my practice, issues related to privilege or work product protection comes up in the context of insurance companies and medical peer review privileges. In these contexts, corporate defendants and insurance companies rarely produce a privilege log when initially responding to discovery requests. Instead, they will make a pro forma blanket objection based on privilege and work product protection and produce no qualifying or descriptive information to probe such a claim. This is technically a waiver of any such privilege or work product protection claim. Our experience is that a court, state or federal, will rarely act upon this initial waiver of the claim without further pre-motions practice discussion between the parties.

Typically, when a responding party asserts a privilege or protection by objecting but produces no privilege log, we engage in a discussion with that responding party to identify the deficiency and ask for a privilege log. The import of the log itself is to allow all parties to have a constructive conversation about the viability of any such claims of privilege or protection prior to seeking intervention from a court. Without such a privilege log, we would simply have to file a motion every time a producing party claims it withheld documents based on privilege or work product protection. This would greatly increase the potential for fumbling, often-unnecessary motions practice, but how else can the propounding party probe the issues? To be fair, when we discuss the need for a log with a producing party, we frequently agree between the parties that any specific communication that is strictly constrained to a party communicating with their trial counsel is not only de facto privileged, but need not be included on any log.

Invariably, when (and if) the claiming party actually finally produces a privilege log, it is woefully inadequate for discussing the validity of any claimed privilege or protection for the document or categories of documents. While the case law seems to have given instructions on what should be included in a privilege log, one thing that would be helpful would be uniform guidance of the minimum requirements for such a document. For instance, it could be a table or spreadsheet with columns devoted to, at least, 1. Who created the document (or if multiple authors) 2. When it was created 3. In what format does it exist (letter, email, memo, etc) 4. Every person to whom it has ever been shared with or transmitted (as a separate issue, there could be a key to identify who each such person is to help explain why a privilege might exist with titles like Insurance Adjuster or Insurance Company Supervisor or Associate lawyer at Law Firm...) 5. A brief, typically generic description of the document (it does not need to be specific because that could waive the privilege, so it can be as simple as "case strategy" or "legal advice" but if it is non-litigation related, that should be discernable and not used as a trick to hide non-protected or privileged documents) 6. A label of the type or types of protection or privilege claimed allowing a good faith basis for withholding the document. There may be other categories, but usually this is enough to stimulate a meaningful conversation between the parties before the need to file any motion and involve the court.

There certainly may be some reason in a Microsoft v/s Apple massive patent litigation or some other pharmaceutical case to allow privilege log by category instead of itemized listings of separate documents. That would likely be the exception, rather than the normal situation. Perhaps there should be a mechanism in the rule that allows the parties to agree, or if no agreement for one party to petition the court, for permission to engage in broader categories of documents in a privilege log as opposed to the default itemized listing of each document. This could easily happen in those applicable cases, leaving the normal case under the existing rule.

In the end, here are my suggestions for how the rule could be improved:

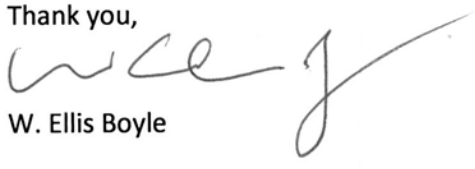
1. Make it more clear that a party must actually produce a valid, usable privilege log when initially responding to discovery requests and asserting an objection to withhold documents based on some alleged protection or privilege, and make it clear that a failure to do so is an overt waiver of any such claim.

2. Create a minimum required format for a valid privilege log that includes enough information to foster a meaningful discussion between the parties to try and avoid motions practice.

3. Have a mechanism that parties can agree, or one party can petition, for the court to permit privilege log by category instead of itemized documents in cases that will have voluminous document production involving many privileged documents that share similarities in type and claim of privilege.

4. Consider allowing a carve out for any records directly between a client and a lawyer involved in the law suit to minimize time spent developing privilege log for information that is pretty obviously privileged.

Thank you,



W. Ellis Boyle

July 30, 2021

Re: "Invitation for Comment on Privilege Log Practice"

Dear Members of the Discovery Subcommittee of the Advisory Committee on Civil Rules:

After a career practicing medicine, I went back to school at age 61 to become a lawyer. I am now in my second year as an associate attorney in a plaintiff litigation firm. I am admitted to both the state and federal bar in Minnesota and practice in both.

In law school (which for me was quite recent) I was taught that Discovery is now a cooperative process, that obstruction and boilerplate objections are unacceptable.

I was shocked to find out that in reality the opposite is true. Defense attorneys are free to disregard rules, and they throw a litany of boilerplate objections at every discovery request. Just this morning I received discovery responses in one of my cases. The objections included privilege protecting responses to such things as a request for the documents supporting the factual basis of Defendant's affirmative defenses listed in their Answer. No privilege log was attached.

It is essential that we retain a legal basis through the Rules to insist on production of a privilege log with identification of the individually protected documents. This can allow us to bypass Defendant's obstruction once the lack of privilege is exposed. If Defendant is allowed to lump documents together, they will inevitably include non-privileged documents with those that are truly privileged.

I urge the Committee to not further facilitate this obstructive behavior. Any limitation of the requirement of providing the basis for the assertion of privilege for each document claimed, would impede the pursuit of fairness and justice in our legal system.

Thank you for your attention in this matter.

Respectfully submitted,

Sincerely,

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PRIV-0058

From: Peter Kohn
To: RulesCommittee Secretary
Subject: Rule 26(b)(5)
Date: Friday, July 30, 2021 3:06:49 PM

Please accept this as a comment regarding the privilege log proposals before the Committee.

I have been a complex case litigator for over 25 years, with document productions into the millions of pages for each case. Many documents that are relevant are ones that passed through attorney hands or over an attorney's eyes. Sometimes legal advice is being sought or rendered. Other times, attorneys have drafted or commented on documents when rendering business advice, or mixed business/legal advice, and sometimes the documents that would otherwise be privileged bear conclusive indicia of privilege waiver. Sometimes lawyers are sent "sensitive" (i.e., highly relevant, probative and prejudicial) documents for no other reason than to later make a claim of privilege "if necessary." I have the enviable position in all of my cases of representing both privilege holder and having to prepare lengthy privilege logs, and simultaneously litigating against a opponent privilege holder and receiving my party-opponent's privilege logs. Sometimes I am the privilege invader, and sometimes my opponent is. This is how litigation between large corporations goes.

From my point of view, it is perfectly clear that privilege logging must be more detailed and granular, not less so. This proposal is in the wrong direction entirely.

To privilege holders, the opportunity to withhold documents under a claim of privilege, however weak or disputable that claim might be, presents a tempting opportunity to conceal evidence that is harmful to ones client. Some lawyers may even feel that their duty of zealous advocacy requires them to withhold any document to which any claim of privilege, however weak or unsustainable, could be asserted, to the extent ethical and permitted by Rule 26(b)(5). The only deterrent to this temptation and its byproduct — the wrongful or, more generously, "mistaken" withholding of documents or portions thereof whose privilege claim is not sustainable — is to require robust and detailed disclosure by the privilege holder of the basis for the privilege and its nonwaiver for each and every document, to facilitate evaluation and challenge by the privilege invader. Yet, even the detailed document-by-document logs that pass Rule 26(b)(5) muster these days (and would be rendered unnecessary by the current proposal) rarely contain sufficiently detailed disclosure to facilitate challenge (an intentional strategy of the privilege holder reluctant to advertise to the privilege invader where the most harmful evidence might be found), and so the logs themselves have to be challenged and required to be more detailed, in order to know whether a challenge to a given document is worth the time. Yet, challenges are sometimes made on instinct and sometimes are successful, and vital evidence is dislodged that is likely the most damaging evidence to the privilege holder in the litigation. More often, successful challenges come from inadvertent disclosures — mere happenstance — which, when checked against the privilege log, expose several other instances of that very same document wrongfully concealed under a bland, generic log entry, illustrating in stark relief the basic problem of insufficient privilege log practices even under today's standards.

Let's not go backwards. Hiding the problem of privilege log abuse by allowing even-less

detailed disclosures does not solve the problem. It just allows the problem to go deeper into hiding. The problem of privilege log abuse is bad enough as it is, and if there is a direction 26(b)(5) should go, it is toward disclosures of greater granularity and detail, not lesser. Greater detail will also have the salutary effect of reducing the judicial burden of having to review random "samples" of documents from insufficiently-detailed privilege logs, a district judge invention whose game-like quality itself illustrates the very problem the current proposal would badly exacerbate.

Thank you for this opportunity to comment.

Peter Kohn

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PRIV-0059

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July 30, 2021

Sent via email: RulesCommittee_Secretary@ao.uscourts.gov

Dear Rules Committee,

I am a plaintiff's personal injury attorney located in Kansas City, Missouri. I focus my practice heavily on medical malpractice cases and catastrophic car crashes. I also handle some product liability cases, including aviation defect cases. My cases are venued nationwide, in both state and federal courts. I regularly litigate against large and small medical facilities, manufacturers of products, and trucking corporations.

I am writing to give my input on the proposed changes to Rule 26(b)(5)(A) concerning privilege log requirements. Claims of privilege are pervasive in my daily practice. Most of the cases I handle involve a defendant proposing a confidentiality agreement / protective order. While such agreements or orders are being worked out, which often necessitates court involvement, defendants often refuse to produce any documents at all, even though all documents sought cannot possibly be confidential or otherwise subject to a protective order. If documents are produced as the agreement or order is being worked out, defendants routinely assert claims of confidentiality to all or nearly all documents produced.

In the rare scenarios where defendants actually provide a privilege log for documents withheld on the objection of confidentiality or privilege without me asking them to do so, such privilege logs rarely comply with the requirements of Rule 26(b)(5)(A) to "expressly" demonstrate the basis for the privilege or provide enough information for us to properly evaluate the basis for the claims. They are merely categorical claims of privilege to justify boilerplate objections. The result of the current rule, and how it is followed in practice, is lengthy meet and confer scenarios, often followed by expensive and time-consuming motion practice, to determine whether what has been withheld is truly confidential or privileged.

Thus, if anything, Rule 26(b)(5)(A) should only be amended in a way that will more adequately explain the claiming party's duty to affirmatively and expressly state its claims of confidentiality and privilege. I am strongly opposed to rule changes that will either 1) indicate that a document-by-document listing is not routinely required, or 2) specify that the claiming party need only identify "categories" of documents under privilege. As to the latter, this language would unquestionably only result in more protracted meet and confer sessions followed by almost inevitable motion practice and unnecessary use of the court's resources as the parties and the Court attempt to determine what is truly meant by and included in the cited categories.

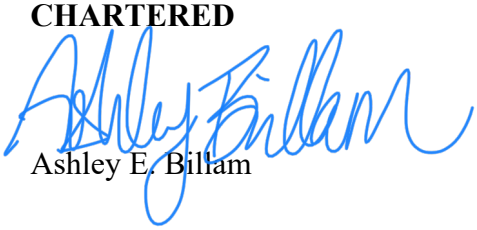
In sum, loosening the requirements or integrating less specific duties on parties claiming privilege would be unduly prejudicial to plaintiffs who are seeking relevant and discoverable material related to their claims. As it stands, parties claiming privilege already skirt around

the requirements and provide little specificity for their claims of privilege, necessitating frequent meet and confers and motions practice.

Thank you for your time and consideration of these comments. Please feel free to contact me if you want any further input in this matter.

Very truly yours,

SHAMBERG, JOHNSON & BERGMAN, CHARTERED



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Linda P. Nussbaum
Peter E. Moran
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July 30, 2021

Via E-Mail

Judicial Conference Advisory Committee
rulescommitee_secretary@ao.uscourts.gov

Re: Invitation for Comment on Privilege Log Practice

To whom it may concern:

For almost three decades, I have represented plaintiffs in complex class litigations, including antitrust, pharmaceutical class actions, and data breach cases. The existing Rule 26(b)(5) provides a clear, workable standard that allows the parties to avoid disputes through meet and confers both prior to production as well as after, should disputes arise. Problems requiring judicial intervention only arise when a party forgoes the rule by providing general or categorical descriptions that prevent the receiving party from performing a meaningful review to determine the propriety of the privilege claims.

At a bare minimum, information about a withheld document, such as: who sent it, who received it, and the subject matter of the document or communication is absolutely necessary because it allows plaintiffs to focus their disputes on key pieces of information contained in the log. Where such information is lacking — where defendants apply boiler plate assertions of privileged such as "concerning litigation" or "concerning agreement" — plaintiffs have no alternative but to challenge thousands of entries or risk being denied those documents that really matter.

Amending the rule as the defense bar would propose to provide even less information than required under the current rule, or to forgo a document-by-document analysis will jeopardize plaintiffs' substantive discovery rights by denying them the ability to meaningfully challenge the privilege assertions as to specific, key documents. Despite its intentions, this would actually exacerbate conflicts over privilege because it would broaden the number of questionable documents, increase the likelihood that defendants will attempt to hide harmful documents, and narrow the tools plaintiffs need to identify important documents and focus the dispute.

The existing rule works. And in situations where its application gives rise to an unduly burdensome situation, a party has the opportunity to seek a protective order that modifies the rule. Accordingly, I believe there is no reason to make any changes.

Sincerely,

/s/ Linda P. Nussbaum
Linda P. Nussbaum

/s/ Peter E. Moran
Peter E. Moran

FEDERAL MAGISTRATE JUDGES ASSOCIATION
COMMENTS ON PRIVILEGE LOG PRACTICE

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has published an invitation for comment on privilege log practice based on a suggestion that rule changes be adopted to address difficulties in complying with Federal Rule of Civil Procedure 26(b)(5)(A). At the request of the Discovery Subcommittee, the Rules Committee of the Federal Magistrate Judges Association convened by Zoom on July 15, 2021, and offer the following comments as outlined in the Invitation.

PRIVILEGE LOG PRACTICE

1. Problems under the current rule

The Committee members acknowledged that they see a great deal of motion practice involving privilege logs. They agreed on two primary means by which such practice might be minimized: (1) court and party management of the issues earlier in the life of a case; and (2) some rule adjustment. The committee concurred that the main problem under Rule 26(b)(5)(A) is that it has been interpreted to require document by document privilege logs even though the rule itself does not state any such requirement. The committee believed some change to Rule 26(b)(5)(A) expressly stating that document by document or categorical privilege logs are permissible, depending on the circumstances, may be helpful. Other problems discussed included frustrations with vague descriptions in privilege logs that fail to give sufficient information for the claim of privilege to be assessed and overbroad categories. The committee favored providing, perhaps in the committee notes, some guidance to attorneys as to how to draft sufficiently detailed descriptions and how to formulate appropriate categories.

2. Possible rule changes to solve problems

The committee members agreed that both document by document privilege logs and categorical privilege logs are permissible under the current rule and that an amendment expressly stating that either method is permitted may be helpful to preclude the rule from being interpreted otherwise. The committee also agreed that Rule 26(b)(5)(A) should not be amended to require the use of categories and correspondingly it should not be amended to require the parties to identify or enumerate categories.

Categorical privilege logs should be permissible so long as the goal of the rule is satisfied, i.e., the categorical descriptions provide sufficient information for the parties to assess the claim of privilege. The categories must be clear, narrowly tailored, and homogeneous such that any example chosen from that category would be representative of the remainder of the documents in that category. Examples of possible categories include e-mails/documents involving outside counsel after the commencement of litigation; e-mails/documents involving in-house counsel where in-house counsel was providing legal advice rather than business advice; emails/documents involving a governmental agency or for which a government privilege is asserted with respect to a particular policy; e-mails/documents involving internal investigations.

E-mails/documents that were shared with third parties or e-mails/documents with no attorney involvement where the claim of privilege may require more detailed explanation, could also be grouped together. Other categories could be based on date restrictions; for example, communications made after the filing of the complaint could be excluded from discovery (unless the claims are ongoing) or communications limited to a range of years relevant and proportional to the claims raised. Producing metadata logs containing certain information about withheld documents in the various categories also may alleviate burden but assist an adversary in evaluating a claim of privilege. Perhaps these exemplar categories could be described in comments to the amended Rule

Allowing documents to be grouped by category in privilege logs has several advantages. First, in complex cases, document by document privilege logs may be cost prohibitive. In addition, use of categories when appropriate would discourage the repetitive and rote objections that are often employed on a document by document privilege log. A nationwide rule would allay the current problem lawyers face in trying to comply with varying rules among the federal district courts.

The committee members also agreed that continued discussion should focus on a potential revision to Rule 26(f)(3)(D) to include, as part of the duty to meet and confer, the topic of how privilege logs should be drafted based on the needs in a particular case under Rule 26(b)(5)(A). If a rolling production of documents is anticipated, the discussion should also address the need to update the privilege logs within one or two weeks of each production. The results of that discussion could be incorporated into the court's scheduling order under Rule 16.

From: Russ Chorush
To: RulesCommittee Secretary
Subject: Proposed Rule 26 Amendment
Date: Friday, July 30, 2021 4:12:37 PM

In my experience representing plaintiffs in patent, trade secret and antitrust litigation, Rule 26's requirement for detailed privilege logs is an important aspect of the Federal Rules' goal of a fair and just judicial system. Parties often have litigation-inspired motives other than guarding the privilege for placing inculpatory or compromising information on privilege logs—namely, a desire to avoid the production and admission of damaging evidence. This same motive exists even when the basis for asserting privilege is weak or non-existent.

The privilege log details currently required by Rule 26 aid the justice system's search for truth by assisting litigants in challenging unjustified assertions of privilege. In one of my cases, for example, those details facilitated a successful privilege log challenge that resulted in the production of one of the most important liability documents in the case. Absent those details, identifying that needle in the haystack of withheld documents might well have been impossible. Amending the rule to provide less information, or to eliminate document-by-document entries, will undermine the ability of litigants to challenge privilege assertions and will encourage parties to withhold otherwise discoverable information under the guise of overly zealous privilege claims.

As such, in my opinion, Rule 26's current privilege log requirements should not be eliminated or narrowed as suggested in the proposal.

Best,

Russ Chorush

Russell A. Chorush, Ph.D., J.D.

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July 30, 2021

To whom it may concern,

I understand the Advisory Committee on Civil Rules is considering making serious changes to privilege log practice in federal courts. My firm has represented plaintiffs in complex antitrust litigation for nearly ten years. In that time, Rule 26(b)(5) as currently written has been an invaluable component to our practice in ensuring that defendants cannot improperly conceal evidence of their liability. The standard is clear and workable, and when disputes do arise, the parties in our experience can generally resolve any such issues without court involvement. We meet and confer before any privilege logs are produced, and the fact that the rule requires the producing party to share a minimum amount of information provides a helpful baseline in determining the sufficiency of privilege log entries.

Changing Rule 26(b)(5) to allow parties to provide *less* information threatens to strip plaintiffs of their right to meaningfully challenge privilege assertions for specific documents which may be needed to prove their case. No potential burden to defendants can be worth the evisceration of discovery rights for plaintiffs. For example, suppose the CEO of a pharmaceutical company accused of antitrust violations has an email exchange with in-house counsel on the very day that an allegedly anticompetitive agreement was executed. The substance of those discussions is privileged, but the *fact* of the discussion, and the right of plaintiffs to seek

deposition and trial testimony about it, can provide valuable inferences for a factfinder. The minimum level of information currently provided by Rule 26(b)(5) allows parties and factfinders to determine some context such as the date and time of such discussions, and the identities of the alleged wrongdoers.

In fact, the effect of such a change to Rule 26(b)(5) would broaden, not narrow, fights over privilege assertions, and potentially require *more* judicial involvement; *more* hours of attorney time devoted to discovery and procedural matters rather than the substance of the case; and could ultimately run counter to the best interests of class plaintiffs.

As the existing rule already provides for the possibility for a producing party to seek a protective order modifying privilege log requirements in situations that may truly be unduly burdensome, the Radice Law Firm sees no reason to change a rule that works well as is.

Thank you,

/s/ John Radice
John Radice, Partner
Radice Law Firm, P.C.

From: Steve Shadowen
To: RulesCommittee Secretary
Subject: Rule 26(b)(5)
Date: Friday, July 30, 2021 4:30:18 PM
Attachments:

For many years I have represented plaintiffs in antitrust and other complex litigation. It is essential that Rule 26(b)(5) continue to provide a clear, workable standard for privilege logs. The logs help prevent parties from improperly concealing important evidence. In the meet-and-confer process, which is based on the baseline information required by the Rule, the parties usually can resolve most disputes *because* the Rule requires the producing party to meet that minimum standard.

Amending the rule to provide less information, and to forgo a document-by-document analysis, is a recipe for squandering judicial resources while empowering those who would abuse the judicial process. Courts would be required to consider whole categories of documents rather than the relatively few that are left after the meet-and-confer winnowing process. And unscrupulous litigants would be tempted to hide key documents within craftily designed and articulated categories.

The proposed rule changes are a solution in search of a problem. I urge you to leave well enough alone.

Steve Shadowen

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Not licensed in Texas; licensed in Pennsylvania

From: Sharon K. Robertson
To: RulesCommittee Secretary
Subject: Response to Invitation for Comment on Privilege Log Practice
Date: Friday, July 30, 2021 4:36:45 PM

Dear Rules Committee:

I've represented plaintiffs in complex litigation for years and have taken the laboring oar on negotiating with defendants on issues relating to privilege and privilege logs in particular.

Privilege logs are an important tool for evaluating whether a withholding or redaction is in fact proper. Rule 26(b)(5) provides a clear, workable standard. The information that the Rule currently requires has allowed us to successfully challenge numerous privilege assertions and secure key documents that were improperly shielded from disclosure on the basis of privilege. And populating that information into a privilege log necessarily requires the withholding/redacting party to think critically about whether the withholding/redaction is appropriate. The process has been efficient -- the parties meet and confer before and after privilege logs are produced and can challenge assertions of privilege where necessary. In many instances, the information provided under the current Rule has allowed the parties to successfully resolve disputes without Court intervention. This is only possible because the Rules require the withholding/redacting party to share a critical, yet, minimum amount of information. Amending the rule to provide *less* information, or to forgo a document-by-document analysis in favor of broad categories/labels, will jeopardize plaintiffs' substantive discovery rights by gutting the ability to meaningfully evaluate and potentially challenge the privilege assertions as to specific, key documents. It would also increase burdens and create tremendous inefficiencies for both the parties and the judiciary, with the parties having less of a basis to meet and confer and the Court receiving more challenges due to the lack of information and/or broad category designations.

The withholding of discovery is significant and should be accompanied but the minimum information the Rule currently requires in order to ensure that the producing party is justified in withholding or redacting potentially relevant materials. I see no reason to change the current Rule.

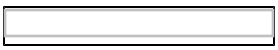
Thank you for your time and consideration.

Best,

Sharon Robertson

Sharon K. Robertson
Partner

Cohen Milstein Sellers & Toll PLLC
88 Pine Street | 14th Floor



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PUBLIC JUSTICE
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PUBLIC JUSTICE COMMENTS TO THE CIVIL RULES

ADVISORY COMMITTEE ON PRIVILEGE LOG PRACTICE

July 30, 2021

Public Justice, P.C. and the Public Justice Foundation (collectively, "Public Justice") respectfully submit these comments to the Advisory Committee on Civil Rules in response to the Committee's Invitation for comments on privilege log practice.

Public Justice is a nationwide public interest legal advocacy organization that pursue impact litigation and communications campaigns to combat social and economic injustice, protect the sustainability of the Eart and challenge predatory corporate conduct and government abuses. It has 2,700 members, from all fifty states, who represent plaintiffs in a broad range of personal injury, employment discrimination and wage and hour cases, consumer, tort (both mass and individual), antitrust and securities fraud, commercial and civil rights cases.

The current formulation of the rule. Federal Rule of Civil Procedure 26(b)(5)(A) provides that,

> When 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.

The rule is written to balance three competing needs: the right to withhold legitimately privileged material, the right to discovery, and the judiciary's duty to provide a forum for truth

seeking. Since it is black letter law (requiring no citation) that the burden is upon the party claiming the privilege to adduce evidence showing facts that support the claim, the rule requires (a) an express assertion of the claim and (b) a description of the basis for the claim. To assess the claim, the rule requires the assertion to be sufficiently detailed to "enable other parties to assess the claim." Of course, the detail of the description is also the basis that enables *the judicial officer* to assess the claim.

As written and in practice, the rule affords parties and courts the ability to tailor Rule 26(b)(5)(A) compliance with the needs of each case. Cases differ not just by the volume of ostensibly privileged materials. They also differ by the centrality of the role of lawyers in the underlying alleged misconduct, in the nature of the way the documents were kept, in the level of fair play by the asserting party in providing the descriptions, and many other factors. Assertions of privilege are also inherently fact intensive. For the almost 30 years since the rule was added (including many years where much of discovery was electronic and digital), the courts have developed tools and a body of case law fleshing out when privilege logs are appropriate and how they are to operate, and that case law has largely done a good job of protecting the rights of parties.

In short, the current rules require disclosure or the information relevant to evaluate a claim of privilege, but do not place a finger on the scale one way or the other as to the level of detail required and whether a claim should be allowed. The current Rule thus allows the parties and the court to do their jobs. In that process, courts often do require document-by-document descriptions. Given the fact-intensive nature of the inquiry this often makes sense. It also lessens the burden of the courts. Itemized descriptions enable the parties and the court to make rulings based on them (if done correctly), and avoids (or makes less likely) the need for a court to review *in camera* large volumes of documents.

Opposition to categorization. Public Justice strongly opposes the possibility (implicitly suggested by the invitation) of jettisoning the present practices respecting privilege logs from the general practice of document-by-document privilege claims in favor of a new approach of categorical claims of privilege to more than one document. Doing so would not only materially harm the evidence-adducing function of discovery but would also be most likely to increase the burden on federal judges in adjudicating discovery disputes, particularly those related to claims of privilege.

The primary issue posed by privilege logs in the explication of facts is that, unfortunately, a producing party does not always wish to have all the facts produced to a receiving party. That's the nature of the adversarial judicial process. Regrettably, discovery is not self-policing, and the court plays a necessary role in stopping the abuse by parties improperly withholding relevant and non-privileged information. The explication of names, dates, and subjects on privilege logs provides a mechanism for challenging over-broad or improper claims of privilege. The attorney client privilege itself is a screen behind which communications and facts are – for good independent jurisprudential reasons – hidden; reducing logs to topical or subject matter designations erects yet another screen and a well-nigh impenetrable one.

Parties receiving privilege logs are inherently in the dark in their ability to determine the validity of privilege assertions, particularly where there is a complete withholding of a document (as opposed to a redacted production). The listing of names, dates, subjects, and description of the document, together, open the door to permit reasonable challenge and do not, of course, infringe on the privilege. Practice has time and again shown, for instance, that when a list of recipients to a communication contain multiple businesspeople and only a single lawyer, there is a likelihood that the communication was a business communication and not one

seeking or receiving of legal advice. The same is true as to having dates – as chronologies of events are developed in litigation, when dates are provided on a privilege log, the legal/business distinction will often become evident. Time and time again, in actual practice, the ability for receiving parties to examine privilege log detail has permitted intelligent meet and conferrals at which designations were either dropped or a more focused challenge could be presented to a court for review. Obviously, in a world where no client (or lawyer) tried to "hide the ball", this would not be necessary but, in the real world of litigation, some information is needed to permit evaluation of claims of privilege.

The concerns we see with permitting categorical logs are exacerbated by a trend we have seen over the years whereby individuals have, in general, become more savvy in realizing that routing communications through, or including attorneys on, communications can be a mechanism for preventing ultimate disclosure. This is unfortunate but true; and, again, privilege log details permit a window into whether challenges to overly broad privilege claims are necessary and justified.

The reason why permitting categorical designations will only increase the burden on the courts (as well as delayed justice) is that when faced with categorical designations, what can counsel do except ask for the court's intervention on a wholesale basis? The present regime of meet-and-conferrals, which, as noted, can, not infrequently, be effective, will be lost. Opposing counsel will stand on its description of a set of communications and say, "yes, that's a fair description and all the documents are privileged." Unless the federal courts abdicate their responsibility to permitting discovery to be a truth-adducing process, counsel can, to all intents and purposes, *only* request a court to do an *in-camera* review. And if such diligent reviews by the courts do not take place, counsel will have incentives to over-designate, and the use of hiding behind including lawyers on communications will only accelerate. The present practice

of meet and conferrals do, in actuality, reduce the burden on the courts (and the expense on the parties). The proposal would increase it, and would delay "the just, speedy, and inexpensive" adjudication of cases.

Respectfully Submitted,

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From: Jeffrey L. Kodroff
To: RulesCommittee Secretary
Subject: Rule 26(b)(5)
Date: Friday, July 30, 2021 4:59:44 PM

My name is Jeffrey Kodroff and I am a partner at Spector Roseman & Kodroff, P.C. I have represented individuals, small and large corporate entities as wells as State Attorneys General in complex litigation for over 30 years.

During my career I have seen an increase in the use of claims of privilege as a method to avoid the production of not just relevant information, but crucial discovery of dispositive information. Privilege logs are the only means available in a litigation to ensure that a party does not improperly conceal evidence.

The American judicial system favors negotiated settlements as a means of resolving disputes. This is accomplished when the parties are forced to analyze the strength and weaknesses of their position based on a full factual and legal record. Just as Court's favor settlements because it forces the parties to assert and defend their positions, the current process of resolving privilege arguments works the same way. Rule 26(b)(5) provides a clear, workable standard. The party asserting the privilege must provide sufficient information to substantial their claim as well as allowing the other party sufficient information to challenge the appropriateness of the claim. The parties then meet and confer to negotiate and resolve most disputes *because* the rule require the producing party to share a baseline, minimum amount of information. As a result, most claims of privilege are resolved without Court intervention.

Amending the rule to provide *less* information, or to forgo a document-by-document analysis in favor of broad categories/labels, will have the exact opposite affect. Not only will it increase the need for a Court's resources and time, it will also jeopardize participants substantive discovery rights by gutting the ability to meaningfully challenge the privilege assertions as to specific, key documents that may be needed/important to prove their case (e.g., associated with an individual who played a key role, or types of documents generated during a couple of week period.).

Any change in Rule 26(b)(5) that decreases the amount of information the parties share with each other will: (1) make it more difficult for the parties to analyze the strength and weaknesses of their positions; and (2) result in fewer negotiated resolutions of privilege arguments. Thus, the proposed change will require more judicial involvement to address more documents – i.e., an entire category as opposed to a few documents/entries. It would also result in many, many more hours of attorney time conferring about discovery matters rather than focusing on the substantive work of the case.

The goal of any changes of the Federal Rules should be to make litigation more efficient for the Courts and the parties. The proposed change will have the exact opposite impact. Therefore, I do not see a reason to make any changes.

From: Donna M. Evans
To: RulesCommittee Secretary
Subject: Comments on Proposed Changes to Rule 26(b)(5)
Date: Friday, July 30, 2021 5:32:20 PM

I am writing to express my concerns regarding changes to Rule 26(b)(5) relating to privilege logs.

Privilege logs play a substantial role in the antitrust class action cases in which I represent plaintiffs. Importantly, privilege logs allow plaintiffs' counsel to assess and, where appropriate, challenge evidence that should be produced based upon the current requirements in the Rule. Absent the minimal information currently required – information which is readily discernible on the face of documents -- plaintiffs will have virtually no information to assess the propriety of privilege claims. The wholesale use of categories simply eviscerates the purpose of privilege logs. The proposed changes also promote inefficiency. Less information means more unresolved challenges will be decided on the court's time with *in camera* review. Finally, the proposed changes are a clear blow to class plaintiffs and a "hall pass" to defendants seeking to bury wrongdoing. The likely results of the proposed Rule changes created many more inefficiencies, burdens on all parties and the court, and hurdles to fair redress. I do not believe the proposed changes are warranted.

Donna M. Evans
Of Counsel
Admitted in Massachusetts

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National Employment Lawyers Association

July 30, 2021

The Honorable Robert M. Dow, Jr., Chair
Professor Richard L. Marcus, Reporter
Members of the Discovery Subcommittee
The Judicial Conference Advisory Committee on Civil Rules
via email: ***RulesCommittee_Secretary@ao.uscourts.gov***

Re: Comment of NELA
Proposed Change – Rule 26(b)(5)(A)

Dear Chair Dow, Reporter Marcus and Members of the Discovery Subcommittee:

The National Employment Lawyers Association ("NELA") submits these comments in response to the Judicial Conference Advisory Committee on Civil Rules, Discovery Subcommittee's Invitation for Comment on Privilege Log Practice.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. Our mission is to advance employee rights and serve lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have faced illegal treatment in the workplace. NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws and comments on relevant Notices of Proposed Rulemaking (NPRMs).

Many NELA members represent workers in federal civil litigation and therefore have direct, first-hand knowledge of privilege log practice. Because NELA members represent workers in both individual and large class action cases, they have a unique perspective on how privilege log issues manifest in many different types of litigation. Our members work as solo practitioners, in mid-size firms, and in large law firms representing clients in cases ranging from individual matters that involve a few hundred documents to complex, multi-state cases (e.g., class action wage and hour claims) that involve thousands of class members and hundreds of thousands of documents.

Based on NELA members' far-ranging experiences, we believe that the current rule requires little, if any change. The root of the problem with privileged documents does not lie in how the Rule is

written or even in how it is applied by the courts. Disputes arise most often when there is insufficient information contained in the privilege log. In other words, where sufficient information is provided by the withholding party to justify the privilege, the opposing party is able to adequately assess the claimed privilege.[1] Where there is insufficient information to allow a party to assess the claimed privilege, the assessing party must then seek court involvement, in the form of an *in camera* review, in order to resolve the dispute.

The proposed amendment to the rule seeks to *limit* the amount of information contained in privilege logs, which will increase the workload of the courts who would need to get involved to evaluate the claimed privilege, and will make litigation more costly for our clients. The process of reviewing and making a determination on the claimed privilege for each document is not possible if the log does not contain a document-by-document explanation of the withheld document. The proposed change would "shift the burden onto the court to review potential large swaths of documents for privilege based on broad categories."[2] In short, the new rule would shift the onus of evaluating the claimed privilege from the receiving party (who will lack sufficient information to assess the privilege) to the court, which will have to conduct a review of the withheld documents.

NELA opposes any modification to the rule that would increase the burden on judges to review privilege logs and asses claimed privilege. However, to the extent the Committee wishes to modify the rule, NELA endorses the idea of adding a requirement that litigants discuss privilege logs during the 26(f) conference, as well as identifying it as a topic to be addressed by the court during a 16(b) scheduling conference. Such an approach is an efficient and tailored way to allow parties to raise questions and concerns prior to the start of discovery such that they can be adequately addressed before disputes arise, or at the very least, establish a mechanism for how a court would like disputes handled if they do come up.

---

[1] Typically, a privilege log should identify each document and the individuals who were parties to the communications with sufficient detail to permit the compelling party or court to determine if the privilege is properly claimed. *Arthrex, Inc., v. Parcus Medical*, LLC, No. 2:11–CV–694–FTM–29SPC, 2012 WL 3778981 at *4 (M.D.Fla. Aug. 31, 2012), *citing CSX Transportation, Inc., v. Admiral Insurance Co*., No. 93–132–CIV–J–10, 1995 WL 855421, at *3 (M.D.Fla. July 20, 1995). Thus, a proper privilege log should contain the following information:

(1) the name and job title or capacity of the author of the document;
(2) the name and job title or capacity of each recipient of the document;
(3) the date the document was prepared and if different, the date(s) on which it was sent to or shared with persons other than the author(s);
(4) the title and description of the document;
(5) the subject matter addressed in the document;
(6) the purpose(s) for which it was prepared or communicated; and
(7) the specific basis for the claim that it is privileged.

Roger Kennedy Construction, Inc. v. Amerisure Insurance Co., No. 6:06–C–1075–ORL–19KRS, 2007 WL 1362746, at *1 (M.D.Fla. May 7, 2007) (detailing the information needed in a proper privilege log); *In re Denture Cream Prod. Liab. Litig.,* No. 09-2051-MD, 2012 WL 5057844, at *9 (S.D. Fla. Oct. 18, 2012).

[2] *State ex rel. Marshall County Comm'n v. Carter,* 225 W. Va. 68, 73 (2010).

On a final note, the LCJ submission also claims that document by document logs are "one of the most labor intensive, burdensome, costly and wasteful parts of pretrial discovery in civil litigation" where lawyers have to identify privileged documents, conduct extensive research into elements of each potential claim, make, and then validate initial privilege calls, and then construct a privilege log describing each withheld document without disclosing privileged or protected information."

NELA would direct the Committee's attention to the fact that many ESI platforms specifically include the efficient and easy creation of privilege logs on those respective platforms as a selling point, which would seem to weaken the argument that it is as onerous a task as it was before modern-day discovery tools.[3] Indeed, LCJ's submission acknowledges the availability of such platforms.

Whether they are brought under the Fair Labor Standards Act, Title VII of the 1964 Civil Rights Act, or the Americans with Disabilities Act, employment cases almost always involve situations where employers (i.e. Defendants) are in control of the vast majority of the information relevant to the claim(s) filed. Any time information that is likely critical to the case is withheld on the grounds of privilege, employees deserve the opportunity to assess that privilege fully, which is best achieved under the rule as it is currently drafted. In light of the above, we urge the Committee to retain Rule 26(b)(5)(A) in its current form.

NELA thanks the Committee for its attention to and consideration of NELA's views on this matter.

Should you wish further information, please do not hesitate to contact the undersigned.

The National Employment Lawyers Association

By its Executive Director, Jeffrey Mittman

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[3] Though not an endorsement by NELA or its members, a quick google search reveals a number of options for ESI with short, easy explanations regarding privilege log creation.
See https://support.csdisco.com/hc/en-us/articles/360039866092-Privilege-log-Feature-spotlight for information on how CS DISCO can assist in the creation of privilege logs (last visited July 23, 2021); *see* https://www.youtube.com/watch?v=vV82Dq9CIhc for information on how Relativity can assist in the creation of privilege logs (last visited July 23, 2021); *see* https://support.everlaw.com/hc/en-us/articles/360000037892-Productions-1-of-3-Creating-a-Production-Protocol#h_01ESWBCJFNW5W6B5NC4F17PCZZ for information on how Everlaw can assist in the creation of privilege logs (last visited July 23, 2021); *see* https://www.logikcull.com/faq/how-to-create-a-privilege-log-of-search-results for information on how Logikcull can assist in the creation of privilege logs (last visited July 23, 2021); *see* https://support.nextpoint.com/hc/en-us/articles/206739276-How-to-Create-Privilege-Logs for information on how Nextpoint can assist in the creation of privilege logs (last visited July 23, 2021).

From: Bart Cohen
To: RulesCommittee Secretary
Cc: Bart Cohen
Subject: Federal Rule of Civil Procedure 26(b)(5)
Date: Friday, July 30, 2021 5:51:17 PM

Dear Sir or Madam:

My firm represents plaintiffs in class actions and other complex litigation. Over the last 30 years, I have specialized in antitrust litigation, including "reverse payment" cases involving generic drugs. I understand that the Advisory Committee on Civil Rules is considering changes to the above-referenced rule. Having repeatedly confronted defendants as to deficiencies in their privilege disclosures, I can assure the Committee that any changes directed at allowing litigants to provide less detail in those disclosures would do a disservice to the pursuit of truth and justice.

The nature of our practice is such that privilege disclosures are exceptionally important, as defendants routinely seek legal advice regarding antitrust and patent issues. While that justifies their designating substantial numbers of documents as privileged, they over-designate in virtually every case, and frequently to an alarming degree. Addressing the issues that raises is already a time-consuming task for plaintiffs' attorneys (who are not paid hourly), and worthwhile only with respect to what appear to be the most valuable documents, based on the minimal information in existing privilege logs.

Allowing even less detail in privilege disclosures would enable litigants to withhold non-privileged documents even more readily than they do now. That will be a particular burden to average plaintiffs and their counsel, most of whom are not as well-funded as class action plaintiffs, and cannot afford to pursue issues not directly related to the merits. More importantly, if litigants are unable to effectively target key documents for disclosure, courts will be faced with passing judgment as to large swaths of documents—many of which will be of no value in resolving the case.

In short, the Committee should not assume that litigants are consistently diligent in properly applying the existing Rule. Any changes making it more lax would reward those that are the least diligent.

Respectfully submitted,

Bart Cohen
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Direct: (917) 438-9198

From: Lori A. Fanning
To: RulesCommittee Secretary
Cc: Marvin A. Miller; Matthew Van Tine
Subject: Comment on Privilege Log Practice (v. 6-8-21)
Date: Friday, July 30, 2021 5:51:17 PM

To the Judicial Conference of The United States, Advisory Committee on Civil Rules:

Please consider the following comment opposing the suggestion for proposed changes to privilege log practice.

We have represented plaintiffs in complex litigation for decades. Privilege logs are an important tool intended to prevent improper concealment of relevant evidence. Rule 26(b)(5) provides a clear, workable standard. The parties meet and confer before and after privilege logs are produced; they are able to resolve most disputes *because* the rule require the producing party to share a baseline, minimum amount of information.

Amending the rule to provide *less* information, or to forgo a document-by-document analysis in favor of broad categories/labels, will jeopardize substantive discovery rights by stripping plaintiffs' ability to meaningfully challenge the privilege assertions as to specific, key documents that may be necessary or important to prove their case (e.g., associated with an individual who played a key role, or types of documents generated during a couple of week period.). That would make disputes over privilege assertions broader, not narrower, and potentially require more judicial involvement to address more documents – i.e., an entire category as opposed to a few documents or entries. It would also result in many more hours of attorney time conferring about discovery matters rather than focusing on the substantive work of the case.

As the existing rule provides the possibility for a producing party to seek a protective order that modifies the rules requirements in unduly burdensome situations, we see no reason to make the suggested changes.

Thank you,

Lori Fanning

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PRIVILEGE AND CONFIDENTIALITY NOTICE

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July 30, 2021

VIA EMAIL
Members of the Judicial Conference
Advisory Committee on Civil Rules
Rulescommittee_secretary@ao.uscourts.gov

Re: Proposed amendments to F.R.C.P. 26(b)(5)(A) – Privilege Logs

Dear Members of the Advisory Committee on Civil Rules:

We write to urge the Committee to reject any proposed changes to Federal Rule of Civil Procedure 26(b)(5)(A). The Rule works well as written. Where problems arise, and resources are wasted, is when the Rule is not followed.

We particularly oppose any amendments that would direct courts away from the common practice of requiring the party asserting a privilege to provide, on a document-by-document basis, information sufficient for the receiving party to test the privilege claim. The possible rule changes outlined by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States—particularly changes endorsing categorical privilege logging—would undermine the spirit of Rule 26(b)(5)(A), disproportionately disadvantage plaintiffs, and create substantial burdens for the judiciary.

Indeed, the suggested rules change has things backwards. When parties in large document cases try to use shortcuts to meet their burden and justify privilege assertions—most usually, through various "categorization" efforts— it creates more work in the long run, particularly for the judicial officers who face repeated motion practice as the parties weed through the obfuscation created by categorization.

Who we are.

The Boston office of Hagens Berman Sobol Shapiro focuses on representing plaintiffs in complex litigation combatting waste, fraud, and abuse in the pharmaceutical and healthcare industries. For nearly 20 years, our office has litigated large, complex class cases against some of the largest pharmaceutical companies (brand and generic manufacturers), developing specialized expertise in pharmaceutical antitrust, RICO, and other litigation challenging a broad range of pricing and access abuses. These suits involve alleged fraudulent marketing, improper manipulation of pricing indices, illegal horizontal price fixing, anticompetitive market allocation agreements (including "reverse payment" settlements), patent fraud and sham litigation intended to delay competitors from entering the marketplace.

To give a sense of the breadth of our work: We lead or have led almost 20 generic delay cases, involving various theories, on behalf of both direct and end payers to settlement and distributions to classes (or aggregated groups). We helped develop the econometric model used to show the relationship between marketing and the opioid epidemic in the opioids MDL (*In re National Prescription Opiate Litigation*, No. 17-md-02804 (N.D. Ohio), Hon. Dan Aaron Polster). We originated the Ranbaxy fraudulent ANDA litigation, alleging the novel theory that a generic company's fraudulent statements to FDA in order to obtain exclusivities violated federal RICO and antitrust laws (*Meijer, Inc. v. Ranbaxy Inc.*, No. 15-cv-11828 (D. Mass.), Hon. Nathaniel M. Gorton). We served as Lead counsel in the *New England Compounding* MDL and as a member of the creditors' committee in the related bankruptcy, representing more than 700 victims who contracted fungal meningitis or other serious health problems as a result of receiving contaminated products, resulting in about a $200 million settlement (*In re New England Compounding Pharmacy, Inc. Products Liability Litigation*, MDL No. 2419 (D. Mass.), Hon. F. Dennis Saylor, IV & Hon. Rya W. Zobel). In the Vioxx MDL, we developed a win-win lien resolution program for consumers and health plans that dispensed with the inefficiencies of resolving insurance liens piecemeal that is now a routine part of mass tort MDLs (*In re Vioxx Products Liability Litigation*, MDL No. 1657 (E.D. La.), Hon. Eldon E. Fallon). And we obtained a $142 million RICO jury verdict against Pfizer for fraudulently marketing its drug Neurontin; negotiated a separate $325 million settlement on behalf of a class of health plans (*In re Neurontin Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 1629 (D. Mass), Hon. Patti B. Saris).

Given the scale and nature of the cases we litigate, privilege issues are endemic and widespread. In the underlying alleged misconduct we litigate, lawyers employed by the defendant have often played a central role; that role is often more business-oriented than legal-advice related. Privilege issues are always highly fact dependent. While the alleged misconduct occurs, sophisticated companies employ practices to enwrap their communications with lawyer-dressing; in later litigation, their sophisticated outside counsel thereafter uses that dressing to conceal information.[1] Frankly, this current effort to place a thumb on a scale in favor of categorization can only be seen as another step towards that end.

Rule 26(b)(5)(A) works well.

Overview. The purpose of Rule 26(b)(5)(A) is to ensure that the default discovery rule is not frustrated by shielding improperly withheld documents. Privilege claims must be properly asserted and subject to testing. Rule 26(b)(5)(A) requires the withholding party to provide, for each document withheld, information that enables the receiving party to "assess the [privilege] claim." In unusual circumstances, involving extraordinary burden, a party may seek relief from the Rule's requirements. In practice, the parties meet and confer before and after privilege logs are produced. The receiving party homes in on the key documents it believes may have been improperly withheld.[2] The parties resolve most, if not all, of their differences. When logs are

[1] Often, when we ask "why is this email privileged," the first (inadequate) response is "because a lawyer was copied."

[2] E.g., in generic delay antitrust cases: documents sent to, or created by, the people who negotiated an allegedly anticompetitive agreement during a two-week time period; documents sent to, or created by, an inventor shortly

done well, and negotiations are meaningful, any dispute landing before a judge has been pruned back to bonsai status (as intended).[3] It is when a party provides *less* than what is required, or relies on broad/categorical descriptions, that problems arise and judicial (or special-master) resources are commandeered.

Rule 26(b)(5) already affords the parties the flexibility to negotiate privilege log protocols that can be tailored to the specifics of each case. In complex cases, the structure, contents, and exemptions for privilege logs are carefully negotiated. The parties work through, up front, the timing for producing logs, the content of the logs (including particular fields/columns), what need not be logged, and the procedure and timing for challenging any log entries.[4] These agreements are often embodied in a privilege log protocol approved by the court. The ground rules are clear from jump street.

While the Rule does not prescribe a particular approach, the approach in our practice has long been a document-by-document log. Only a document-by-document log, when prepared correctly, can begin to provide a basis for testing the privilege and sussing out abuses.[5] For example, pharmaceutical companies' in-house counsel often wear "two hats" – business and legal – and are involved in or simply copied on many emails and documents subject to discovery. An initial privilege review may mark every document including that lawyer as "privileged." While some may be properly privileged, routinely, these communications do not seek legal advice; the "lawyer" is simply a participant in a business discussion. Absent a document-by-document log, plaintiffs wouldn't be able to narrow or focus their challenges on those documents.

Under the current Rule 26(b)(5), the parties have unconstrained latitude to negotiate specific issues in each case that may warrant approaching a privilege log differently. This latitude enables the parties to use their experience and expertise to craft a process that works for the case, enabling them to address issues without the need for judicial involvement, and limiting the scope of challenges when judicial involvement is necessary.

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before a drug company allegedly improperly lists her patent in the FDA's Orange Book; and/or documents sent to, or created by, scientists shortly before a drug company submits an allegedly anticompetitive petition to the FDA.

[3] *See* Advisory Committee Notes, 1993 Amendments ("The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.").

[4] In our experience, the parties work through the contents of the log, including, document type, Bates reference, for emails, to/from/cc/bcc, the privilege claimed, and, of course, a description of the document, its subject matter, and its contents sufficient to establish the privilege under Rule 26. There may also be negotiations over whether the party claiming the privilege must log entire families of documents and individual emails within email chains. We also agree on a process for parties to raise, discuss, and potentially challenge privilege assertions.

[5] We do not want to be misinterpreted as suggesting at the information provided in document-by-document logs is always sufficient. But categorical logs would provide even less information, leading to more spent resources by the parties, larger challenges to the privilege assertions, and thus countless more work for the judiciary.

Modern electronic document collection and the electronic databases used on both sides of the ledger already allow for most of the contents of document-by-document privilege logs to be populated with ease. Nowadays, privilege reviews in complex cases are virtually always done electronically. Documents are flagged as potentially privileged in the producing party's document review platform. With a few keystrokes, that software will generate a spreadsheet listing potentially privileged documents and associated metadata, which ordinarily includes the date(s) a document was created or modified, the title of document, the document type (e.g., email, pdf, or Word document), and, for emails, the sender, recipient(s), subject line, and attachments.

These fields, particularly the to/from, date, subject, and document title fields are critical to assessing the asserted privilege. We can concentrate on the individuals at the heart of the alleged wrongdoing. We can focus on the most relevant time period, too. Unsurprisingly, this is where we tend to find the most mistakes, oversights, and overly broad privilege designations.[6]

Technological tools such as technology assisted review ("TAR") help identify privileged documents, and automated privilege log entries from drop down menus can help to make the process more efficient and less burdensome on the producing party but can sometimes provide very little meaningful information to the party receiving the log. A fine balancing act must be struck between efficiency and functionality.

Problems arise, and judicial resources are wasted, when a party does not follow the rule – e.g., provides only categorical descriptions.

A comprehensive document-by-document log is more efficient to the parties and the court because it allows the parties to thoughtfully meet and confer regarding disputes. A deficient privilege log can have serious consequences, including protracted discovery dispute challenges, waiver of privilege and/or court imposed monetary sanctions. Privilege logging becomes a time-consuming expensive process *as a result of a producing party's overly broad interpretation and assertion of privilege*, not the current document-by-document privilege log model.

In our experience, the biggest time drags for judges occur when a party creates privilege logs by having reviewers pick from a pre-programmed drop-down menu of a few static choices (e.g., click the "privileged" button and then pick one: "email concerning litigation," "email concerning patents," "email concerning agreement."). In an antitrust case challenging a patent settlement agreement, this can result in *tens of thousands* of privilege log entries that simply say "concerning the agreement" and reflect that a lawyer was copied. Without the information about who created what document, when, to whom it was sent, and the subject matter of the specific communication (e.g., "about the value of the authorized generic clause"), the plaintiffs cannot focus the dispute on key documents. Plaintiffs wind up

[6] Many of these improperly withheld documents are shaken loose after simply identifying them to defense counsel. It is often the plaintiffs that bear the burden of having to commit significant resources to reviewing the defendants' logs to identify these errors.

having to identify thousands of inadequate entries, huge swaths of privilege log, because we lack the ability to identify the documents that may actually matter.

Judicial intervention on a larger scale may also be required when privilege logs report only the "categorical" description for the top (most recent in time) email in a chain, but do not reflect the information that is being redacted/withheld as privileged (which is in the third email down and involves a different subject matter). The plaintiffs can only identify this problem when *a redacted version of an email is produced*, so that one can compare the redaction to the privilege log description. In a categorical log, where documents are entirely withheld, we could never identify this inconsistency.

The kind of "categorical" privilege logs proposed would provide even less information. That will only exacerbate the "categorical" problems and either (1) waste judicial resources trying to resolve disputes about whether huge swaths of logs are actually privileged or (2) turn the universe of withheld documents into a black box, functionally gutting the notion that the opposing party is entitled to test the privilege assertion and providing defendants with ever incentive to hide unfavorable documents with near certainty that – if they break the rules – they will never be found out.

A topical or categorical privilege log permitting similar documents to be grouped together and summarized would make it more difficult to analyze privilege determinations and would undermine the utility of the log. Also, there are few guidelines for categorical privilege logs and as a result, federal districts have all adopted different standards, creating a lack of uniformity, inevitably leading to more judicial intervention and involvement to provide guidance. The current rule provides flexibility for parties to negotiate the parameters of the privilege log by devising protocols at the beginning of the discovery process to permit categorical or topical privilege logs if a document-by-document privilege log is deemed to be (1) unreasonable and (2) overly burdensome for the producing party.

Weakening the standards for privilege logs by adopting a categorical approach, even if it does not otherwise touch the latitude provided by the Rule, will create a race to the bottom, endangering the parties' ability to get agreement on anything more than the Rule requires and thus sending more and larger disputes to the court.

A stitch in time saves nine: a real-world example of how insufficient, category-driven logs created a more burdensome process for all parties and the court.

The recent *Restasis* antitrust litigation demonstrates that category-driven logs waste attorney and court resources.

In *In re Restasis Antitrust Litigation*, a large pharmaceutical defendant requested additional time at the outset of the case to be able to produce its fulsome privilege logs. It then produced multiple privilege logs with thousands of entries (corresponding to thousands of documents) that provided only "drop down" category-driven descriptions of the basis for its privilege claims. During a hearing on the plaintiffs' privilege log challenges, counsel for the defendant explained that the "standard review process for any large commercial case" relied on temporary attorneys to mark documents as responsive, to flag any potential privilege issues, and to select from a series of pre-populated descriptors. Then the documents would be

"escalated" to associates and partners at the firm. As described by defense counsel, "we do our best to make sure that the production, that we do a good quality control effort, but *we can't possibly look at every document.*"[7] Meaning, it seems, that in many instances the supervising attorneys did not set eyes on the allegedly privileged document (let alone confirm that the document was in fact privileged, that the drop-down option selected applied, and/or that a revision to the default drop-down description reflecting the actual basis for the privilege assertion was not necessary).

Defense counsel also explained that they rely on the plaintiffs' adversarial challenges to their privilege log descriptions to flush out documents that might not actually be privileged and should be produced: "It also may happen that documents are marked as privileged that shouldn't have been. That also happens, and we rely on the privilege protocol and *the challenges by plaintiffs to focus in on the documents* that are most important to their case…."[8]

It should not be the case that defendants rely on plaintiffs' challenges to fulfill their obligation to produce non-privileged documents. Nor should the onus be on the plaintiffs to challenge a categorical privilege claim just to get a supervising attorney to look at the withheld document and then – months after the log was produced – decide whether to produce the non-privileged document or to articulate, for the first time (and often after the close of fact discovery) the true basis for the privilege claim. This is precisely why Rule 26(b)(5) contemplates that privilege may be waived when the producing party fails to substantiate its claim in the first instance.[9]

Following that 2018 hearing, the parties continued five months of litigation over the privilege log and withheld documents. The parties eventually agreed to a system where potentially improperly withheld documents were identified using search terms (which were more specific than the general category descriptions used to create the log) and defense counsel re-reviewed 18,000 withheld documents, leading to the production of thousands of pages of previously withheld documents.[10] In total, the parties spent almost a year disputing the sufficiency of the privilege logs themselves and the propriety of withholdings. Far from ideal.

The court was also forced to intervene several times, by considering and resolving motions and holding hearings, even before it could even get to the point of making a determination as to whether a document was properly withheld. Judicial resources, and the resources of both parties, could have been saved if the defendants had provided sufficient logs at the start that would have permitted the plaintiffs to assess and potentially challenge disputed documents without the need to bother the Court.

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[7] Hr'g Tr., Dec. 19, 2018, at 24-25 *In Re: Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, No. 18-md-2819 (NG). We attach a copy of the full transcript as Exhibit A to this letter.

[8] *Id.*

[9] *See* Notes ("A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.").

[10] *See* Stipulation, *In Re: Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation*, No. 18-md-2819 (NG), ECF No. 254.

The problems of *Restasis* would be ten-fold if the Federal Rules confirmed that a producing party could rely on categorical descriptions and need not proceed on a document-by-document basis. The plaintiffs would have had no ability to identify and narrow their privilege challenges.

In conclusion, the current Federal Rule provides the parties with the flexibility to craft individual protocols to suit the needs of the case. In large document cases, all parties benefit from document-by-document privilege logs that provide sufficient information to assess the privilege. Changing to categorical logs would result in many additional attorney hours and judicial time spent on privilege matters instead of moving matters forward efficiently.

Sincerely,

/s/ Thomas M. Sobol
Thomas M. Sobol
Lauren G. Barnes
Kristen A. Johnson
Gregory T. Arnold
Jessica R. MacAuley
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PARTNERS

cc: Bradley J. Vettraino, ASSOCIATE
Andrea Furman, STAFF ATTORNEY
Jenny O'Brien, PARALEGAL
Princess Dyer, INTERN

Exhibit A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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IN RE:

RESTASIS (CYCLOSPORINE OPHTHALMIC EMULSION) ANTITRUST LITIGATION

18 MD 2819 (NG)

U.S. Courthouse
Brooklyn, New York

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December 19, 2018
10:00 a.m.

Transcript of Civil Cause for Status Conference and Oral Argument

Before: HONORABLE NINA GERSHON,
District Court Senior Judge

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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

(In open court.)

THE CLERK: All rise. Good morning. The United States District Court for the Eastern District of New York is now in session. The Honorable Nina Gershon is now presiding.

THE COURT: Good morning.

THE CLERK: Civil cause for a status conference in regards to Restasis, docket number 18 MDL 2819.

May I have the appearances for the direct purchasers, please.

MS. JOHNSON: Good morning, Your Honor. Kristen Johnson, Hagens Berman, for the direct purchasers class.

MR. SOBOL: Good morning, Your Honor. Tom Sobol for the direct purchasers.

MR. DEMUTH: Good morning, Your Honor. Bradley Demuth from Faruqi & Faruqi, for the direct purchasers.

THE CLERK: For the indirect purchasers.

MR. DRACHLER: Good morning, Your Honor. Dan Drachler --

THE COURT: I didn't hear what you said.

THE CLERK: I'm sorry. For the indirect purchasers.

THE COURT: Okay.

MR. DRACHLER: Good morning, Your Honor. Dan Drachler, Zwerling, Schachter & Zwerling, on behalf of the indirect purchaser plaintiffs.

MS. SHARP: Good morning, Your Honor. Dena Sharp for

the indirect plaintiffs as well.

MR. FASTIFF: Good morning, Your Honor. Eric Fastiff, also on behalf of the end-payor plaintiffs.

MR. McEWAN: Good morning, Your Honor. Ryan McEwan of the Joseph Saveri Law Firm, on behalf of the end-payor plaintiffs.

THE COURT: We have this whole row here. Can we finish out the row. Who are the other people in the row, next to Mr. Fastiff?

MS. RAVKIND: Lauren Ravkind, Your Honor, on behalf of Walgreen, Kroger, HEB, and Albertsons Companies.

THE COURT: Your name is?

MS. RAVKIND: Lauren Ravkind.

THE COURT: All right. Is this your first time here?

MS. RAVKIND: Yes, Your Honor.

MR. BLOOM: Eric Bloom, Your Honor, Hangley Aronchick, on behalf of CVS and Rite Aid.

THE COURT: All right. Now, the back row.

MR. McEWAN: Good morning, Your Honor. Ryan McEwan of the Joseph Saveri Law Firm, on behalf of the end-payor plaintiffs.

MS. SHAH: Good morning. Sona Shah, from Zwerling, Schachter & Zwerling, for the end-payor plaintiffs.

MR. WATTS: Good morning. Tom Watts from Girard Sharp, on behalf of the end-payors. Good morning, Your Honor.

MR. ROBERTS: Good morning, Your Honor. Mike Roberts on behalf of KPH Healthcare, a direct purchaser plaintiff.

THE CLERK: For the defendant?

MR. ROYALL: Good morning, Your Honor. Sean Royall from Gibson Dunn & Crutcher, on behalf of Defendant Allergan.

MR. STOCK: Eric Stock, also from Gibson Dunn.

MS. REZABEK: Rachael Rezabek, also from Gibson Dunn.

THE COURT: I'm sorry. I didn't get your last name. Speak up, please. I didn't get your last name.

MS. REZABEK: My apologies, Your Honor. Rachael Rezabek, also from Gibson Dunn.

THE COURT: Spell it, please.

MS. REZABEK: R-E-Z as in zebra-A-B as in boy-E-K.

THE COURT: Okay.

MR. PARROTT: Good morning, Your Honor. Matthew Parrott from Gibson Dunn.

THE CLERK: Thank you. For Mylan?

MR. FODEMAN: Good morning, Your Honor. Moe Fodeman from Wilson Sonsini, for Mylan Pharmaceuticals. Again, good morning, judge.

MS. HOANG: Good morning, Your Honor. Thu Vu Hoang with Wilson Sonsini, also for Mylan.

THE CLERK: For Akorn.

MR. DZWONCZYK: For Akorn, Your Honor, Mike Dzwonczyk, from the Sughrue Law Firm, for Akorn Pharmaceuticals.

THE CLERK: For Teva.

MR. LaROCK: Adam LaRock, L-A-R-O-C-K, from Sterne Kessler Goldstein & Fox.

THE COURT: For?

MR. LaROCK: For Teva.

MR. ROZENDAAL: Good morning, Your Honor. J.C. Rozendaal, also from Sterne Kessler, for Teva.

THE CLERK: Did I miss anyone? Thank you. Please be seated.

THE COURT: Okay. Did we miss anyone?

Are the lawyers present for the EPP individual cases?

MR. SCHIRRIPA: Yes, Your Honor. Frank Schirripa, from Hach Rose Schirripa & Cheverie, for International Union of Operating Engineers Local 501 Welfare Fund. Good morning, Your Honor.

MR. EDELSON: Good morning, Your Honor. Marc Edelson, Edelson & Associates, on behalf of the Philadelphia Federation of Teachers Health and Welfare Fund.

THE COURT: Counsel, after the proceedings, you are going to have to come up and talk to the court reporter and make your appearance and give your cards so she can get your names correctly.

MR. ALBERT: Good Morning, Your Honor. Lee Albert from Plumbers and Pipefitters Local 178 Health and Welfare Fund.

THE CLERK: Thank you.

THE COURT: All right. Counsel, we have a fairly significant agenda. So let me start as we did last time with the generic issue, so we can allow the nonparties to leave once that issue is resolved.

As you all know, I received a letter from Allergan stating that as of December 5, 2018 the generic manufacturers had not produced documents responsive to Allergan's subpoenas; that they had not even committed to producing those specific documents; and that they had instead sought to reopen negotiations over confidentiality, which was, of course, the subject of the generics motion to quash Allergan's and the plaintiff's subpoenas. In response, I directed the generics to respond; and they have said in their letters that they will be producing the requested documents, and they offered some justifications for their delay.

Before I express any opinions about this dispute, I need to hear whether there is currently a dispute and what the positions are.

MR. PARROTT: Yes, Your Honor. Since Your Honor ordered the generic manufacturers to respond to my letter and state their position, we have had some progress, and documents have started rolling in. I don't think there is currently a dispute as to Allergan's subpoenas at this time. Allergan is reviewing the documents that are being produced. There may be

issues we need to bring to Your Honor's attention, but until we review the documents and receive a complete set of them, we will not be able to determine that.

Then, of course, we will need to enter the deposition phase of the generic manufacturers, and we are continuing to talk to them about that.

THE COURT: All right. So is your position then that I don't need to do anything at this point?

MR. PARROTT: At this point, Your Honor, that's correct.

THE COURT: All right. And plaintiffs?

MR. DEMUTH: Good morning, Your Honor. Brad Demuth for plaintiffs.

We have also been discussing the subpoenas that the plaintiffs had issued to the generics, which were broader than the subpoenas that Allergan had issued. The generics have produced documents in response to our subpoenas. We have continued to negotiate the scope. There are more documents that they are committed to producing, and they are working cooperatively.

At this point we are in the process of digesting what they have been producing. We are still in dialogue about what still needs to be produced; and at some point, too, we are going to have conversations about scheduling the depositions.

All of that seems to be in order. We don't have any

disputes at this point to raise at this time.

MR. PARROTT: And, Your Honor, if I may just add one point. The reason we felt compelled to bring this to Your Honor's attention was primarily because at that point there was not much progress, and we were concerned about completing this in the operative schedule, which has fact discovery closing on February 8th. So that is still a consideration that we are working through with the generic manufacturers.

THE COURT: Anything else from the generics?

MR. FODEMAN: No, Your Honor. On behalf of Mylan, nothing on our behalf, unless Your Honor has specific inquiry. But I agree with counsel that we have been producing documents, and we will continue to endeavor to get them the materials they need should materials be provided and not be sufficient.

THE COURT: All right. Counsel, I'm always happy to hear that everything is okay and that you don't need me, but I do feel compelled to say a few words about what happened here.

My concern is that you are maybe moving along now only because I got a letter from Allergan and I issued an order saying you must respond. It seemed to me that once I issued the order denying the motion to quash, the documents would roll. There is no reason they weren't already prepared and ready to go.

The issue was about confidentiality. I don't see that there was any reason for any delay whatsoever. Frankly, I also

didn't see the need for the supplemental confidentiality order. I issued it as appropriate.

It seems to me -- and this goes to Allergan as well as to the generics -- it's implicit in our original stipulated confidentiality order that if you name lawyers who are going to be the in-house counsel who are going to see something, if you change your mind, you are going to give notice of it. That has to be.

Mr. Parrott's letter indicated that that's in fact what they were going to do. That in my view should have been enough. We have a stipulated confidentiality order, a supplemental one now, fine; and you will operate on that, but I would not like to see something of this type of delay happen again. Okay.

Let's move on to the things where you are asking me to make a ruling. One issue, which I just don't have the answer to, is the end payer plaintiffs' amended complaint. I have now had two letters, one from Mr. Saveri. Now I have one from Mr. Fastiff. I'm glad I have the three lawyers here. I still don't understand exactly what it is you folks are doing and why.

So if there is something that all of you understand -- oh, let me make the generics leave. Thank you very much.

MR. ROZENDAAL: Your Honor, this is J.C. Rozendaal. In light of Your Honor's last comments, I think it appropriate

to mention to the court that we received an additional subpoena Friday, which was served yesterday, asking for a different set of documents regarding the Canadian product. So that is something that we are certainly working on producing; but in case that ever comes up to Your Honor's attention again, I want to make it clear that that's something we are just starting right now.

THE COURT: Okay. Very good. Thank you.

MR. STOCK: The only thing, Your Honor, I would like to flag about that is that we think there is some doubt, given the lack of a final completion date for the generics' production, that we will be able to conduct depositions of these generics within the January to February 8th time frame.

THE COURT: You are not asking for a date. It seems to me, as I said, you have a subpoena you moved to quash. The motion to quash is denied; you produced. Period. End of story. Any date after that is late, in my opinion. That's how you should view it.

MR. STOCK: If the generics would like to give us a date that think they can produce everything by, then that could give us some comfort for right now, especially because they are right, we did serve a new subpoena on new issues that came to our attention as the case progressed.

We do think this will come in when we talk about scheduling later; that is, it is very unlikely that we will be

able to conduct depositions of these generics within the schedule, but we can continue to talk about that.

THE COURT: All right. If you write me a letter that you can't agree on a date and you give me dates, you are going to get a date that nobody is going to like. So sit down and try to work that out. We have other things to do today.

MR. FODEMAN: Thank you, Your Honor.

(Mr. Fodeman, Ms. Hoang, Mr. Dzwoncyck, Mr. Rozendaal, and Mr. LaRock exit.)

THE COURT: Yes, Mr. Fastiff.

MR. FASTIFF: Good morning, Your Honor. I hope I can answer your questions and we can put this issue to bed.

THE COURT: Okay. I would also like to know whether Allergan has anything to say about it. They haven't said a word, but after we hear from Mr. Fastiff, if Allergan wants to speak, of course I would like to hear from them. Go ahead.

MR. FASTIFF: So the three plaintiffs at issue here, although they are not named plaintiffs, they remain plaintiffs in the case. They are technically, I guess, absent class members at this point because they are not named plaintiffs in the consolidated amended complaint.

Adding them to the signature block of the consolidated amended complaint was a mistake, and we apologize. We think we can rectify this simply by filing a corrected first amended complaint and removing them.

THE COURT: What's the point of all this is what I want to know. What's going on?

MR. FASTIFF: It's just that we don't need to name every plaintiff who filed a complaint in the consolidated amended complaint. It's just unnecessary. It becomes duplicative in terms of the states of coverage and their necessity of having so many plaintiffs, having so many named plaintiffs.

THE COURT: Is it so they are not deposed?

MR. FASTIFF: Correct, and they don't have to produce documents, exactly. The other plaintiffs are sufficient, and Allergan has raised no question as to -- certainly at this point as to why those plaintiffs are not named; and, if they have any questions, we would be happy to answer them.

THE COURT: And does this have anything at all to do with what happens if these cases are not entirely resolved in this court?

MR. FASTIFF: Well, that's why their complaints are not dismissed and the docket is not closed. That's why I wrote -- I think all the complaints were technically, in -- I'm trying not to use legal words but here is the one I use -- abeyance. If you would like to administratively close all the individual dockets, we can do that.

THE COURT: I don't think that's necessary. I just want to know what's going on.

MR. FASTIFF: That's all it is, is that we didn't use every plaintiff in the consolidated complaint. We mistakenly included their names on the signature block, which I assume that's why Your Honor saw it.

THE COURT: Yes.

MR. FASTIFF: So we apologize for bringing this to your attention unnecessarily. We think we can just leave the complaint as it is.

If you would like us to file a corrected complaint and remove the signature blocks, we are all willing to do that as well.

THE COURT: And you also said, though, that you may be using the lawyers in those cases, who are essentially then, as far as the consolidated complaint is concerned, they are unnamed plaintiffs. You might use those lawyers to do some work in this case.

MR. FASTIFF: Correct.

THE COURT: Compensable work?

MR. FASTIFF: Correct.

THE COURT: You are not going to use other unnamed plaintiffs, whoever they might be, their lawyers, to do compensable work?

MR. FASTIFF: Off the top of my head, the answer to that would also be correct. If anyone is to do work in the case, they would, I assume, file a notice of appearance.

THE COURT: And it has to be under your direction?

MR. FASTIFF: Absolutely. The only compensable work is that assigned by interim co-lead counsel.

THE COURT: Allergan, did have you anything?

MR. STOCK: I do have two brief comments, Your Honor. First of all, as it relates to some confidential information, I don't know who is in the courtroom.

It is my understanding as well that when he raised the issue of attorneys receiving compensation and not being named on the docket that there are some attorneys that plaintiffs now claim were mistakenly left off the docket. I believe the DPPs. This relates to our dispute with FWK over the propriety of that entity.

I don't know if you are interested in that, but I just want to flag it.

THE COURT: I mean, I'm interested in everything, but I don't know what you are talking about. Can we focus just on these three?

MR. STOCK: Just focusing on these three, the only other thing we wanted to add is that the DPPs did add some state law claims into their amended complaint; and we are investigating a potential motion to dismiss, and I think there are better than even odds that we will be filing a motion to dismiss soon.

THE COURT: You have a stipulated briefing schedule

already?

MR. STOCK: I don't think we have a briefing schedule.

MR. FASTIFF: We do, Your Honor.

MS. SHARP: We do.

MR. STOCK: Okay. I stand corrected.

THE COURT: You have a briefing schedule, and I don't see any reason for us to have a premotion conference on it. Right? Do you agree with that?

MR. STOCK: Yes.

MR. FASTIFF: Yes.

THE COURT: So nothing about this other issue is of interest to Allergan; is that correct?

MR. STOCK: Obviously, we agree with Your Honor, that their complaint should be corrected so that it's correct.

THE COURT: These are the only three.

MR. FASTIFF: Yes, Your Honor.

THE COURT: So I believe I was asking you about the circumstance where everything wasn't resolved in this case, I should say in this court, and that the cases have to go back to transferor courts. So well, two of those three cases are here, right?

MR. FASTIFF: Right.

THE COURT: And what happens when I issue an order that applies to all the EPP cases? Basically I thought we would only have one EPP case, right, the consolidated amended

complaint. What happens to those three?

MR. FASTIFF: They are technically absent class members at this point. They have pending class cases on file, but their cases are stayed, I think, effectively; and I don't think they are subject really to any substantive orders. So they are not participating in the briefing, or any motions attacking the pleadings aren't directed at them.

I will give them an opportunity to respond. They are just suspended. They are just stayed.

And I think if those cases became operative as individual complaints, I think they would have to have a discussion with Allergan as to what decisions have been made that would be binding upon them. I think there is some give and take as to that, clearly.

MR. DRACHLER: Actually, Your Honor, I think they are bound by the decisions in this case until such time as there is a reason to, if any, to restore those cases to their original courts; but they are going to be, as any absent class member, they will be bound by decisions in this case.

MR. FASTIFF: I'm not going to disagree with Mr. Drachler.

THE COURT: Do you want to confer with your colleagues and decide what position you want to take before I hear from the lawyers sitting in the back there?

MR. FASTIFF: Sure.

THE COURT: Is there something unusual about this?

MR. FASTIFF: No, there is nothing unusual. This is very common. There are cases where there could be hundreds of clients -- or hundreds of complaints, individual complaints, putative class complaints; and the consolidated complaint may only have five named plaintiffs and the case simply proceeds.

THE COURT: Okay.

MR. FASTIFF: I mean, generally the case is going to resolve either at the motion to dismiss stage, the summary judgment stage, or post-trial; and, if it's summary judgment or post-trial, presumably the court will have certified a class and they would have had an opportunity to opt out. If they hadn't opted out, they would be bound, and that would simply resolve their cases.

THE COURT: All right. They are making it clear that they are not opting out. They want to be part of the class.

MR. FASTIFF: Correct. Exactly.

THE COURT: Okay. So anything else? How about from Mr. Schirripa, Mr. Edelson, or Mr. Albert?

MR. EDELSON: I don't have anything else to add, Your Honor.

THE COURT: Are you agreeing with the representations you have heard?

MR. EDELSON: Yes, Your Honor.

MR. ALBERT: Yes.

THE COURT: All right. Thank you very much.

MR. FASTIFF: So, Your Honor, would you like us to file a correction to the signature block?

THE COURT: Yes. So we will call this a corrected complaint, and it's only going to have that one change.

MR. FASTIFF: Right, and it won't change any of the deadlines we have already agreed to.

THE COURT: Yes. Okay. Thank you.

MR. FASTIFF: Thank you, Your Honor.

THE COURT: All right.

MS. JOHNSON: If I may, Your Honor, because Mr. Stock raised this earlier, the directs did discover that an attorney or two had been inadvertently omitted from the signature block on a consolidated direct purchaser complaint. Those lawyers filed pro hacs, and the court has now allowed those pro hacs and the notices are on the record.

THE COURT: Is there any issue about that?

MR. STOCK: There may be an issue, but we will raise it during class certification, Your Honor.

THE COURT: Okay. All right then. Should I be excusing Mr. Schirripa, Mr. Edelson, and Mr. Albert?

MR. SCHIRRIPA: If the court doesn't have anything further.

THE COURT: No. You are welcome to stay, if you want.

MR. SCHIRRIPA: I would love to, but I have to get

back to my office.

THE COURT: All right. Thank you.

MR. ALBERT: May I provide my card?

THE COURT: Excuse me?

MR. ALBERT: May I give my card?

THE COURT: Yes. Please give your cards to the court reporter, all three of you, so we can get these properly reported.

(Mr. Schirripa, Mr. Edelson, and Mr. Albert exit.)

THE COURT: Maybe I will take what I hope will be the easy thing first. Allergan's motion to compel production of the 1199 contracts, has that been resolved?

MR. STOCK: Your Honor, I believe it's been resolved. We are told that 1199 will be producing the contract with a minimal number of redactions. If they would give us a date certain or a date range, I think we could table that motion for today.

MR. DRACHLER: Well, we have been -- we had an agreement with Express Scripts. So we expect that we will be able to produce those contracts within a week, give or take a day or two for the holiday; and I don't think there is any reason for the motion to stay on the calendar. If there is going to be another issue, it's going to be something that's going to require different briefing.

MR. STOCK: I would defer to Your Honor on how to

handle it procedurally.

THE COURT: Well, if the motion is resolved and if there is anything else, we have the papers. We can go back to it. It's not a problem. Okay. Thank you.

MR. STOCK: Thank you, Your Honor.

THE COURT: All right. Then our principal dispute today is the plaintiffs' motion to compel Allergan to produce documents withheld as privileged. Ms. Sharp, is the ball in your court?

MS. SHARP: It is, Your Honor.

THE COURT: Okay.

MS. SHARP: Your Honor, would you prefer to have me at the bar?

THE COURT: Yes. Maybe that would be good, and who is it, Mr. Parrott or Mr. Stock?

MR. STOCK: Your Honor, I will stay at the bar.

For us, I'm going to argue the basic points of the motion; but, to the extent that Your Honor wants a factual description of these individual consulting relationships, Ms. Rezabek is going to handle Mr. Pollock, and Mr. Parrott is going to handle Mr. Hanford's factual situation. So I will start up, but one of them may be joining us.

THE COURT: Okay. That's fine.

Actually, the last document I received was a reply. So maybe I should first hear from Mr. Stock, if he wants to

reply to the reply.

MR. STOCK: Sure. I mean, I would like to defer to Your Honor in terms of how you would like to address this. We have some global points. I don't want to repeat what's in the briefs.

I think fundamentally our goal is to proceed in an efficient and practical manner. So, let's put aside the consulting issues for a second. In terms of the challenge to the citizen petitions and our request for the --

THE COURT: All right. Shall we do that first? That's fine.

MR. STOCK: Okay. The 502(d). Your Honor, we hope we could have worked this out without the court's intervention, but we haven't. We don't really know what the plaintiffs are asking us to do. They have demanded production.

THE COURT: I'm with you there. I'm not entirely sure what it is that the plaintiffs want me to do, and so --

MR. STOCK: If I could just briefly comment.

THE COURT: Sure.

MR. STOCK: We are willing to do quite a lot. As we told you in the briefs, we have spent thousands -- and that's not an exaggeration -- thousands of hours on the privilege logs and a lot of time on the citizen petition documents.

THE COURT: Let me ask you a question. You say "we." Who is we? What is your review process?

MR. STOCK: That's a very good question. This, I think, plaintiffs will agree -- let me know if you don't agree -- this is the standard review process for any large commercial case.

So what happens is you get hundreds of thousands of documents that you need to review. No law firm can handle that, certainly not in a cost-efficient way. So you bring in a group of temporary attorneys to do the first review of these documents and you give them instructions. But a lot of it is reliance on these temporary attorneys' understandings of the laws and the rules.

So the temporary attorneys will go through the documents. In some cases, Your Honor, and in some cases we cite in our papers, the defendants just -- or the parties in question just produce the documents after the contract attorneys review it, and they agree to deal with privilege later. We see a lot of documents like that.

In other cases, there might be a computer review process.

THE COURT: Wait a minute. You are talking about other cases?

MR. STOCK: Yeah. I'm just talking in a general sense.

THE COURT: Tell me what you did.

MR. STOCK: What we did was when documents were marked

as responsive --

THE COURT: By who?

MR. STOCK: By the contract attorneys, they would --

THE COURT: So the contract attorneys, the first review, they identify what was responsive.

MR. STOCK: And they also put in a recommendation for privilege.

THE COURT: Okay. Then what happens?

MR. STOCK: Then it gets -- those documents get escalated to the Gibson Dunn attorneys, and we look at as many as we can. And, you know, we do our best to make sure that the production, that we do a good quality control effort, but we can't possibly look at every document.

And the way -- what we expect to happen is that there will be mistakes and there will be inadvertent production of privileged documents; and this is now codified in the federal rules, that where that happens we send a letter to claw back the document for the document to be returned, and that's routine now.

It also may happen that documents are marked as privileged that shouldn't have been. That also happens, and we rely on the privilege protocol and the challenges by plaintiffs to focus in on the documents that are most important to their case, and then we rereview those documents and say, you know -- and, frankly, Your Honor, in part in reaction to what you said

on the bench, Your Honor, our attitude has been where the plaintiffs have challenged a document we want to do our best to give the plaintiffs the document.

So in the vast majority of cases where plaintiffs have challenged a document from our privilege log, we have tried to interpret the document in a way that it would not be privileged and we can release it, and we try to release it.

THE COURT: Who actually reviews the documents that Gibson Dunn then decided to turn over?

MR. STOCK: The documents that they brought to our attention?

THE COURT: Yes.

MR. STOCK: The Gibson Dunn lawyers are looking at those.

THE COURT: Who?

MR. STOCK: Usually junior to mid-level associates, and some documents get escalated to the senior.

THE COURT: None of the folks who are seated?

MR. STOCK: Yeah, Mr. Parrott and Ms. Rezabek looked at a good number of the documents.

THE COURT: Okay.

MR. STOCK: Your Honor, I think -- part of our request is that, as we mention in our brief, Magistrate Judge Peck has kind of led the field in this area along with the Seventh Circuit, there is an increasing trend toward moving more

efficiently by -- let's say, there is, you know --

THE COURT: Let's leave this aside for a moment. We will get back to the 502(d).

The question I have is are the parties saying we agree completely on what the law is as to what should be produced, but it just turns out that it ends up that Allergan doesn't produce the same documents that the plaintiffs think you should produce under this same legal standard.

Now, how many documents are there at issue in this category, approximately?

MS. SHARP: Are you asking me, Your Honor?

THE COURT: Yes, or whoever wants to respond.

MS. SHARP: I will respond to that first. The short answer is we don't know, and part of the reason we don't know is because, from our point of view, many of the privilege log entries are deficient, deficient under the Chevron case, deficient under Rule 26(b)(5)(B), which requires us to be able to assess the privilege claim.

What we have seen in the logs -- and I would take issue a little bit with the way Mr. Stock characterized the process, because I think the position Allergan has taken is that, hey, plaintiffs, you guys point to problem areas in the log and then we will go look at those documents one by one. We understand that's their position.

We don't think that's the way the process works,

because looking at the log holistically, we have seen literally thousands of documents that have entries that say things like legal advice about regulatory issues. Is that a citizen petition document or not? I, frankly, don't know.

So the short answer to your question is how many citizen petitions --

THE COURT: You asked for citizen petition documents, so.

MS. SHARP: Right, and we have identified a relatively small sampling of documents that we are quite certain are citizen petition related because they say rendering legal advice about citizen petition, without any more detail than that. So we know there are at least hundreds, thousands. I would expect there to be thousands in this case, because this case is about citizen petitions.

THE COURT: Well, what are you asking me to do?

MS. SHARP: A fair question. I think, from my perspective, there are two things we want to do, because Your Honor, I think I would take a slightly different tack on where the parties are with regard to the relevant legal standard.

THE COURT: Okay.

MS. SHARP: We read the cases one way. I think Allergan might read them a bit differently.

THE COURT: Nobody addressed that in the briefs, so I can't make a ruling.

MS. SHARP: Yes.

THE COURT: I'm happy to make a ruling.

MS. SHARP: To be fair, I think we would like to ask Your Honor to make a ruling; and we have come up with what we think are some relatively straightforward guidelines on what the cases say about what's in and what's out as to privilege.

THE COURT: But that's not in the briefs?

MS. SHARP: That's correct, it's not in the briefs.

So what we would suggest, given the high rate of return that we have gotten on the documents we have identified -- I mean, we have identified a lot more than eight but eight are at issue here, and, out of those, seven are documents that Allergan released and said you are right, they are not privileged. So what we would like to do is in relatively short order we would like to meet and confer with Allergan about the standards that apply and, if we have a disagreement about those standards and how they apply to the documents in the case, we would like to brief that in very short order with Your Honor.

THE COURT: Would that involve my looking at some of these documents?

MS. SHARP: I think that, frankly, depends a little bit on the guidance that the court provides us today and the way that meet and confer goes.

If we were to ask Your Honor to look at documents,

what I would suggest -- and this is subject to the input of my colleagues -- would be a very small set, for starters. Now, of course, the problem for us is we are, you know, we are operating with a blind hand. We don't know what is behind most of those privilege log entries.

Some of them that have been released or some that have inconsistent redactions that we have flagged for Allergan, would suggest very strongly to us that things are being withheld that relate not to legal advice but things like the science behind the citizen petitions and other relatively, to us, clear issues that are facts and information that underlie the draft guidance and the comments that Allergan provided in the citizen petitions but don't have the protection of privilege because they, of course, don't, you know, they don't bear the lawyerly advice or the request for lawyer advice that would qualify them as privileged. So I think that what would make sense, because Your Honor is correct, given the relatively compressed nature of the briefing here, we were learning in realtime what Allergan's positions were; and, to be fair, they were learning a bit about our positions too.

So, to me, what would make a lot of sense would be for us to have a very short fuse on have a meet and confer for the parties to either agree or disagree on what the legal standards are and for us to take a cut at least at some corpus of documents.

And we would like to talk a bit about process, because Mr. Stock has raised it. Clearly, the parties have a different view about how these things should go down. What I would say is there is a clear set of documents that is already in issue that we have raised going back to October, and we could start with those and then start building concentric circles around those to start determining exactly how we want these citizen petition issues to get resolved.

THE COURT: Are you asking that Gibson Dunn make a further review of the documents?

MR. SOBOL: May I address the court, Your Honor?

THE COURT: Yes.

MR. SOBOL: May I do so from here? I have more support here for me.

THE COURT: Okay.

MR. SOBOL: So, yes, we do want Gibson Dunn to review a set of documents, but the question, of course, is we are not asking the absurd, which would be go back and review all 27,000.

THE COURT: No, but 27,000 is the total on the block.

MS. SHARP: Yes.

MR. SOBOL: Correct.

THE COURT: So how many of them fall within the categories that were identified in Ms. Sharp's brief; documents concerning the citizen petitions -- yes, so that was the

categories.

MR. SOBOL: So it's in the range of 120 to 150 documents. So let me explain what it is that, at least from my perspective, we would be asking. I'm going to take a couple of steps back.

It seems fairly clear that in these circumstances there may be a marked difference of opinion of the parties about the appropriate criteria to employ when identifying privilege under these unique circumstances of a citizen petition.

THE COURT: What's unique about it?

MR. SOBOL: Because in this situation when a citizen petition is filed under the statute and under the regulations, the filer must sign a certification indicating that the filer has submitted not only all information that they want to submit but all information that cuts in favor or against the things that they are asking. So by the act of filing a petition, a party exposed them to the fact that there may be things that are behind closed doors that they should have submitted along with that petition. That's somewhat different.

Judge Orrick, in the Lidoderm case, when addressing these specific issues about what should be privileged and what should be not privileged, issued a decision that in many respects is favorable to defendants and in some respects is favorable to the plaintiffs in this case. He sort of did a

middle-of-the-road approach.

What I hear the defendants saying here today is that, on the one hand, they gave their reviewers, quote, instructions -- right? We don't know what those instructions were -- but, on the other hand, what we hear is that their contractors, quote, use their own individual understanding of the law, whatever that might be.

Now, it seems to me --

THE COURT: Depends what school they went to.

MR. SOBOL: Right.

MS. SHARP: Among other things.

THE COURT: Among other things.

MR. SOBOL: And what circumstances.

THE COURT: And what circumstances.

MR. SOBOL: In fairness, frankly, that can happen. So I'm not casting any aspersions. I'm just saying what I think is the honest problem here.

So it seems to -- at first, I do agree completely with Ms. Sharp. The parties should meet and confer and then send some letter briefs within some reasonable time, here is what we think the rules of the road are, here is what the other side thinks the rules of the road are. If there is an exemplar or two of a document that someone wants to show that articulates the principle, then that would be the way to roll with that piece of it.

Then the question would be, okay, plaintiffs, are you really going to say that they should have to review all 27,000, or is there some subset that you can define or they can define that makes it a narrower group.

THE COURT: But 27,000 is all the documents on the privilege log. So there is a certain body of them that relates to citizen petitions.

MR. SOBOL: Yes.

THE COURT: So how many of that?

MR. SOBOL: So Ms. Johnson has actually done the effort of looking through their privilege log and trying to figure out where would we want to force them. So go ahead.

MS. JOHNSON: So just to describe our process, Your Honor, which I think is a helpful contrast, we have a lawyer on our citizen petition team, a junior partner in another law firm involved in this case, to do an initial cut at identifying entries that we thought, based on the minimal description provided, likely related to citizen petition or the bio-equivalence guidance, as those two issues do sit hand in hand. Of that, I believe, he identified about 20,000 entries. Maybe it's 30,000 entries in total.

THE COURT: I thought there was only 27,000 entries in total.

MS. JOHNSON: I'm sorry. 2,000. I'm sorry. I apologize.

THE COURT: Well, this is good. This is good.

MR. STOCK: We have already narrowed the dispute.

THE COURT: We have already narrowed the dispute to ten percent.

MS. SHARP: We are making huge progress.

MS. JOHNSON: My apologies. Between 2,000 and 3,000 entries were identified. We then looked at those with different time periods, so which of those entries pertain to the second period of time when the second citizen petition was pending, the third citizen petition was pending, and afterwards. We did not, for these purposes, focus on the time period of the first petition. That was frankly because there were a lot of documents for me to look at.

I then went through personally and looked at every entry of that subset that fell from the second citizen petition through the end, where there was a redacted document and the entry did not immediately appear to clearly be communications between lawyers and only lawyers, that seemed to be about legal advice. I opened it, I looked at the redacted entry, and I made notes as to whether or not I thought this was something we would challenge in these particular citizen petition categories, something we would challenge in other citizen petition categories, or something that I thought was fine.

From that, we isolated, for today's purposes, it's about 120 documents that we thought fit into category one or

category two, which were the two discrete citizen petition issues we were raising today.

So that's not to say, Your Honor, not because I'm trying to overreach but because I want to be clear about what that subset is. That's not to say there aren't other citizen petition entries about which I had questions or thought we might challenge on another basis, but this was an effort to identify the ones that were either nonlawyers communicating with lawyers in parts or seemed to be about information that would underlie the citizen petition.

THE COURT: Okay. So is the suggestion that you go back and review just those 120 documents at this point?

MS. JOHNSON: So the 120 would only relate to these citizen petition entries pulled here.

Ms. Sharp, do you want to explain the other 30?

MS. SHARP: Sure. So there is another set of documents that we identified in an October letter that we sent to Gibson Dunn that identifies a small handful -- not hundreds; dozens maybe -- of documents that predate these, that relate to the time period when the draft guidance was issued and Allergan was experiencing the aftermath and deciding what to do.

THE COURT: Okay. So 120 plus 30. We have 150. Is that what you are talking about, Mr. Stock? What do you think?

MR. STOCK: I think if they are looking for documents relating to citizen petitions, it's dramatically more than

that; but, if they are focused on 150 they think are important to their case, that's fine with us.

MS. SHARP: I would like to be clear, though. Again, we don't know what's important to our case and what isn't. We are taking our best shot in the dark.

THE COURT: What happens after, if there is a review? You are saying standards will be determined, either by agreeing to them or by me, and then the parties will use those standards to review -- or Allergan will use those standards to review the documents if those standards turn out to be different from what they already used.

MS. SHARP: Exactly. So we would come to either an agreement or an order on what those standards are; Allergan would abide by those, whether by agreement or order; and then Allergan would rereview all documents that are citizen petition or guidance related, and pronounce itself once and for all as to those documents, so that we have something concrete to challenge, if we must, later on.

THE COURT: We are leaving aside the 502 issue and will get back to. But apart from whether we get to 502, what is your position?

MR. STOCK: I'm not sure I understand. What's this process with the 150 documents that you guys were proposing?

THE COURT: That, as I understand it, the parties will meet and confer and try to lay out what are the legal

standards. It's a paragraph, I guess.

MS. SHARP: Actually, a chart like this.

THE COURT: A chart?

MS. SHARP: Yes.

THE COURT: For the legal standards? I don't want -- I want to focus on what you are saying.

MS. SHARP: Yeah.

MR. STOCK: This may be a better process. I'm open to their process.

What we would like to do is have a 502(d) order so that we can release documents without worrying about waiving privileging for other documents.

THE COURT: Okay. Leaving aside --

MR. STOCK: It's hard to leave that aside because that was our proposed process.

THE COURT: You are quite right. Let's go to 502. We will do the 502 and come back.

MR. STOCK: So, Your Honor, just to use this as an example, if they give us a list of 150 and they say they are not going to waive privilege, we might give them a hundred of the 150. So we can be looking at the same documents and having this conversation. Right? Like I said, we are happy to release most of the documents that they want.

We have, you know, this case is a perfect illustration about how waiver of the privilege could result in unknown

effects. The patent case, all the documents for the patent case were produced in this action.

We don't know what happens if we waive the privilege in this case, if we produce a document that seems innocuous to us, and then there is some other subsequent case where all the documents from this case are produced and someone claims we waived the privilege over all documents that went to our outside citizen petition lawyer, King & Spalding.

THE COURT: Then you come to me and say, we are not producing these documents unless you order us to, judge.

MR. STOCK: Well, what I'm saying is --

THE COURT: If I order you to produce them, then you haven't waived, right?

MR. STOCK: I think that's probably right, but if you issue the 502(d) --

THE COURT: I'm here to serve.

MR. STOCK: I'm sorry?

THE COURT: I'm here to serve.

MR. STOCK: If you issue the 502(d), we can review and release documents so much faster because we are not worried about the collateral consequences.

THE COURT: All right. Let's talk about 502. So here is the problem that I see. Okay. I understand that the parties did not agree on the 502(d) order in the beginning of the case.

It seems to me that the 502(d) order, Judge Peck's typed order, is something that issues in the beginning of a case, if the parties agree and/or if the court orders it, because otherwise, like right now, as I understand it, you can look at your documents and you can say these were the documents, we are never turning these over, these are absolutely privileged, we hang onto them, and then you produce everything else, because they support you, they don't injure you, your position.

What kind of an order is that for a judge to issue?

MR. STOCK: Well, Your Honor --

THE COURT: It's too late to do that kind of an order. It's got to be unfair. I don't see any way it can work fairly.

MR. STOCK: I'm not sure why --

THE COURT: Unless I'm missing something about what you are proposing.

MR. STOCK: I do think that it is fair. What if there are 150 documents in dispute and we can release 100 of them with a 502(d) order? Then we can focus on the 50 that matter. I mean, isn't that --

THE COURT: What are you saying? So with those 50 what do we do?

MR. STOCK: They may --

THE COURT: You don't produce everything, but --

MR. STOCK: We may need in camera review of those.

That's how it works in these other cases. That's why it's so efficient, because you reduce the number. When we go through these 150, if there is -- I'm not quite confident that there will be any useful guidance that comes out of that, because the trick here is not coming up with the rules. The trick is applying the rules to the documents. That's what's really difficult.

I have had calls an hour long with me and seven associates where we spend an hour on ten documents. Not because we are not sure what the law is, but because it's really hard to figure out. Was that in-house attorney acting as a lawyer or were they acting as a businessperson? Or, did this come from a request from King & Spalding or did it not? Maybe I need to call the person and ask if this came from a request.

So a lot of the time and difficulty with this review process is not figuring out the rules. It's applying them. If we know that if we release this document that it's not going to result in a waiver, then I won't bother calling up the employee and I will say let's just give them this because who cares.

THE COURT: You have Mr. Royall there.

MR. STOCK: Yeah.

(lawyers confer.)

MR. STOCK: So that's an important point. What Mr. Royall is saying is what Judge Peck's order does is it

doesn't rely on documents you produced. You produce documents to the 502(d), you don't waive the privilege. You are not allowed to rely on those yet.

So what it does, the reason it's so efficient, is that it postpones the privilege question until either party wants to rely on it. Then, when a party wants to rely on the document --

THE COURT: No, it doesn't, because that's my point. If some documents you are going to withhold no matter what, you are not going to produce. This is not -- I have issued, I believe, orders like this. Not the 502(d) but similar-type issues on confidentiality. The parties -- and correct me if it's not really parallel -- but trademarks, whatever, some kind of proprietary information, not privileged, and we allow the parties to just share everything because there is no issue about privilege; and then, later on, if someone wants to use it and there is a dispute about its usability, then I will make the decision. Okay.

But it strikes me that that is not this. Here, you want to say some documents are in fact totally privileged, we are not sharing them with you because we don't want you to see them, whether you use them or not. They are privileged. We know these documents are really privileged. Then there is this whole other body of documents that goes out.

Your point is, well, at least we have narrowed the

body of documents at issue?

MR. STOCK: Exactly. And I can tell you I have reviewed dozens of documents personally that are of no importance to the case, that I have spent dozens, maybe a hundred hours, trying to figure out if it's privileged or not, just because our client, for good reasons, doesn't want to waive the privilege. So what is the point of that?

What is the point of us spending hours calling up in-house lawyers, saying when you sent this communication was it at the request of King & Spalding? Was it for the purpose of legal advice? What is the point of having all that attorney time and all that delay when, if we have the 502(d), we will just hand it over and, if you are right and they are interested in other documents, at least we have dramatically narrowed the set from 150 to 50.

THE COURT: Don't the federal rules take care of that without the 502(d) order?

MR. STOCK: I think the federal rules contemplate exactly this, and that's where the law is heading; but, no, they don't take care of that problem without a 502(d) order.

THE COURT: And what documents are you saying this would apply to, things you have already produced or production in the future?

MR. STOCK: Whatever Your Honor would like. We could have it going forward as part of this review. If the

plaintiffs ask us to review documents, that if we decide to release them, that that doesn't waive the privilege, then we can release. We can, first of all, be a lot quicker and move through our review twice as fast, minimum, because we don't need to, you know, obsess over whether a document might be on the margins of privilege or not. We can just release it.

THE COURT: What you are concerned about is a subject matter waiver on that?

MR. STOCK: That's right. We are worried we give a document, and let's say King & Spalding is cc'd on the document. Let's say they are not a to, they are not a from. I would normally look at that and say, you know what, since King & Spalding is a cc, maybe this is not actually about a legal issue, maybe they are just cc'd for information. But we worry that we hand over the document to them and that either they or another plaintiff's lawyer in the future who gets a hold of the document will say, guess what, you gave over a document with King & Spalding on it, you have now waived all of your -- you have waived the privilege with respect to all of your communications with King & Spalding about the citizen petition.

It is not a farfetched scenario, Your Honor. This could happen; and our client is right to, you know, to tell us that we need to be extremely careful about releasing any document that could be privileged; but, with the 502(d), we

could move many times faster and avoid those ancillary documents.

MS. SHARP: If I may, Your Honor.

THE COURT: Yes.

MS. SHARP: The exact situation that Mr. Stock described is addressed in Federal Rule of Evidence 502(a). It says, 502(a)(3) says that where there is disclosed and undisclosed matter on the same subject, the question is the only time the subject matter -- not the only time, but the circumstance in which subject matter waiver will usually occur is when the undisclosed and the disclosed documents ought, in fairness, to be produced.

THE COURT: I get it. We have been through it.

MS. SHARP: So to me it's not like subject matter waiver happens with the snap of a finger. As Your Honor said -- and we appreciate Your Honor's availability to deal with these issues -- if we think a subject matter waiver would be an appropriate thing for the plaintiffs to move for, for some reason, that would, of course, be subject to adversarial process and the court's ruling. So we don't think that's an adequate reason to enter the order.

As Your Honor pointed out, 502(d) orders are routinely entered when they are entered at the beginning of the litigation; and when Rule 16 and 26 were amended -- I think in 2015 -- they explicitly incorporated Rule 502 and said, hey, as

part of your 26(f) conference talk about 502 issues. We did that. We came to ground on 502(b). We don't see any circumstance here that changed.

The third point, that is probably the most important, is that if Allergan got its way and got this 502(d) order now, I don't know how we would resolve any privilege issues in this case ever, and the privilege issues are going to --

THE COURT: Why is that?

MS. SHARP: These privilege issues would get kicked down the road further. We wouldn't know. So if Allergan produces, in Mr. Stock's example, produces 100 out of 150 challenged documents, of those hundred we could start building our case, we could start building a brief or a deposition around those documents, and only find out in the deposition that they now take the position that that is privileged, after having taken a look at it. We are not talking about the first look here that 502(d) contemplates.

We are talking about the second look here, when we have challenged it and they still take the position, eh, it's a wobbler so we are going to produce it, and we only get to find out on the fly at a deposition or after we have filed a briefing with the court that that document is then clawed back. That just doesn't seem workable from our perspective.

MR. STOCK: Respectfully, I would disagree. First of all, that problem, it already exists under 502(b); but they may

have documents in the production that were inadvertently produced, and they take the risk that that document will be clawed back. So that's a problem that the federal rules already contemplates.

And it's worth the tradeoff, because what it does, the number of documents used in an antitrust case has got to be less than one percent of the documents produced or looked at. Maybe it's one-tenth of one percent. So that's a great tradeoff to have, to allow documents to be efficiently produced and then only escalate disputes when they happen.

In this particular example, if you were building your case around a document that we produced and, you know, it later is teed up as a privilege issue, then it will go before the court; and the number of issues that go before the court would be much fewer than would go before the court in the absence of a 502(d), and you would get the documents that much quicker and you would get to see them during the dispute with the court, instead of it being an in camera kind of situation. So I think it's dramatically more efficient to have this 502(d).

To address Your Honor's point about whether it needs to be at the beginning of the case, in the beginning of the case we did not have all of the attorney custodians that have since entered into the case. That is what kind of broke, you know, the straw that broke the camel's back, in terms of the massive number of privileged documents. We did not -- we did

ask for a 502(d) during the meet and confer, and they declined; and that wasn't worth escalating to Your Honor at that time, before we knew we were going to have all these attorney custodians.

Now that we have all these attorney custodians and we have a deadline coming up, there is a premium on efficiency and getting these documents out of our hands and into their hands, and the 502(d) will dramatically speed that up; and there is no prejudice to the plaintiffs, of getting copies of documents that, so that we don't have to spend dozens of hours looking at them when we are fully prepared to release them. It just magnifies the number of disputes and slows down the document production process.

MR. SOBOL: Your Honor, may I be heard when it's appropriate?

THE COURT: Yes. I would like someone to address whether or not my comments before, whether they are not pertinent or correct with respect to the difference between the defendants holding back certain documents as definitively privileged and letting other body of documents go out.

MR. SOBOL: That's the point I wanted to make.

THE COURT: Okay.

MR. SOBOL: First, let me make clear, if what the defendants are proposing is they are going to produce to us all of their documents unredacted, I have no objection to a 502(d)

order.

MR. STOCK: Obviously, we are not proposing that.

THE COURT: Right. Okay.

MR. SOBOL: Now that we have established that, now we know exactly what's going on, because now it's called cherrypicking. Right? They are going to produce to us documents that they may or may not use in the future -- which I will turn to in a moment -- and withhold other things, right, and, therefore, we are put in the situation where they are cherrypicking. Right.

Also, the problem they are suggesting here is that now we don't know -- this problem, about the scope of what it is that they have decided to cherrypick, gets kicked down until we get their trial exhibit list, because that's when we find out the documents they are going to use at trial.

THE COURT: No. The ones they would be withholding as privileged and not producing under 502(d), you could challenge.

MR. STOCK: Exactly.

THE COURT: Right? You don't have to wait until the trial.

MR. SOBOL: Right now I'm just talking about the bucket of those they have cherrypicked and decided to give to us now, we don't find out whether or not they are going to use them or not until we get their trial exhibit list, like in December for our January trial. Right? So that's -- talk

about kicking a can down the road. What are we supposed to do with it then?

THE COURT: Ms. Sharp suggests we might find out at the deposition.

MR. STOCK: I think that's exactly right.

MS. SHARP: Perhaps.

MR. STOCK: That's what happens in these other cases where these 502(d) orders are issued, is that once they are used at a deposition, then it either gets resolved or teed up to the court.

MS. SHARP: But we are talking about documents that the defendants want to use.

MR. SOBOL: That's if they decide to use it at the deposition.

MS. SHARP: Yes, that's right.

MR. SOBOL: If I do my cross-examination and I sit there and say, okay, I'm going to bring this guy to trial, so I'm not going to use my documents now, no. When I'm going to learn about whether or not they are going to use something that they cherrypicked will be in fact when I get their trial exhibit list.

THE COURT: Let me just answer to this. So you are saying under 502(d) if you want to use it at a deposition, if the opponent wants to use it -- in this case, the plaintiffs wants to use it at a deposition -- you could use it.

MR. SOBOL: Sure.

THE COURT: And you wouldn't know --

MR. SOBOL: What else they have.

THE COURT: -- if the defendant is going to be asserting privilege about it until later? Is that your understanding?

MR. STOCK: No, not at all. That's exactly how it works under Judge Peck's order, is that once they introduce a document that they like, that they want to use at a deposition --

THE COURT: That they want to use?

MR. STOCK: Right.

THE COURT: It doesn't matter who wants to use it? If anybody wants to use it, then there is a ruling if there is a dispute?

MR. STOCK: That's right. Sure.

MR. SOBOL: So understand what the hypothetical is here. So they cherrypick the documents that they know don't hurt them. They give them to us. So which of those documents am I going to use at a deposition? Probably not many. Right?

But they may want to, and I won't know about that until the trial exhibit list. That's the way this rolls.

Now, in terms of --

THE COURT: Now, they want to, but they -- how does that hurt you?

MR. SOBOL: If they want to use one of their cherrypicked documents that they have produced to us, that they think don't hurt them or help them -- those are the ones they are going to give us, right -- we find out that they plan to use that when they put it on their trial exhibit list, right?

THE COURT: Yes?

MR. SOBOL: And then at that point -- in December, or whenever we get their trial exhibit list -- that then tees up the question, when we say, well, wait a second, now that we know you are going to use that, we need to challenge whether or not you have produced everything within the scope of that document because now is the time, according to the way that they would have this roll out, that now that they are getting to use the document, we identified they are using the document, that's when we figure out the scope of what it is that they did not give to us. That's when we are trying to figure that out, because this is not one of the situations you are trying to avoid cherrypicking. Instead --

MR. STOCK: Your Honor --

MR. SOBOL: Wait. The way this normally happens is they produce their documents during discovery and when we get the documents in discovery that's when we are challenging the scope of the waiver, during discovery, so that this is not something that happens three weeks before trial. That's the fundamental difference of what's going on here.

THE COURT: Okay. What about the common use of the 502(d) order, 502(d). You don't normally use that at all, or you are opposed to it?

MR. SOBOL: I have never used it because the kind of cases that I have, it's a situation where it creates precisely this problem; and I used to do a lot of other civil litigation, right, where it would actually make an awful lot of sense at the very beginning of the case for people to say this is what we are going to do, because there is not an awful lot to be concerned about cherrypicking. It's also, people have identified the volume of what's going to be produced.

So here, there is no -- there are no ground rules right now, at the beginning of the litigation, where they are saying the scope of what they have to produce. They are making internal decisions and just making decisions one way or the other regarding what they are going to produce to us; and they are doing their job, by being zealous and making sure they exercise rights to not produce that which they believe might be harmful to their client. I understand that. That's part of the adversarial process.

But that's why you don't use a 502(d) in this situation. If in the beginning of the case we said they agree, they are going to produce everything about the citizen petition, period, and having agreed to do that, then there is a 502(d). Oh, okay. But that's not what they are suggesting.

MR. STOCK: I completely, respectfully disagree, Your Honor.

First of all, the vast majority of these documents at issue are not important, and that is the main reason we want the 502(d), because it is a waste of everybody's time for us to spend dozens, maybe hundreds of hours going over unimportant documents because we don't want to waive the privilege. Number one.

Number two, if what Mr. Sobol is afraid of happens and we produce a document that's very favorable to us, then he could use it at a deposition. Hey, this is a great document for Allergan, let me put it in front of the executive responsible for Restasis, let me see about this document. When was this document created? Were lawyers involved? What other documents were created about it?

That's why this makes so much sense, because we can ignore the hundred documents that don't matter, focus on the one that matters, ask about it at deposition; and then we can have a discussion about it, when he has already looked at it, instead of having hundreds of in camera discussions with the court as to whether this document is privileged or not.

MR. SOBOL: Well, understand, Your Honor, anybody who is skilled at deposition isn't going to be creating a record for the opponent to use at trial.

MR. STOCK: You need to prepare your cross. If you

see a bad document for you, you need to ask the witness about it before he is on the stand.

MR. SOBOL: No, put him in the box. Put him in the box.

MR. STOCK: You can send us a letter about documents that you would like us to make a privilege call, and we will do that.

MS. SHARP: And thus identify our work product? That is not how the process works.

MR. STOCK: You're afraid of us giving you documents. I don't understand. They don't want us to give them documents.

MR. SOBOL: So the other issue, Your Honor, that Ms. Johnson correctly points out is that under the current process that the parties agreed to at beginning of the case, if there is a clawback request, the clawback request is narrowly tailored to the circumstances where it was inadvertently produced.

Under the 502(d) order that was proposed in these circumstances, there is no limitation to the clawback. That's also another problem.

Now, I wanted to take this back, because what we were trying to figure out was what the most efficient process is. If we go back to the process we were trying to identify before, where we articulate what the ground rules are and then there is at least a first wave of a rereview, to see whether or not what

has been done so far is 90 percent accurate or seven-tenths inaccurate -- which so far it is, right -- then we will know where we are, and that's what I suggest we do.

MR. STOCK: What I'm saying, Your Honor, is that I'm happy to work with them on guidelines; but, number one, I don't think that's the way that these issues are teased out efficiently, to talk about guidelines in a way that's divorced from the actual documents. They are not going to get to see these documents and we are going to talk about guidelines? It doesn't real make a lot of sense to me, number one.

And then, number two, as I said, the real difficulty here is applying the guidelines to the documents. That's what takes dozens, if not hundreds of hours. We can agree that documents that are predominantly for a business purpose are not privileged. Guess what? That is really not helpful because that is going to take thousands of hours, to figure out if it was predominantly for a privileged purpose.

So our solution, where you have the 502(d), they challenge specific documents, we give them as many as we can, they can ask for in camera inspection of the rest, that's how courts have resolved these questions. Almost all these cases cited by both parties involve in camera inspections by courts. No one tries to decide these issues, you know, in a vacuum without getting a sense of, well, let's see if that document really looks like it was intended for a legal purpose.

And the way to avoid the court being overwhelmed with those in camera requests is to have the 502(d). Let the parties worry about these documents, the vast majority that don't matter; and then dramatically narrow the dispute for the court. That's what's going to be efficient.

THE COURT: Counsel, let's take ten-minute recess. Okay.

(Recess.)

(In open court.)

THE CLERK: All rise. Thank you. Please be seated.

THE COURT: All right. Let me just take a couple more minutes on this issue, and then we need to do the other issue and a few other things.

So let me ask whether the parties would agree to a 502(d) order that was limited to the citizen petitions and draft guidance area. That group of documents are the ones, not all the documents in the case, but that group. That would mean producing, though everything, not holding anything back at all, but only in that category.

Is that something Allergan would consider?

MR. STOCK: No, Your Honor. We would like the 502(d) order so that we can release --

THE COURT: Only those ones that you want to release. All right. Never mind. So that didn't work.

MR. STOCK: Nice try.

MR. SOBOL: Never mind.

THE COURT: I said to my clerk this will not work. So. All right. I tried.

What I'm struggling with right now, because I don't really want to delay this, is whether or not there is any possibility of a meet and confer working here to narrow down the issues, either for me or if we need to send this out to someone else to look at all the documents.

MR. SOBOL: If I may, Your Honor?

THE COURT: Without my deciding whether or not a 502 order should be imposed.

MR. SOBOL: In my view, if the 502(d) is taken off the table and the parties are left where they were, which is their pretrial order and 502(a), then, as we have suggested, there probably is a need for a meet and confer on the standards, letter briefs. There is probably also some help in terms of the meet and confer on the scope of the document review that would occur, whether it's the 140 and what the consequence is after that. So I think that's what we suggest.

THE COURT: Okay.

MR. SOBOL: Fair enough?

MS. SHARP: Fair.

THE COURT: Okay.

MR. STOCK: Your Honor, I think our side conferred, and we don't think this discussion over the standards is a

fruitful avenue because it's divorced from the actual documents.

THE COURT: Well, what you have been saying about that was quite impressive to me, and I am concerned about that. I think I'm understanding what you are saying, and, if in fact the lawyers have a standard, I could say the standard now wouldn't take long to say it, but the issue is how it would apply in a particular case; and what I'm concerned from what Mr. Stock said is that for any single document you may need information beyond the face of the document to know whether it's privileged. This does happen. So if that's the case, what have we accomplished, anything? So this is what I'm concerned about.

MR. SOBOL: I think in the vast majority of situations document review and privilege are decided by the four corners of the document itself. It's fairly rare. There are probably are times where you need to go beyond it.

THE COURT: Yes.

MR. SOBOL: Rather than talking about -- and this was suggested by one of my co-counsel -- the kinds of examples we have seen already are the kinds of situations we would think clearly the documents should have been produced and where the seven of the eight end up being produced immediately, as in the example, are discussions about the science or whether or not particular arguments should or shouldn't be made in the citizen

petitions. That's not the rendition of legal advice, certainly not in this situation.

That's certainly the kind of thing what we thought a dialogue between the parties and an agreement or not with you about what the standards are that helps educate people.

THE COURT: The other thing that just occurred to me is that if you have this body of documents that was produced after a rereview, those documents would become exemplars of what should be produced.

MR. SOBOL: Exactly.

THE COURT: So there is no reason not to look at 150 documents to see whether or not they fall within the category of the documents that have been produced.

MR. SOBOL: Right.

THE COURT: Would you agree with that, Mr. Stock?

MR. STOCK: I think that's exactly the right procedure. They have identified 150 documents, let us look at them, and we will produce what we don't think is privileged.

THE COURT: Okay. Let me do this. Are you finished?

MR. SOBOL: I guess what I would say is we would like them to be doing that on the basis of a set of criteria that the parties either agree or that the court has ordered, because if we are doing that in the abstract right now, then we don't know what is behind their decisions, which is a distinction of what the appropriate principles are. That's the concern that

we have.

THE COURT: Okay. All right. Counsel, let's try this.

Without making a definite, final ruling on the applicability or whether I should issue a 502(d) order, let me just say I'm very skeptical about it. So let's proceed on that basis and ask you to do this meet and confer, as the plaintiffs have suggested, and go over at least these 150 documents that have been identified.

I'm a little unclear about these concentric circles of other categories of documents and how that will all play out, but maybe you can try to identify that for Allergan as well, so that we know what the world of dispute is really here because I want to know whether, as Mr. Sobol called it, whether we need to privatize some document review here. Okay. So I will leave that to you, and I will leave that to you for the briefing.

Let me switch to something I was going to say at the end of this conference because we were talking about briefing. We had a small dispute about discovery motions that led to Allergan asking for more time and because Allergan indicated that it thought I had not authorized full briefing for the discovery motion.

So here is what I wanted to say about that. The most important thing, of course, is that the parties agree in advance on whatever format it is that they choose to brief

something from the discovery.

I would like to read to you from the minute entry from the -- I don't know if anybody ever looks at these -- the minute entries from the November 5, 2018 conference. I said, the parties are to fully brief, parens, by letter or motion, close parens, disputes that require the court's attention by December 6. So my idea was that you would decide that and you decide it in advance.

So, in the future, if the parties believe it would be helpful, they are welcome to fully brief the discovery issues. I don't think we need such long page limits. So we will say the moving brief and opposition brief should be limited to 15 pages and a reply limited to five. I think the moving party should always file a reply. In other situations, like the 1199 issue that we had, I think, clearly letters are sufficient.

Frankly, I think that the issue that you want to tee up now is not a letter motion. It doesn't have to be 15 pages, but I do want to have the cases double spaced, et cetera. Okay. So my own instinct on this issue is since you really didn't brief the heart of these issues yet, I think it would be helpful to me if I have more information. Then again, on the timing, if you do this all in advance we won't have the problem of having to extend time for the briefing. Okay.

So with respect to the final issue, which we did brief very extensively, which has to do with the two consultants, let

me just say I feel more comfortable that I understand the issues that you have on that; and so, why don't I leave it to you to present what ever else.

I think we started then with Mr. Stock, and if I have questions I will ask.

MR. STOCK: Should I do it from here, Your Honor?

THE COURT: It's up to you.

MR. STOCK: I think I will because my colleagues may be jumping in.

THE COURT: Okay.

MR. STOCK: So this is the issue of the consultants, Your Honor.

THE COURT: Yes.

MR. STOCK: So like the issue we just discussed, I think the key issue here, again, is application of the law rather than identification of the law.

THE COURT: I don't think that's right.

MR. STOCK: You don't think so? Okay.

THE COURT: No. Well, because, at least with respect to functional equivalents, it's not at all clear to me that the Second Circuit is going to buy that, but so I think we have to start with that.

MR. STOCK: Okay.

THE COURT: But if they do, then you will have to show that -- then it's the application, I agree with you.

MR. STOCK: Okay. So let me address that then.

THE COURT: Okay.

MR. STOCK: I think in order to find for plaintiffs on this, you would need to find for them on -- you would have to draw at least three conclusions. First, on the functional equivalent, you would have to say I'm not going to follow the Flonase decision, I'm not going to follow the FTC versus GlaxoSmithKline.

THE COURT: I can follow Ackert, which is a nice Second Circuit case that, I think, supports the plaintiffs. I mean there are other cases. The cases are pretty disparate, aren't they?

MR. STOCK: I believe that Glaxo -- the FTC versus GlaxoSmithKline and the Flonase cases are the most factually similar to this situation.

THE COURT: So you are agreeing that the grand jury subpoena case by Judge Kaplan is not similar because it's criminal?

MR. STOCK: No, I do believe that's similar, but it's not a functional equivalents case.

So in the functional equivalents area, the two cases that are most factually similar are the Flonase case, which is really on all fours with our situation, and FTC versus Glaxo case, which is a D.C. Circuit decision, both of which are incredibly similar. They both involve cross-functional teams

at a pharmaceutical company, where members of the pharmaceutical company had to involve outside consultants to be part of the cross-functional team in order to achieve a legal objective; and the court in Flonase and the D.C. Circuit in Glaxo both found that it was not necessary to apply a rigid interpretation of the functional equivalence doctrine, that these were clearly cross-functional teams, these consultants played an important role in that functional team, and it was very -- seemed quite easy for those courts to decide that consultants like the ones that are at issue in our case are functionally equivalent to employees that that should be protected.

THE COURT: So how do you distinguish from the functional equivalent of an employee and every consultant in the world who might be hired by a client? Where is the line?

MR. STOCK: I think the one place you can look to for the line is was this group providing -- were they part of an integrated team to achieve a legal objective. That's what was true in Flonase, and that's what's true here.

In some of the other cases, the consultant may have been kind of on their own, doing their own review, like an auditor or like a financial consultant in one of the cases. I think that that is -- you need to look at whether the consultant is really functioning as part of the legal team or whether they are functioning as part of a cross-functional

legal team, or are they functioning as an outsider with their own independent interests. So I think that's what makes the difference in these cases.

The pharmaceutical industry is such a strong candidate for protecting the privilege here. If you looked at some of the documents, which we are offering to provide you with in camera, you will see that King & Spalding is e-mailing these individuals like they are just part of the team.

THE COURT: They certainly are. It was quite surprising to me, to tell you the truth.

MR. STOCK: Well, it shouldn't be, because in Flonase it was the same. It's clear --

THE COURT: You think King & Spalding rely on one district court decision to risk waiver of the privilege?

MR. STOCK: I think it's ordinary procedure that when there is a particular expertise that you need, like in this case, if we have a particular expertise that we need we bring in a consultant, and they are part of the team. I think that's ordinary procedure, where you are working on a legal project, like a citizen petition.

So I do think it's pretty ordinary, and it doesn't surprise me that the King & Spalding lawyers would be in regular contact with these consultants and --

THE COURT: No, that's not the point. The point is not whether they are in regular contact. The point is whether

or not their contact creates a privilege.

MR. STOCK: So I would say --

THE COURT: I mean lawyers talk to witnesses. They don't have privilege about every witness that they talk to.

MR. STOCK: So, respectfully, actually I would think I would slightly disagree with that.

It's not a question of whether the privilege was created. I think that is undisputed, that the privilege was created. The question is whether it was waived when the information was shared.

THE COURT: Fair, and corrected. Thank you.

MR. STOCK: If you look at these documents, you will see they are privileged documents, putting aside the question of waiver. Legal advice is being shared. Why is it being shared? Because these consultants played a crucial role in helping to shape the legal advice. So King & Spalding needs to understand --

THE COURT: So what does that mean, to shape the legal advice? Of course a lawyer gives legal advice based upon all kinds of investigation. He talks to witness, he talks to all kinds of people; but he doesn't share or she doesn't share with the people she is talking to the advice that she has given or will give to her client.

She takes the information in. What she says to her client, on the other hand, is privileged. What the client says

to her is privileged. Where is it not a waiver to discuss all that with an utter stranger to the case?

MR. STOCK: Well, so I think there is some blending of the issues.

THE COURT: I see it as a stranger. Saying part of an integrated team? These are not full-time employees of Allergan. They are just consultants, like every other consultant. I have struggled with this, as you can see.

MR. STOCK: Your Honor, I'm not really sure there is a difference.

THE COURT: Between what?

MR. STOCK: In the real world between Allergan, which has multiple campuses all over the country, to a New Jersey team saying let's get one of our California Orange County employees helping out with a citizen petition process, you know, ten hours a week. Versus let's get, you know, Mr. Hanford involved ten hours a week helping out on this cross-functional citizen petition.

THE COURT: One reason is privilege and waiver. I mean, that's a big reason.

MR. STOCK: The court in Flonase didn't think so. Neither did the D.C. Circuit in GlaxoSmithKline.

THE COURT: Let's not belabor this. Okay. Anything else?

MR. STOCK: Well, yeah. That's one of the questions

that needs to be resolved, the functional equivalents question.

There is Southern District case law on this too. The Copper antitrust case is also of the same mind. There is also a separate doctrine, where you don't even need to reach the issue of functional equivalents, which is was a lawyer reaching out for information critical to providing legal advice.

And this is, you know, the Second Circuit in Kovel, this is the Grand Jury case that you mentioned before from Judge Kaplan. And here, it's a similar goal, I think.

The goal is really the language and the thought from Upjohn about, well, you can't -- this is a very complex world we live in right now. You can't give effective legal advice unless you have access to all sorts of technical information, and to deny --

THE COURT: That has to do with the employees at Upjohn, right? That has to do with protecting privilege when we are dealing with not just, the old term, the control group but also the lower-level employees. Upjohn doesn't have anything to do with nonemployees, does it?

MR. STOCK: It was expanded -- the idea was expanded in Kovel, and then it was expanded in Grand Jury.

THE COURT: Well, Kovel we are talking about the interpreter and the accountant?

MR. STOCK: That's right.

THE COURT: Where else in the Second Circuit? Where

else?

MR. STOCK: In Re Grand Jury.

THE COURT: In the district court.

MR. STOCK: That's right.

THE COURT: And that has not been expanded, and our other courts in this circuit have said, well, Judge Kaplan was concerned about criminal cases, and he says about ten times in his decision, in this criminal case where the government has so much power, we are going to expand the privilege.

MR. STOCK: So I would respectfully disagree with that. First of all, I think, Judge Swain also issued a similar decision in the Copper antitrust case.

THE COURT: Okay.

MR. STOCK: And, first of all, I would say it's not a coincidence that every single antitrust case, that I could tell from the briefing, it came out our way. It came out with an understanding that in the modern world, you know, this is the reality of the modern world.

So in Copper and in Grand Jury, if I can address your Grand Jury point, I think what the court in the Grand Jury, with Judge Kaplan in the Grand Jury opinion was focused on, it was not in a criminal case. That was not what he was focused on. He was focused on it was a case of public importance, and that's why it was important to have the media team, you know, providing input to the attorneys, so the attorneys understood

the media implications of their legal decisions; and he protected that.

And this is also a case of public importance. This is not a private contract dispute between, you know, two parties. So, actually, I think, this case, the Restasis case, is very similar to the kinds of considerations that Judge Kaplan had in mind in In Re Grand Jury. It's also a case where, well, if you are going to make a legal decision about the citizen petition you ought better know what the FDA thinks about that and you better know how the FDA regulations --

THE COURT: No, I don't believe there is anything in the plaintiffs' papers that suggests that Allergan and/or its lawyers should find out about that. The issue is whether or not the communications remain privileged.

(Continued on the next page.)

(In open court.)

MR. STOCK: But in Grand Jury, Judge Kaplan found that those interactions between the attorneys and the PR firm that were necessary to inform the lawyers' legal advice were protected. And the same goes here where our end needed to consult with these particular consultants with specialized expertise about the FDA, about Capitol Hill, and you could take those considerations into mind, just like the attorneys in the Grand Jury case needed to keep in mind the PR issues when coming up with legal advice. And so if this case really falls squarely within Grand Jury, if you take the importance of the Grand Jury context in -- in Grand Jury to be a case of public importance, I don't see any distinction, any material distinction between the reasoning that Judge Kaplan used and the reasoning that we're using to justify protecting the relationship between the attorneys and the individuals who are supplying them with essential information to get their legal advice.

Yes, he may be sharing a draft legal document that is indisputably privileged to obtain input from these specialized consultants --

THE COURT: But let me ask one factual question that needs to be firmed up.

So the plaintiffs have described Mr. -- is it Live-a-ly [phonetic] or Lively?

MR. STOCK: Yes.

THE COURT: How do you pronounce it?

MR. STOCK: Lively.

THE COURT: Lively. Mr. Lively is a lawyer. You say he isn't a lawyer. Is he a lawyer?

MR. STOCK: Well, that was a mistake by them. Mr. Lively is an employee of Allergan.

THE COURT: All right.

MR. STOCK: And he is not a lawyer. He's a public affairs individual.

THE COURT: All right.

MR. STOCK: But he retained Mr. Hanford, who has expertise that Mr. Parrott can give you in more detail, but if there's -- if that helps Your Honor's analysis.

THE COURT: Well, let me just ask you: Do you think it matters whether or not these consultants were hired by outside counsel, inside counsel, or someone else in an attempt to comply?

MR. PARROTT: I think it -- it does matter. It's relevant. It's relevant consideration, Your Honor.

THE COURT: Okay.

MR. PARROTT: And that's what the cases say.

And I want to just emphasize that these consultants, Mr. Hanford and Mr. Pollock, they are not strangers to our -- these are not like third parties that have no affiliation with

Allergan that somebody just picked up the phone and called. That does happen in some of the cases, but that's not what happened here. These were consultants who were retained by Allergan and they have a confidentiality obligation to Allergan. That's one of the key touchstones in Kovel, Grand Jury, all the cases, frankly. What matters is, Are they within the confidential sphere of discussion involving the lawyers?

So to your question, Your Honor, I just want to emphasize that because it's relevant to the question --

THE COURT: But does it matter if they were hired by outside counsel, inside counsel --

MR. PARROTT: Yes.

THE COURT: -- or someone else at Allergan? And you said "yes," but you haven't told me, is there a range; is there a binding detail or --

MR. PARROTT: So let me just give you the facts. Okay?

THE COURT: Okay --

MR. PARROTT: So --

THE COURT: -- no. I want your -- first, I want to know your opinion about what the legal standard is.

MR. PARROTT: Yes, I think it does matter.

THE COURT: Okay.

MR. PARROTT: It does matter.

THE COURT: Okay. How does it matter, as between, for example, being hired by an outside counsel or being hired by inside counsel or being hired by an employee; which is most favorable to your position?

MR. PARROTT: Well, you go to the root. You need to go to the root of the communication. Why is this particular communication being made? In Mr. Pollock's situation, he was brought in specifically at the point in time when Allergan was responding to the FDA's first draft guideline. The FDA did something that was -- that Allergan thought highly unusual and it brought in this expert who was a former FDA director who had extreme expertise and experience with these regulatory issues and the science. He was perfect for this. And they didn't -- Allergan didn't have somebody in-house who could do this.

So the lawyers -- you look at the retention --

THE COURT: Well, who hired him?

MR. PARROTT: So you look at the retention agreement --

THE COURT: Right.

MR. PARROTT: -- with Mr. Pollock. Mr. Burrows, who was an associate vice president -- or associate general counsel, I believe his title was, he signed that retention agreement. So he -- you can say Mr. Burrows hired him, if that's how you want to look at it. But it was a collective team decision. It wasn't Mr. Burrows picking up the phone and

saying, You know, let's bring this guy in. It was -- King Spaulding was consulted. The scientists were consulted. They said, We need expertise here to make sure we're doing this right; to make sure we're making the right arguments to the FDA and not, you know, going off the reservation. So that's why they brought him in. They made him sign the retention agreement, and that had a strict confidentiality obligation within it. So when there were communications -- at that point when there were communications between the lawyers and Mr. Pollock that had legal advice in them or that asked him for information so that the lawyers could evaluate the legal positions Allergan was going to take, those are the communications that are privileged.

We are not -- I want to be very clear, we are not taking the position that every communication with Mr. Pollock was privileged. We cited examples in our brief where we produced many documents where Mr. Pollock is just simply providing information, and feel free to stand up, because I want the others on our team to talk about this. But this is -- this is -- this is not a blanket privilege assertion we are making. All we're talking about here is the mere involvement of Mr. Pollock or Mr. Hanford waived the privilege.

As for Mr. Hanford --

THE COURT: So what are the documents that you're saying that are not being withheld that have Pollock on them?

MR. PARROTT: Do you want to --

MS. REZABEK: Certainly, Your Honor.

So those documents we provided for the Court in, I believe Exhibit 8 through 11 --

THE COURT: Okay.

MS. REZABEK: -- should be the McKenney declaration.

THE COURT: Yes, okay.

MS. REZABEK: And there are two that specifically concern Mr. Pollock, and the first one --

THE COURT: Well, how would you characterize this document as you are saying he did not have to withhold on privilege grounds.

MS. REZABEK: So in the first document, it's simply Mr. Pollock --

THE COURT: Oh, well, let me ask you this: Are you saying that they just were not privileged to begin with, it's nothing about waiver?

MS. REZABEK: That's correct, Your Honor.

THE COURT: Okay. All right. Thank you.

All right.

MS. REZABEK: So the first document concerns an FDA meeting that Mr. Pollock attended and found to be interesting and relevant to Allergan, and so he brought that meeting to, I believe, Mr. Burrows's attention and just said that he wanted to talk about it and let him know how it went because that was

a meeting that was not common for the FDA to hold publicly. So that was --

THE COURT: So was there -- he discusses the meeting with Burrows, with the lawyer?

MS. REZABEK: That's correct, Your Honor.

THE COURT: In the email?

MS. REZABEK: He says he wants to talk about it. He doesn't -- he basically gives --

THE COURT: Well, I mean, did you withhold as privileged whatever he said about the contents of the meeting?

MS. REZABEK: It seems from the email that they -- they had a phone discussion about it, and they --

THE COURT: Are you saying that is privileged or not?

MS. REZABEK: I think it would probably depend -- that that conversation, it would probably depend on the circumstances and how that related to the other works that Mr. Pollock did for Allergan with respect to responding to the FDA draft item. But certainly the fact that Mr. Pollock attended a public meeting that was held by the FDA and found it interesting, I think we would agree that that of itself and that -- on the face of the document would not be privileged.

The second document, if Your Honor would just give me one second, is Mr. Pollock providing to, I believe again it's Mr. Burrows, an FDA presentation on biopharm -- I don't want to butcher what the topic of the presentation was, but if

Your Honor will give me just one moment?

(Pause in proceedings.)

MS. REZABEK: The presentation that was held by the FDA on biopharmaceutics of drug delivery systems. And that's something that circulated to several of the attorneys and a couple of Allergan employees, and then eventually sent from Mr. Burrows, Allergan's in-house counsel, to Mr. Pollock, and that's another example of a document that we produced that involves Mr. Pollock.

THE COURT: I will give some time if Ms. Sharp wants to respond, but let me just finish up here with Allergan on this point, because I do not want to...

Well, go ahead. Anything else?

MS. REZABEK: No.

THE COURT: Okay.

MS. REZABEK: Those are the --

THE COURT: All right.

MS. REZABEK: I would say those are the two.

THE COURT: All right.

So now, Mr. Parrott, you said that King & Spaulding was consulted before hiring Mr. Pollock. Ms. Markus of King & Spaulding did not say that. She simply said I understood -- I understand that Allergan's in-house legal team retained certain consultants with specialized expertise, including Mr. Pollock and Hanford.

Is this a new fact you want to add to the mix?

MR. PARROTT: I'm not certain whether -- I'm not certain who made the recommendation, who was the first person to say Mr. Pollock, Robert Pollock would be perfect for this. That's not in the record, and if I suggested that, I misspoke. I apologize for that.

THE COURT: Okay.

MR. PARROTT: But what matters here is that Allergan's in-house team ultimately is the one that made the representation. But the engagement, the engagement of Mr. Pollock, and that does matter because it shows that the lawyers needed this particular help, his assistance in specialized information.

As for Mr. Hanford, a little bit of a different situation. The company went through an acquisition, as Your Honor may know, around 2015, by Actavis. Several of the Actavis management folks came over to Allergan, including Mr. Bailey, general counsel; Mr. Lively, who you asked about who was the director -- the VP, director of government affairs. They had worked with Mr. Hanford at the time it was Actavis, and when the corporate reorganization at Allergan occurred, they said, Let's make sure -- Let's continue to work with him and they worked with him for a number of purposes.

One point that the plaintiffs make in their reply brief for the first time, which we haven't had a chance to

respond to, is that Allergan has a large government affairs team. That's just not accurate. They have our org charts. They know the size of the government affairs team. It's Mr. Lively and three individuals. That is a small government affairs team. Allergan does not have a lot of lobbyists --

THE COURT: Does it matter?

MR. PARROTT: Well, it does matter because --

THE COURT: Why?

MR. PARROTT: Because -- because in this particular instance, they said, Let's involve Mr. Hanford in the Restasis situation. This is an extremely complex regulatory situation where you had the FDA doing things that Allergan thought was highly unusual. You had Congress, which was also involved looking at what the FDA was doing and oftentimes critical of the FDA. You had Executive Branch issues, and so Allergan needed somebody with -- able to see the forest through the trees, so to speak, and who was in Congress, knew the personalities, knew what was going to happen if Allergan took particular positions. And so the lawyers said, Let's involve Mr. Hanford in the Restasis situation. He was already on retainer. Introduces the consulting agreement. That also had the strict confidentiality provision. That's extremely important here. He was not a stranger to Allergan. He worked continuously with Allergan, and they relied on his expertise.

Again, with Mr. Hanford, we have produced the

communications between Mr. Lively and others with Mr. Hanford that are not privileged -- that did not originate from the lawyers. That's an important distinction here, because what matters -- and if you look at Grand Jury, the In Re: Grand Jury case on this, what matters is what is the origin of the communication?

It is somewhat arbitrary. Judge Kaplan admitted that. Yes, to an outside observer, it's hard to draw this line. But what matters is, Did the lawyer reach out for specialized information? The plaintiff has put at issue two documents where Mr. Bailey, the general counsel, and other lawyers in-house, including Mr. Poche, who is a head of the intellectual property group at Allergan on the in-house side, were emailing about particular privileged issues. I don't think there's any dispute that the original emails were privileged. But then they involved Mr. Lively, who is the VP of government affairs, and he forwarded those emails in these two particular instances to Mr. Hanford. In one it's just to Mr. Hanford, and in another it's to Mr. Hanford and one of Mr. Pollock's colleagues. The reason -- Mr. Lively claims in his declaration, the reason he did that was because he was relying on Mr. Hanford as, essentially, part of his team that was involved in responding to these Restasis issues which had a lot of government affairs and regulatory considerations that they wanted Mr. Hanford's advice on.

THE COURT: All right. Let me use -- let's do an example: There's an email dated July 30, 2015 from Mr. Hanford to Mr. Moxie and Ms. Condino. It's described as an email providing information in order to obtain legal advice of counsel regarding interactions with government officials.

Is Mr. Hanford seeking legal advice from Allergan's counsel or is Mr. Hanford providing information so that Allergan's attorneys can provide effective legal advice?

MR. PARROTT: Your Honor, are you reading from the privileged log that's at issue in this case?

THE COURT: Yes.

MR. PARROTT: If you could just tell me the --

THE COURT: I think it's Page -- okay. Page 9 of the log, I believe.

MR. PARROTT: And this is Exhibit 7, I believe, of the McKenney declaration.

THE COURT: I understand. I've lost it --

MS. SHARP: Yes, it is.

THE COURT: Page -- yes.

MS. SHARP: Exhibit 7.

THE COURT: Exhibit 7.

MS. SHARP: Yes, Page 9.

THE COURT: Thank you.

MR. PARROTT: And what's the entry on that? Well --

THE COURT: 7/30/15, an email providing -- the

description is an email providing information, presumably from Mr. Hanford, in order to obtain legal advice of counsel regarding interactions with government officials.

MR. PARROTT: Right. I don't --

THE COURT: What's going on? I don't understand it.

MR. PARROTT: Well, so here's what we would need to do: I don't have that particular document in front of me today.

THE COURT: Oh, okay.

MR. PARROTT: But what we would need to do is to look at that document, read the four corners of it, and if it's not clear what's going on, we would need to do further investigation outside of the four corners of the document.

So, for example, that could be the reason -- I'm speculating here -- but that could be an email where Mr. Hanford said, Pursuant to the phone call we had earlier or pursuant to the call we had yesterday or a meeting or whatever, here's some information that you asked for. Or, you know, he could unilaterally be bringing information to the lawyers' attention precisely because he knows what they're working on and what legal issues they're drafting.

THE COURT: So is the point that he's acting as functional equivalent or -- what is he in that role?

MR. PARROTT: Yeah. We -- our position is in that role, he is functionally equivalent to an Allergan employee

because he's filling a specialized role that Allergan needed, that the lawyers needed, and that other Allergan employees otherwise couldn't afford.

MR. STOCK: But he also could be providing information under the Grand Jury and under the In Re Copper standard, information essential for the provision of legal advice. Because if this related, for example, to a citizen petition and the authors of the citizen petition, those drafting the legal strategy needed to know something about -- about, you know, the topic reference, then that would be protected under -- in the Copper Antitrust case and in the Grand Jury case. So I think there would be -- both rationals would apply.

THE COURT: Okay.

All right. Anything else, Mr. Stock, or anyone else on Allergan's side --

MR. PARROTT: No.

THE COURT: -- before I hear from the plaintiffs?

MR. STOCK: The only thing I want to add, Your Honor, is it really -- I don't think we should have the notion that it's really just the Grand Jury case by Judge Kaplan that supports this reading of the law. It is the Copper Antitrust case. There's a case, Crane in the District of Massachusetts. There's, again, the two pharmaceutical cases that are by far the most closely related to ours, Flonase and GlaxoSmithKline.

I mean, I really do think that there's a groundswell, and I would think it fair to say it's the majority opinion that this is kind of how you should look at privilege in a multifunctional team and complex regulatory environment. So I think there's -- there's quite a lot of cases. We could talk about more of them, but I think you have --

THE COURT: Okay. I got it. Thank you.

Ms. Sharp?

MS. SHARP: Thank you, Your Honor.

Not surprisingly, we don't agree with the groundswell on the issues. The Court -- I think the first question the Court asked is, Where is the line as the consultants? And as we explained in our brief, we think that Magistrate Judge Francis's decision in Export & Import Bank supplies that line as it pertains to the functional equivalent doctrine. And so without belaboring that, you know, there are three factors there and the holistic question under the functional equivalent doctrine is does this person -- you know, does he walk like a duck and talk like a duck? Does he walk like an employee and talk like an employee? Is he standing in for an employee?

And the reason that the Copper Antitrust case is not a good analog here, and similarly Grand Jury isn't either for similar reasons. Copper Antitrust involved a Japanese company that was confronted with a trading scandal. They were in

full --

THE COURT: Who was the judge on that?

MS. SHARP: Judge Swain.

THE COURT: Okay. I have the cases in my mind more by who the judge is than maybe by the name of the party.

MS. SHARP: Sure, it's Swain, S-W-A-I-N.

THE COURT: Okay. Thanks. Yes, I know Judge Swain very well. She was a bankruptcy judge in our district. We were very -- okay.

MS. SHARP: Well, now she gets to preside over antitrust cases and trading scandals.

And in that circumstance what was happening is there was a Japanese company that was confronted with the hellfire associated with the trading scandal and all kinds of inquiries and investigations. And what they said there was, We are completely out of our depth. We have no idea how to manage this crisis. We are bringing in a consulting firm who is going to fix this for us. That's different from our perspective than bringing in garden-variety consultants who are providing some input, relativity sporadic, not necessarily on any sort of routine basis.

And just to go through the functional equivalent factors quickly, with regard to Mr. Pollock, no primary responsibility. He appeared to be a fellow who weighed in on things and provided some input. That's fine. But that doesn't

look like an employee from our perspective. He helped with Allergan's response to the draft guidance, perhaps. What we have seen in the documents so far is that he was weighing in on issues like science. So again, we would challenge the underlying premise that there's necessarily privileged information being passed to or from him because he's mostly a science guy, from what we can tell.

But he didn't coordinate that draft guidance, the response to draft guidance. Ms. Standerwick at Allergan did. He didn't sign the comments to the draft guidance. Mr. Spivey did. And other folks at Allergan had leadership roles.

The Steinfeld case, and I can't remember the judge on that one, Your Honor, I apologize, pointed out that the consultant there continued to use his own email, continued to use his signature block that says, you know, I'm with such and such consulting firm. That's true as to Mr. Pollock, too.

With regard to the declarations that Allergan submitted, what they basically say in essence, Mr. Burrows's declaration says that Mr. Pollock both evaluated legal developments and provided information --

THE COURT: Slow down a little bit.

MS. SHARP: My apologies.

What the declaration says is that Mr.Pollock evaluated legal developments and provided information and advice. That's providing input. That's not making decisions.

That's not being an employee.

As to the duration of the relationship, very short term. From what we can tell from the privilege log, almost all of these communications in question are from a two- to three-month period in 2013. That's not the kind of continuous relationship that Judge Francis laid out in the Export & Import case. He's not a full-time employee; didn't have a desk at Allergan; didn't have an office at Allergan. As far as we can tell, did not seek out legal advice from Allergan's counsel, perhaps providing input. And bottom line, as to the functional equivalent as to Mr. Pollock, we can't see anything that he did on his own that was just not part of the team.

Now as to the team standard versus Export & Import, it's true that Judge Brodie in the Flonase case acknowledged that she adopted a broader view of this exception to the waiver rule, but there's no suggestion that any Court in this district has said, That's right. Flonase is the standard that we should apply rather than Export & Import. And as I think Your Honor alluded to initially, it is even in question, Judge Nathan in the Church & Dwight case raised the question about whether the Second Circuit would even allow any such exception, particularly given the way the Second Circuit has dealt with privilege exceptions in cases like Ravenell and Ackert. So that's one thing.

The last thing on Mr. Pollock is this: We did --

Mr. Parrott's right, we challenged two emails in our motion and we -- subsequently after doing the briefing, we found another document that Allergan had withheld in some circumstances and produced in full in another circumstance. So we had a pair of documents, one with redactions, one without. So we got to peek behind the curtain, and what we saw in that document, which we brought to Allergan's attention as soon as it came to ours, was that the discussion was about science. And when we asked Allergan, So is this one privileged or not? They said, No, this one comes off the log as well. So we're three for three in terms of the documents that we have challenged so far. But we haven't seen any indication in the log that any of these other documents would be any different. That's as to Mr. Pollock.

As to Mr. Hanford, very briefly, very similar analysis under the Export Import case, in that we haven't seen and Allergan has not even tried to meet the Export Import standard by laying out how these folks met the criteria that are set forth in that case. We don't see them having responsibility for any specific topic. The declarations are much the same in that they suggest that he evaluated and provided input sometimes. His work in relationship with Allergan, as far as we could tell, was quite sporadic. What the declarations -- I think the word the declaration uses is "oftentimes." That, to us, doesn't mean the continuous and close working relationship

set forth in Export Import.

I think we conflated a little bit in the discussion the functional equivalent doctrine, which I've now addressed, and then the question of whether we spoke when necessary to the provision of legal advice. That's the Grand Jury case, and needless to say, we agree with Judge Kaplan in the sense that he very severely limited that case. And I think the Ravenell decision we site, which in turn cites the actual --

THE COURT: Judge Gold, right?

MS. SHARP: Correct. Yes, Your Honor.

(Continued on the next page.)

(In open court.)

MS. SHARP: As that decision pointed out, In Re Grand Jury, as far as we can tell, has arguably extended the privilege deferment in this regard. As Judge Kaplan pointed out in that decision, it wasn't based on some new reading of the law.

What he said is it was based on, quote, the broad power of the government, and then he goes on to say things like and the fact that, quote, the media, prosecutors, and law enforcement personnel in cases like this often engage in activities that color public opinion. Highly different set of circumstances.

THE COURT: All right. Anything else on the motion?

MS. SHARP: Last point I will make on the necessary provision. What Mr. Parrott said, I think he was referring to Mr. Hanford when he said we need some help. That's not the standard. The question under Kovel and Ackert is not whether these folks are just useful. They need to be absolutely necessary.

MR. PARROTT: Your Honor, we have submitted declarations from the lawyers and Mr. Lively, who worked with these people. They say their input was necessary. That is the evidence that's before you. So I don't understand why the plaintiffs take the position that there is no support for that point we are trying to make.

The suggestion that we are off the reservation with the law, it's not true. If you look at Kovel, the Kovel decision is directly a lineage of Upjohn from the Supreme Court; and Your Honor is correct, that Upjohn did not involve third parties, but what Upjohn was focused on is, okay, what matters here? The Supreme Court said we want to encourage the public policy of free flow of information to the lawyers so that they can keep their corporate clients in compliance with the law.

It's not a far extension of that. That's why cases like Kovel, Grand Jury, Copper, say, okay, when there is a need to bring an outside party in, as long as you do it the right way, as long as it's not a stranger to the company, then that person can also be within the privilege. So that's why we think we are squarely within Second Circuit and Supreme Court law.

As to the point that the involvement of these individuals hasn't been continuous, again, that's inconsistent with the factual record before Your Honor. We went to the trouble of creating specific privilege logs in the exhibits so that Your Honor could see what documents are at issue with these individuals. You will see there are points in time when these individuals were brought in for the specific purpose that they were needed, and there are lots of documents at that point in time.

So it's correct, these individuals are not employees. They are not constantly involved in Allergan's business, but when they are brought in for the purpose that they are needed for, the continuous involvement standard or requirement is met. And again, the declarations before Your Honor explain this.

The lawyers relied on these people when they were involved in the projects at issue. The notion that they were not integrating into the team, again, is inconsistent with the evidence. The declarations from these individuals at Allergan and outside counsel, Ms. Markus at King & Spalding, say that I work this these people as a team, I treated them as a member of the team. That's why they are not strangers. They were brought in specifically for this purpose, and Allergan did the best they could to make sure they were within the privilege.

MR. STOCK: One last point I wanted to make on that. I do want to disavow the court of this notion that there is some difference between the law being applied in the Eastern District of Pennsylvania or the D.C. Circuit and here. I think it's the same law. In fact, Flonase cites Copper and Judge Swain's decision in Copper Antitrust.

THE COURT: And she distinguishes Export-Import, right?

MR. STOCK: That's true.

THE COURT: She said we are not following that.

MR. STOCK: That's true.

THE COURT: It's the New York decision. It wouldn't be the first time.

MR. STOCK: Copper is a New York decision too, and Grand Jury is a New York decision too. I think the Kovel Second Circuit decision in no way limits the principle to translation. It's much broader than that. I think courts, many courts, have recognized that.

So I just want to highlight that this is a consistent pattern among all courts looking at antitrust cases, looking at the pharmaceutical --

THE COURT: Do you think antitrust and/or pharmaceutical cases are different --

MR. STOCK: I think that --

THE COURT: -- in this regard?

MR. STOCK: So Flonase and Glaxo are the pharmaceutical antitrust cases. The law that they apply, I think, would clearly protect our documents. Copper is also an antitrust case.

THE COURT: What I'm asking you, is there anything about this type of case --

MR. STOCK: Yes?

THE COURT: -- and how it would yield a different view on exceptions to the attorney-client privilege?

MR. STOCK: Yes, I do believe that's true.

THE COURT: Tell me.

MR. STOCK: First of all, the pharmaceutical context, I think, is a fairly no-brainer for the cross-functional, the importance of a cross-functional team, the need to bring in consultants to be part of that cross-functional team; and I think the judge -- which was it -- the judge in Flonase --

THE COURT: Judge Brodie.

MR. STOCK: Brodie, she says in applying the principle set forth by the Supreme Court in Upjohn, there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation, if each acts for the corporation and possesses the information needed for the attorneys; and then she says, moreover, this approach reflects the reality that corporations increasingly conduct business not merely through regular employees but also through a variety of independent contractors retained for a specific purpose. To apply the narrow construction of the privilege to communications involving independent consultants would be too restrictive to be realistic in today's marketplace, where businesses frequently hire contractors and still expect to be able to seek legal advice.

This is tailormade for the pharmaceutical industry, where everything they do involves regulatory issues, involves public policy issues. So I do think the pharmaceutical context is absolutely critical here; and, I think, the fact that all the antitrust cases go the same way is also important here and

not surprising because antitrust cases tend to raise public policy issues.

I think Ms. Sharp made exactly the point that I had made from In Re Grand Jury, that Judge Kaplan was not solely focused on the fact that it was a criminal case but the fact that it was a matter of public concern. Antitrust cases tend to be matters of public concern. That's why Sumitomo had to enhance its PR resources in a big antitrust case with public concern.

Here we have a perfect storm of a pervasively regulated company, a matter of public concern. There is simply no question that pharmaceutical companies faced with that context are going to need to bring in consultants to help their lawyers make the right call; and that's exactly what Judge Brodie was protecting, that's exactly what the D.C. Circuit was protecting in the GlaxoSmithKline case, and that's what, I think, animated Judge Swain's decision in the Copper Antitrust case, which was cited by those other decisions.

THE COURT: All right. Thank you.

MR. SOBOL: May I be heard?

THE COURT: Mr. Sobol.

MR. SOBOL: I think it's important to understand the context of the citizen petition process and what is going on with respect to the relationships at the company and the hiring an outside consultant.

So, at the time that these lawyers are trying to undertake some activity with other people inside Allergan, right, not all the things that they are doing is giving legal advice.

THE COURT: You are talking about the in-house counsel?

MR. SOBOL: In-house counsel or even King & Spalding.

THE COURT: All right.

MR. SOBOL: What they know is they are in the process of preparing something that's going to be filed with the FDA, a citizen petition. So that they know they are in the process of doing something that's going to be public.

They also know that when, as, and if they decide, the company, Allergan, decides to file that petition, it's going to certify under oath that it is providing all information that both supports and goes against its position. Now, before the company files that citizen petition, it has certain rights about what it is that the communications have been between the parties and their outside consultants; but the second it makes the decision that it's filing a citizen petition, it is opening up the door to the fact that now they are opening up the fact of what information they have that was in their hands at the time they filed that citizen petition, that might cut against what it is that they were doing.

Now, if you look at this very particular situation,

here they are calling a former FDA guy, Pollock, as an outside consultant and they are asking him to give them information about science. Not legal advice, not something that's going to -- even that science is going to be used for legal advice. It's going to be making a decision, a business decision, a science decision will be made whether or not we are going to include this or not in the citizen petition.

Now, if this man said to them, I think you are full of beans, and said that to the lawyers and I think you are full of beans as a matter of science, that has to be disclosed. It can't be privileged. So I'm not talking about any of these arguments that people are having.

THE COURT: I'm not sure I know what you mean. You mean that has to be disclosed in the citizen petition?

MR. SOBOL: Correct.

THE COURT: Okay. So are you saying because it has to be disclosed in the citizen petition it can't --

MR. SOBOL: What I'm saying for these purposes is that when a lawyer is sitting down and hiring outside consultants to give them information in preparation of a citizen petition, they don't have an expectation that those communications are going to be privileged, if it's information that they are getting about the science that goes to the merits of the petition. That's what I'm saying.

So I'm not going into these arguments, which I think

both sides have talked an awful lot about the cases and all the rest of functional equivalents and all the rest of that; but behind this process -- and what I think should inform your judgment about these privilege issues -- is that lawyers asking for information about the science they know, they can't keep it secret, if the company decides to file the petition, which it did here. That's my point.

MR. STOCK: Your Honor, the way I would respond to that is that I think Mr. Sobol is raising important issues, but they are probably issues that are not dependent on whether a third party is involved or an internal employee is involved. I think there are difficult issues in this case as to what is privileged and what is not.

What Judge Brodie found and what Judge Swain found and what Judge Kaplan found is that we should look at the substance of the communication to determine its privilege. The addition of a consultant as part of a cross-functional team should not turn it into a black-and-white, easy-to-resolve question. It's a hard question to resolve. That's what I was opening up with. These are very hard questions to resolve.

Simply saying one is a third party avoids what are really the real privilege questions in the case. The inclusion or absence of a third party --

THE COURT: So you are saying even -- however I would rule on this issue about the consultants, we are still going to

have Mr. Sobol's issue.

MR. STOCK: I think Mr. Sobol's issue is the issue. The consultants issue is not the issue. The absence or presence of a consultant should not be determinative.

What should be determinative is whether the document is privileged. I think that's what we should focus on, the substance.

THE COURT: At this point the plaintiffs have not challenged the documents in terms of the substance of the documents. Right, Mr. Sobol? Am I right?

MR. SOBOL: Yes.

THE COURT: They might be? You might be challenging that, or not?

MR. PARROTT: What this motion does, Your Honor, is it seeks a blanket ruling that every communication involving these consultants must be produced. That's what this motion currently does.

THE COURT: No, I understand that.

MR. SOBOL: You understand.

THE COURT: Yes, but I'm saying that's because of a waiver, if I were to find a waiver.

If there is no waiver, if I were to find there wasn't any waiver, the plaintiffs may still be challenging these documents. Correct?

MS. SHARP: Right.

MR. STOCK: That's what we are saying we should be focused on, whether these documents are privileged.

THE COURT: When would we do that?

MR. STOCK: Sorry?

THE COURT: When would we do that?

MR. STOCK: Let's get to that. We opened up -- we think this motion is a side show. Let's focus on what's privileged and what's not and what process we can come up with to determine that, not try to make blanket, categorical decisions based on factors that --

THE COURT: Let me say something about this blanket, categorical. It seems to me that once upon a time, in an earlier conference, I suggested to counsel if there were categories of documents that you thought that I could resolve by category, present them to me.

So I don't think there is anything untoward about the plaintiffs making this effort. However I decide it, I don't think you can say there was something wrong about them presenting it as a category.

MR. STOCK: I agree with that; but I do think it delays the real issues, which are focusing on the actual documents in terms of whether they are privileged or not. I think focusing on the third parties involved, based on this modern understanding of cross-functional teams is not the right question. The right question is: Is it privileged or not.

MS. SHARP: If I may, Your Honor. It's a threshold question. The threshold question is whether the privilege has been waived as to these third parties. Your Honor is exactly right.

If for some reason Your Honor concludes that the privilege has not been waived, yes, there will be individual challenges as to these documents, like the three we have already gotten Allergan to produce.

THE COURT: Anything else in response to the motion?

MS. JOHNSON: I just want to answer your Honor's question. I heard you to ask at some point whether we had also challenged the substance of these documents or whether we were solely proceeding on the nonparty waiver issue.

The way that they have been articulated and, I think, as Mr. Sobol just articulated, the categorical issue, that was the third issue that we identified in the third bullet of our opening motion, which was communications about facts and information Allergan possessed that supported or undercut positions it took in its citizen petitions, including communications about whether to submit such information to the FDA.

THE COURT: I see, I see. Thank you. So I will reserve decision on this aspect of the motion.

And so I think we just have a couple of other things to look at. You had talked about giving me an update on

deposition scheduling. I don't know if there is anything we need to say. Have the parties identified their witnesses already?

MS. JOHNSON: Yes, Your Honor. I will try to do this very briefly, and if anyone wants to add.

THE COURT: Okay.

MS. JOHNSON: We have, I believe, it's about 18 depositions of Allergan current and former employees scheduled for January and February.

THE COURT: Okay.

MS. JOHNSON: Two of those I wanted to mention, Your Honor, and just to let the court know that if it's okay with the court, the parties had agreed that the deposition of Mr. Pyott, Allergan's former CEO, and the deposition of Mr. Saunders, Allergan's current CEO, would occur sometime after the close of fact discovery in order to accommodate their schedules.

THE COURT: That's fine.

MS. JOHNSON: Okay. We just wanted to let the court know that. I think that's the only issue there in terms of Allergan's deponents.

In terms of depositions of plaintiffs, the defendants have identified the plaintiffs that they would like to depose. Some plaintiffs have provided dates. I believe not all, but it's my understanding all plaintiffs are working on providing

dates; and, as far as I'm aware, there are no other pending issues with plaintiffs' depositions at the moment.

MR. STOCK: That's right. There is one plaintiff witness, who one of the direct purchasers said they are going to make a motion to block that deposition; but we are not raising that with Your Honor today. We are going to go forward with the 30(b)(6), and then probably tee that issue up for Your Honor in January.

THE COURT: Okay.

MS. JOHNSON: Your Honor, the last category of depositions then would be nonparty depositions. I just wanted to preview that for you.

There is, of course, within that bucket, anticipated to be some depositions of generics companies. It's a little unclear to me today how many there will be and when those will occur, but that's anticipated.

THE COURT: Okay.

MS. JOHNSON: Plaintiffs have also served a subpoena on King & Spalding that contemplates both documents and depositions from King & Spalding. A date has been noticed for that but not scheduled yet.

I believe there is one additional nonparty subpoena, which plaintiffs intend to serve as of today but I don't know whether they have served it yet. So I will hold off on getting the particulars on that.

MR. STOCK: Your Honor, I just want to add this will be a segue to the next topic, that there are a large number of categories of depositions that my own view is I don't see it likely at all that they will take place before the current expiration of discovery. I mentioned the generics already.

I think some of the third parties that our colleague mentioned are unlikely to happen by February 8th because documents are not going to be produced in time.

Another agenda item you will see is that the retailers we have agreed to a phased discovery procedure with them. I think it's very unlikely that they are ready to be deposed within the current discovery schedule.

So Mr. Royall is going to handle the scheduling issues for us, but I do -- since we are talking about update on depositions, I do want to flag we have got 18 depositions of Allergan in January, we have got probably a dozen depositions of the plaintiffs in January. A lot of documents haven't been produced yet. So it seems extremely unlikely that these depositions are going to be completed during the current schedule.

THE COURT: Yes? Counsel, identify yourself for the court reporter, please.

MS. RAVKIND: Lauren Ravkind on behalf off Walgreen's, HEB, Kroger, and the Albertsons companies.

With respect to Mr. Stock's comments about we have

agreed to phased discovery, that is not completely correct as it pertains to my clients. We have reached an agreement with Allergan on -- and there are no disputes, Your Honor, to present to you today, and we are proceeding. We expect to begin -- we have started producing information.

THE COURT: What is the dispute? You are saying it's not completely correct. What is your dispute?

MS. RAVKIND: We have not agreed on a phased approach. We have agreed on a noncustodial search with respect to our -- they are nonparty PBM affiliates of our clients.

It is not a phased approach with respect to my clients, and we expect to begin producing the documents that are the subject of that this Friday, and we expect that we will be substantially complete with document production by January 11.

MR. STOCK: I think a misleading presentation was created for Your Honor because the phased discovery was with CVS and Rite Aid.

MS. RAVKIND: I wanted to correct that for the record and as it pertains to my client.

THE COURT: Very good. Thank you.

MR. BLOOM: Eric Bloom, Your Honor, for CVS and Rite Aid. I just want to clarify a little bit more.

The issue of the phased discovery actually applies to nonparty affiliates of CVS and Rite Aid. CVS and Rite Aid

retail entities are the plaintiffs in this case; and, in an effort to streamline and expedite discovery of two PBM entities that are affiliated with CVS and Rite Aid, we agreed to work with the defendants to try to facilitate that discovery without their having to serve subpoenas, without going through arguing whether we have possession, custody, or control of the documents.

So this is simply an effort to expedite; and it's my understanding that both of those companies are going to be starting to produce the first stage of the documents this week. So to the extent it's phased, it applies to nonparties. I want to clarify that.

THE COURT: Is there some significance to the word "phased" that people are like, no, I'm not engaging in phased discovery? It sounds like a good thing to me. Right? What am I missing?

MR. STOCK: It's a perfectly reasonable accommodation that we both made with each other. I'm just highlighting --

THE COURT: I'm asking a serious question.

MR. STOCK: So I do want to highlight. So CVS and Rite Aid have agreed to -- he has mentioned the first stage. It's a three-stage production. So first, there is going to be production of one category of documents. Then later, after we review those, there is going to be a production of a second category, and then a third.

And what I'm saying is there is very low likelihood that all of that takes place in time for us to conduct depositions by February 8.

THE COURT: I see. Okay.

MR. SOBOL: Your Honor, I'm going to try to truncate the next discussion item. Okay?

THE COURT: Good.

MR. SOBOL: The scheduled matter.

THE COURT: Okay.

MR. SOBOL: So the defendants provided a proposal to the plaintiffs earlier this week, regarding some modifications to the schedule in light of et cetera, et cetera. We haven't had the opportunity to meet and confer about it, nor even for the plaintiffs to make a consensus regarding what our position is.

THE COURT: Okay.

MR. SOBOL: It's clear that we are not, you know, jumping up and down and saying not another day. Right? So there is something for the parties to talk about.

THE COURT: Good.

MR. SOBOL: What I would suggest is that the parties do that and they either provide a joint proposal to you, say a week from Friday, December 28; and, if we can't provide a joint proposal, the parties will give you two pages as to what their position is.

MR. ROYALL: Your Honor, I agree it would be fruitful for the parties to confer on this. I don't know what the outgrowth of that will be, but we might find ourselves in the position where, as alluded to in the agenda, where Allergan feels the need -- perhaps plaintiffs as well, but Allergan would feel the need to file a motion to brief the court on justification for proposed revisions to the schedule.

THE COURT: You really think we need motion practice on this? I don't think so.

MR. ROYALL: My only concern -- it could be by form of a letter -- the two-page limit would be my only concern. I would just -- if we do end up with a significant disagreement, I would want to make sure we had enough space to make our position known. So something longer than that.

THE COURT: So you will agree between yourselves as to how much time you need; but I don't think this is something that requires motion practice, with briefing and so on. You will come in, we are going to meet regularly, you will come in; and I will rule on it, or, if you need a ruling before your coming in, I can accommodate that as well. Okay.

But agree on how much, how many pages. Okay?

MR. ROYALL: Yes, we can confer on that as well.

THE COURT: All right. So the question then is: When do you want to come in? You had suggested January, but I really think it's a bit early to come in, in January.

So I would suggest some dates in February.

MS. SHARP: May we confer for just one moment, Your Honor?

THE COURT: Sure.

MS. SHARP: Thank you. Your Honor, if I may, one question. We contemplate the citizen petition briefing, and we talked about it earlier being relatively expedited for obvious reasons.

THE COURT: Right.

MS. SHARP: To me, one question would be if the court will want to hear argument on that.

THE COURT: I don't know.

MS. SHARP: Right. If not, I think that pushing a hearing after February may be fine; and, if so, perhaps we can make ourselves available in mid-January for purposes of --

THE COURT: The problem is that, frankly, I have a period of time that I won't be available from mid-January. So I doubt that will you be able to finish everything and that I would be prepared, because I could see you like the week of January 14. The next week is blocked.

So I don't think that we could do it by then. So I think we should move it into February, which will affect your issues about scheduling, I understand, but I don't think it's too bad. I can give you some ideas of dates that are good for me, if you like.

MS. SHARP: That would be great.

MR. ROYALL: Your Honor, I think Ms. Johnson and I may be on the same page here. I was just consulting our deposition schedule, and there is a deposition that she alluded to that would be in New Jersey the week of the 11th, but that that would be on the 13th or the 14th, the following day, is just a Thursday, or potentially the 15th, conflicts with deposition schedule.

MS. SHARP: Valentine's Day?

THE COURT: That's February.

MR. ROYALL: February 14.

THE COURT: Oh, February 14 is perfect.

MS. JOHNSON: Okay.

THE COURT: Okay, yes.

MS. JOHNSON: Yes.

THE COURT: It's good for me. Would you like 10 o'clock?

MR. SOBOL: Yes.

MS. JOHNSON: Yes, Your Honor. Thank you.

MR. ROYALL: Thank you, Your Honor.

MS. SHARP: One other question, Your Honor, if I may.

Would the court like to set a briefing schedule on the citizen petition issues as well?

THE COURT: Seven days okay? You tell me.

MS. SHARP: From my perspective, this should go pretty

quickly because these issues certainly will impact how things go from here.

THE COURT: Okay.

MS. SHARP: So without having consulted with everybody on my side, I mean, we are mindful of the upcoming holidays; and what I would throw out there as a suggestion would be, to the extent briefing needs to happen, that we would submit -- the plaintiffs would submit their argument brief the first week in January, perhaps January 7 or around there. That's the second week.

THE COURT: Mr. Stock?

MR. STOCK: January 7 you are saying? I guess I don't really understand what we can brief by January 7.

We thought we were going to go through the 150 documents, we were going to look at them, see which ones we were able to produce. They were going to look at the ones we produce, and then kind of take it from there in terms of how to figure out what is the basis under which we are withholding the remaining documents.

I don't see how that could be done by January 7, given the holidays. So I'm not even sure exactly what it is we are briefing.

MS. SHARP: We hope that that's clear after the meet and confer is finished. So I guess I would ask Mr. Stock --

THE COURT: Right. Let's find out how long it will

take. You are going to do a rereview then of the 150 documents?

MR. STOCK: Yes. I would say we could produce documents from the 150, let's say, by January 4th. You want to take two weeks to meet and confer after that, something like that?

MS. SHARP: Ten days. How about until January 14, for us to file our brief?

MR. STOCK: Then you need time after we meet and confer to file your brief. So you want to file your brief by January 18?

MS. SHARP: No. What I'm suggesting is that we meet and confer the week of the 7th, come to a resolution by the January 11th, file our brief by January 14.

MR. STOCK: We can respond --

THE COURT: I didn't hear.

MR. SOBOL: I quipped that the brief was written already, so.

THE COURT: Then why didn't you serve it on her?

MS. SHARP: We wrote it up.

MR. STOCK: So if plaintiffs want to provide a brief on January 14, we can respond by January 28.

MS. SHARP: Well, Your Honor, working backwards from that, I guess the really relevant question would be: When would Your Honor like to receive our reply in advance of the

February 14 hearing?

THE COURT: So let's see. If the defendant wants until January 28, did you say?

MR. STOCK: Yes, Your Honor.

THE COURT: Your brief isn't ready yet?

MR. STOCK: If we can see theirs we might be able to get it ready.

THE COURT: How about the 4th?

MS. SHARP: Certainly.

THE COURT: All right then. Very good.

MR. SOBOL: Thank you.

THE COURT: We brought you a beautiful day today.

MS. JOHNSON: You did.

THE COURT: I don't know what it's like in Boston today. Colder?

MR. SOBOL: Colder.

THE COURT: All right then. Well, nobody knows what's going to be February 14.

MR. SOBOL: It's going to be cold.

THE COURT: It's going to be cold, but hopefully we won't have a storm.

Anyway, we will keep in touch with you and we will see how it goes. All right. Thank you very much.

MR. SOBOL: Thank you, Your Honor.

MS. SHARP: Thank you, Your Honor.

MR. STOCK: Thank you, Your Honor.

MR. PARROTT: Thank you, Your Honor.

THE COURT: You will look at this transcript and you will order this transcript.

(End of proceedings.)

o O o

Certified to be a true and accurate transcript.
/s/ Michele Nardone
MICHELE NARDONE, CSR -- Official Court Reporter

From: George Tolley
To: RulesCommittee Secretary
Subject: Comment re: Privilege Log Practice
Date: Friday, July 30, 2021 6:06:25 PM

Dear Members of the Judicial Conference Advisory Committee:

I write to prove commentary with respect to Rule 26(b)(5)(A) and its application specifically with respect to the provision of privilege logs.

I am a litigator, practicing in both state and federal courts, principally handling medical negligence cases on behalf of patients and their families. These documents are document-intensive, frequently involving thousands of pages of medical records. With the advent of electronic health records in every hospital in the United States, the number of "documents" generated in every hospital encounter has multiplied.

In every medical negligence case involving a hospital defendant, documents are withheld in discovery on the grounds of privilege, pursuant to state and federal privilege statutes. Some of these laws (such 42 U.S.C. § 299b-22, enacted in the Patient Safety and Quality Improvement Act of 2005) create a "patient safety work product privilege" to shield certain documents from discovery because they concern "quality improvement" practices. From time to time, such "quality improvement" privileges are claimed in order to shield internal hospital policies and protocols.

Despite the frequent claims of privilege as a defense to discovery in medical negligence litigation, however, it is my experience that a formal "privilege log" is almost never created, because a formal "privilege log" is not necessary. Counsel for all parties meet and confer with respect to the claims of privilege, and discovery disputes are resolved, either formally or informally, without the need for logs. On the rare occasions when a log has been produced, I am wholly unaware of any difficulty or hardship associated with producing such a log.

Furthermore, in appropriate cases, claims of privilege can be resolved with an agreed protective order that controls access to privileged documents and ensures that sensitive material is not shared more broadly than necessary. Pursuant to an agreed protective order, sensitive documents can be shared with the parties and expert witnesses, and then returned or destroyed at the end of the litigation.

Accordingly, in my view, there is simply no need at all for a broad, sweeping change to Rule 26(b)(5)(A). While it may be true that some forms of document-intensive litigation find the creation of "privilege logs" to be burdensome, that has never been my experience.

Thank you very much for your kind attention to these comments.

Sincerely,

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July 30, 2021

Via email

Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Discovery Subcommittee
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE
Suite 7-300
Washington, DC 20544

Re: ***Invitation for Comment on Privilege Log Practice***

Dear Members of the Discovery Subcommittee,

I write concerning the Invitation for Comment on Privilege Log Practice to relate my views and the views of my firm based on our experiences in scores of complex class action cases. The Subcommittee should not entertain any proposal to diminish the requirement for a party to justify its privilege assertions on a document-by-document basis. Enabling parties to lump their privilege assertions into broad "categories," instead of individually identifying them, invites abuse of the attorney-client privilege and the work-product doctrine, and the concealment of discoverable material.

The bedrock principle governing discovery is that a party must produce relevant and responsive information. *See* Fed. R. Civ. P. 26(b). Only privileged information, and information not proportional to the needs of a case are excluded. As explained below, permitting categorical logs risks misclassifying standard non-privileged information as disproportionate to the needs of the case, on the improper rationale that crafting privilege logs can be difficult and inconvenient. But any excessive burden arising under the current framework can already effectively be addressed through a request for a protective order, which aligns as a matter of policy with the black-letter notion that the burden is on the party asserting privilege to justify the privilege claim.

"The attorney-client privilege obstructs the truth-finding process." *FTC v. AbbVie, Inc.*, No. 14-5151, 2015 U.S. Dist. LEXIS 166723, at *19 (E.D. Pa. Dec. 14, 2015) ("*AbbVie I*"). Accordingly, it is "strictly confined within the narrowest possible limits consistent with the logic of its principle," *id*., and it is the burden of the party claiming privilege or work-product protection to justify the assertion. The party making the assertion therefore must provide a minimum baseline of information about withheld information to meet its burden. Permitting

parties to apply privilege assertions to categories of documents, instead of individual documents, risks permitting them to obscure particular documents that may uniquely differ from other documents in the same category. For instance, it is generally recognized that an email between two business people discussing business matters is not privileged. Such an email may later be forwarded to an attorney with a request for legal advice. The same email may later be forwarded again between two business people, who decide to discuss a different, non-privileged topic altogether. Similarly, where an attorney "is merely copied on the email thread and does not contribute to the discussion," the email is not privileged. *AbbVie I*, 2015 U.S. Dist. LEXIS 166723, at*38-39. Since a categorical privilege log will not provide information about who sent, received, or was merely copied on a particular email, when it was sent, and the purpose of each individual communication, such a log would leave the receiving party unable to assess the claim of privilege. Another example is "[p]re-existing, non-privileged documents." These materials "do not become privileged merely because they were later sent to an attorney." *FTC v. AbbVie Inc.*, No. 14-5151, 2016 U.S. Dist. LEXIS 113731, at *10 (E.D. Pa. Aug. 25, 2016) ("*AbbVie II*"). Yet they can easily be lumped into a category of documents, leaving the receiving party with no way to ascertain whether the withheld document preceded the email exchange. A final example (of which there are many others), are documents that have been disclosed to third-parties. Disclosure of privileged material to third parties ordinarily constitutes a privilege waiver. A communication between a party and a third party that is later forwarded as part of a request for attorney-advice may be partially privileged. But an attorney-client communication that is later forwarded to a third party is subject to waiver. Using a categorical log, a party may withhold both types of communication under a broad category, undermining the purpose of the discovery rules, disabling the recipient from assessing the privilege claim, and inviting disputes.

To the extent that privilege disputes have become burdensome and time consuming for the Federal Courts to adjudicate, it is because of the tendency of some litigants to attempt to evade the current rules and overgeneralize their privilege descriptions, resulting in needless motion practice. Relaxing the rules to permit such lapses, instead of expecting and requiring litigants to comply with existing rules, rewards that defiance, and serves neither the interests of truth nor justice.

Thank you for the opportunity to comment.

Respectfully,

/s/Dan Litvin

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PRIV-0075

July 30, 2021

Via Email: RulesCommittee_Secretary@ao.uscourts.gov
Members of the Judicial Conference
Advisory Committee on Civil Rules

RE: Fed. R. Civ. P. 26(b)(5)(A) – Privilege Logs

To the Members of the Advisory Committee on Civil Rules:

I am the owner of Bell Law, LLC, a 4-attorney law firm in Kansas City, Missouri which primarily represents plaintiffs in litigation, both individual and complex. I write this letter on behalf of my firm and its attorneys to implore the members of the Judicial Conference Advisory Committee on Civil Rules to leave Fed. R. Civ. P. 26(b)(5)(A) unchanged.

In our practice, we regularly see parties attempt to assert privilege where it is not proper. In those situations, the privilege log is essential in assessing the veracity of the asserted privilege. Currently, this rule reasonably requires a party—whether Plaintiff or Defendant, individual or business—claiming privilege to provide the necessary information to enable the other party and the judge to assess the asserted privilege. Indeed, this is the purpose of the privilege log.

Privilege can be waived as to one document but not others. Changing the rule to permit identification by category would enable parties to hide important documents under the guise of privilege without the possibility of being held accountable.

Not all communications are privileged merely because an attorney is copied. For example, it is widely recognized that underlying facts which are communicated by an attorney do not become privileged. Recently, we had a party assert privilege as to such communications, and that privilege was correctly overruled. Using a categorical method of identification, this challenge would not have been possible—or would have involved substantially more time and expense to bring.

In our practice, it is all too common for parties to decry the privilege log requirement as being too burdensome. But in reality, this is merely a responsibility of the parties because the party asserting the privilege bears the burden of proof. The privilege log ensures accountability in these assertions.

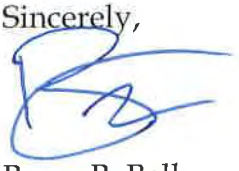
We also find that the parties who complain the loudest about the burden of making a privilege log are also the parties who make the most improper designations. Whether they later withdraw those privilege designations or they are overruled by the Court, the common thread is the privilege log which provides information on the asserted privilege as to each document.

Ultimately, the burden of the privilege log is not nearly what it is frequently claimed to be. In large, complex litigation with thousands or millions of pages of documents, the parties are almost always using document review platforms, such as Relativity or Everlaw. With each year, more competitors enter the field of e-Discovery, driving innovation and keeping prices for these products reasonable. These platforms make the creation of a privilege log simple and efficient by automating most of the process. They also enable quick redactions where only portions of documents are privileged.

In smaller cases where document review platforms are not necessary, there are also far less genuinely privileged documents. In these cases, the parties are generally not using search terms to cull through gigabytes or terabytes of data. Instead, they are typically using targeted searches. The parties are also generally utilizing much narrower discovery requests, targeting specific documents. When this is done, there are far fewer genuinely privileged documents, making the requirement to produce a document-by-document privilege log manageable.

I am not insensitive to the delicate balance that must be maintained with respect to privilege logs. But the current requirement is fair. To ensure litigants remain accountable, I urge the Advisory Committee to leave the rule unchanged.

Sincerely,



Bryce B. Bell

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July 30, 2021

COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Behind the Times: Reforms to Privilege Log Rules Are Necessary to Alleviate the Disproportionate Costs and Burdens of Protecting Privilege in the Modern Era

Dear Members of the Discovery Subcommittee of the Advisory Committee:

As a practitioner who specializes in discovery and serves as the co-chair of my firm's eDiscovery team, I respectfully submit the following Comment in response to the Invitation for Comment on Privilege Log Practice issued by the Discovery Subcommittee of the Judicial Conference Advisory Committee on Civil Rules.[1] The Subcommittee requested input from the bench and bar related to the challenges associated with privilege logs in modern civil litigation, as well as potential solutions to the problems of current privilege log practice. Based on my extensive experience with privilege issues in large, complex litigation on behalf of clients across a range of industries, I am pleased to share with the Subcommittee my perspective on these challenges, including the excessive burdens and costs of compiling privilege logs in large document cases, and to offer potential reforms that would bring current privilege log practice in line with effective principles governing discovery in the digital era.

INTRODUCTION

Federal Rule of Civil Procedure 26(b)(5) provides that a party who withholds otherwise discoverable information based on the attorney-client or work product privilege must "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."[2] Although not mandated by the Federal Rules, many litigants have long satisfied this requirement by providing the opposing party with a privilege log, which

[1] I am a partner at Sidley Austin LLP, and my practice has long included a special focus on privilege and eDiscovery. I am the founder and head of Sidley's eDiscovery and Data Analytics team, and I am a frequent speaker and author on privilege issues in the context of modern discovery. The views and opinions expressed in this Comment are those of the author only and do not reflect in any way the views and opinions of any law firm, company, agency, or other entity to which the author is affiliated.

[2] Fed. R. Civ. P. 26(b)(5)(A)(ii).

often provides information to satisfy the elements of the privilege claim on a document-by-document basis.

The practice of providing detailed information about each privileged document to the opposing party was developed in a paper world—when most privileged communications were made via paper correspondence and, thus, the overall volume of privileged documents that were logged was limited and manageable. In the modern digital era, however, the ease and informality of electronic communications (in particular, email and messaging applications) has exponentially increased the number of privileged documents in a case, transforming the privilege log into one of the most burdensome and expensive aspects of modern e-discovery. Particularly in large document cases, the size, complexity and cost of the privilege log—which can easily reach tens of thousands (if not hundreds of thousands) of log entries and cost more than a million dollars—may render an otherwise reasonable discovery request disproportionate to the needs of the case.

Based on my significant work with corporate clients in complex litigation and, more specifically, through my extensive e-discovery practice, it has become clear that the once-manageable standards governing privilege logs are now behind the times. Privilege log rules that may have worked in a paper world simply are not equipped to handle the massive volume of electronically stored information ("ESI") that legal practitioners must handle during discovery today. Current privilege log practice no longer furthers—and, in fact, now hinders—the goals of just, speedy, and inexpensive resolution of litigation; thus, reform is required.

In light of these significant and recurring challenges, I respectfully urge the Committee to amend the rule(s) in several ways, identified below and outlined in detail in Section II, to create a uniform and modernized privilege log practice across the federal courts. The recommended changes would provide much-needed consistency across federal practice, as well as increased efficiency, effectiveness, and fairness in the process, which would benefit courts, lawyers, and litigants alike. Suggested reforms include:

- adopting a clear Rule that document-by-document logs are presumptively unnecessary in large matters or when the burden of composing a document-by-document log would violate proportionality;
- adopting a presumption that a withholding party may submit a categorical or metadata privilege log;
- adopting a clear Rule that redacted documents do not need to be included on privilege logs where the document itself provides sufficient information for the requesting party to assess the privilege claim; and
- where document-by-document logs are required, adopting a clear Rule that only one log entry is needed for each substantive communication (*i.e.* threading of email/chat communications is presumptively allowed).

I. Current Privilege Log Practice, Which Was Developed Prior to the Rise of Big Data, Places a Huge and Disproportionate Burden on Parties While Providing Little Attendant Benefits to Assessing Privilege Claims.

A. Federal Rule of Civil Procedure 26 and current privilege log practice were established in a paper world and do not adequately address the e-discovery challenges brought about by big data.

The rules governing identification of privileged documents were established during the paper era, prior to the rise of the Internet and the arrival of big data in litigation.[3] The 1993 Amendment to Rule 26(b)(5) set the requirement that litigants must "provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection."[4] The Rule does not "define for each case what information must be provided."[5] In other words, it does not proscribe any specific manner of privilege logging or even that a privilege log is required at all.

In the absence of specific requirements, however, the document-by-document privilege log emerged as the typical standard for demonstrating compliance. The rise of the document-by-document log is strange in hindsight because such logs appear contrary to the 1993 Advisory Committee Note. Where documents over which privilege is claimed are voluminous, the Committee Note expressly states that detailed logging of individual documents may be unduly burdensome and, thus, unnecessary: "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."[6] Thus, the drafters foresaw that defending privilege claims with detailed logs could become overly burdensome in time, and they provided flexibility to allow parties to meet the Rule's requirements in those circumstances.

The express exception to document-by-document privilege logging contemplated by the Advisory Committee seems to have been lost on requesting parties, most of whom continue to expect painstakingly-detailed privilege logs on an individual document basis, even in cases where the volume of potentially relevant documents number in the millions.

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[3] Thirty years ago, there was no nationwide rule for identifying documents withheld based on privilege. Some jurisdictions—such as the Southern District of New York and the Northern District of California—outlined specific privilege log requirements, but there was little agreement about questions of log adequacy or remedies for non-compliance. *See* Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Ct. 19, 24-25 (2009).

[4] Fed. R. Civ. P. 26(b)(5) advisory committee's note to 1993 amendment. The Committee thought that the requirement of providing "pertinent" information would "reduce the need for in camera examination of … documents." *Id.*

[5] *Id.*

[6] *Id.* (emphasis added).

The Advisory Committee Note to the 2006 Amendment to Rule 26 further supports the argument for modernizing privilege log practice. It explains, "[t]he volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming."[7] These same concerns are present in drafting the privilege log itself and provide a basis for reasoned amendment to current privilege log practice.

Accordingly, having been established in a predominately paper era where privileged communications were more limited, the tedious requirements of document-by-document privilege logging have proven ill-suited to modern civil litigation. My own experience demonstrates this fact. I worked on my first privilege log more than 20 years ago. The log consisted of only a few hundred entries because the client, at the time, still conducted most of its communications in paper. Compare that to a more recent matter, where the company produced a document-by-document privilege log of more than 400,000 entries, costing the company several million dollars.

Although many other aspects of discovery practice have been modernized to account for the explosive growth of ESI in civil litigation,[8] the FRCP has thus far failed to optimize privilege logs for the digital age. This failure to account for modern communication is not only behind the times, but also at odds with the goals of the Federal Rules and, therefore, requires reform.

Many in the legal community have recently recognized the need for Rule reform in this area. For example, in the fall of 2020, in an effort "to devise potential alternatives to traditional privilege logging,"[9] the Electronic Discovery Reference Model ("EDRM") published a streamlined, draft protocol for privilege logs. The protocol noted that "[i]n cases with large productions and a significant number of privileged documents, the traditional preparation of privilege logs is burdensome, time consuming, and frequently not particularly useful for requesting parties to evaluate the privilege claims."[10]

B. Producing a privilege log is a tedious and burdensome undertaking that provides little return benefit.

Under current practice, parties who claim privilege by drafting a document-by-document log typically compose a privilege log entry *for each document*, and each entry generally consists of the following information: (1) one to two sentences describing the withheld information, (2) the date of the document, (3) the name of its author, (4) the name of its recipient(s), (5) the name(s) of all people given copies of or copied on the document, and (6) the privilege or

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[7] Fed. R. Civ. P. 26(f) advisory committee's note to 2006 amendment.
[8] *See, e.g.*, Fed. R. Civ. P. 37(e) & advisory committee's note to 2015 amendment (related to spoliation of ESI); *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y 2012) (approving use of technology-assisted review in document review), *adopted*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).
[9] Electronic Discovery Reference Model, *EDRM Streamlined Privilege Log Protocol* 1 (Nov. 30 2020), https://edrm.net/wp-content/uploads/2020/11/EDRM_Privilege-Log-Protocol_Draft-as-of-11_30_20.pdf.
[10] *Id.* For full disclosure, I chair the EDRM's Advisory Council and worked on early versions of this protocol.

privileges asserted. Even more information may be provided depending on the case. Compiling this level of detailed information in a privilege log is a tedious process, even where the number of privileged documents is few. But with the staggering growth of ESI in recent decades, the number of privileged documents that must be included on a privilege log can become unmanageable.

As previously explained, it is my experience that in today's large document cases, it is not uncommon for privilege log entries to number in the tens of thousands, requiring thousands of hours of attorney time and costing the client as much as a million dollars to compile the privilege log alone. Further, drafting privilege log entries tends to be far more tedious in complex cases where email correspondence often include numerous individuals from various corporate entities, some of whom may not be current employees or working in the same position as they were when the document was created. Thus, the current logging requirements impose massive burdens and costs on producing parties—and particularly, on producing parties with a substantial amount of documents.

In contrast to the tremendous effort and resources required to compile a privilege log in large document cases, courts have recognized the relatively minimal benefit it confers in return, stating: "[T]oo often I have found the traditional privilege log useless." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-489(PLF/JMF/AK), 2009 WL 3443563, at *10 (D.D.C. Oct. 23, 2009); *see also Lurensky v. Wellinghoff*, 271 F.R.D. 345, 355 (D.D.C. 2010) (finding "privilege logs to be on the whole useless"); *Marshall v. D.C. Water & Sewage Auth.*, 214 F.R.D. 23, 25 n.4 (D.D.C. 2003) (finding privilege logs are "useless"); *Mitchell v. Nat'l R.R. Passenger Corp.*, 208 F.R.D. 455, 461 (D.D.C. 2002) ("While Fed.R.Civ.P. 26(b)(5) requires what lawyers call a 'privilege log,' I have held that such logs are nearly always useless.)

The Subcommittee may not realize that, despite the cost and time associated with carefully logging privileged documents, the majority of individual privilege log entries in the largest logs are *never* reviewed by the receiving party or its attorneys. Thus, document-by-document privilege logs may not only be "on the whole useless,"[11] but also a tremendous waste of resources. It simply is not feasible for attorneys to review all individual entries on the most lengthy privilege logs, given the restraints of resources, time, and cost in litigation. Rather, to audit large privilege logs, receiving parties often resort to filtering on Excel spreadsheets or running searches. It makes little sense to expend the massive amount of effort, time, and money that goes into the process of preparing a detailed privilege log when the majority of entries will never even be reviewed.

Recognizing the excessive burden and futility of compiling lengthy privilege logs, some federal districts have adopted local rules that provide more flexible privilege log requirements. *See Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J.*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) (quoting with approval Local Rule 26.2, which permits categorical logs, and which recognizes

[11] *Covad Commc'ns Co. v. Revonet, Inc.*, 267 F.R.D. 14, 28 (D.D.C. 2010) (citing *Mitchell*, 208 F.R.D. at 461).

that with "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"). While helpful in alleviating burdensome privilege requirements for litigants in some districts, local rules create inconsistency among the standards governing the adequacy of privilege logs across federal practice. *See* Sedona Conf., *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. 95, 156 (2016) ("The process of logging is further complicated by the lack of a uniform standard applied by the courts regarding the adequacy of the content of privilege logs.").

C. The burdens of creating privilege logs are often not proportional to the requested discovery and not apparent at the initial stages of litigation.

Another problem with current privilege log practice is that, in many large document cases, the enormous burdens and costs of drafting a privilege log may make responding to a discovery request non-proportional, even when the request is otherwise proportional and relevant to the litigation. Further compounding this issue, the parties generally negotiate e-discovery protocols and the scope of discovery at the beginning of a litigation when they likely do not have "a full appreciation of the factors that bear on proportionality."[12] Disputes may therefore arise at the outset before the parties have an informed view of the true cost of the discovery requests.

If the parties cannot resolve discovery disputes, the court will consider the question of undue burden.[13] But the analysis will similarly be difficult when the number of privileged documents is unknown and the cost of production is still theoretical. Some logs may take "thousands of hours and hundreds of thousands of dollars to prepare,"[14] but it usually will not be apparent that a logging protocol is non-proportional until the parties are nearing the end of a review. Many responding parties encounter unexpectedly large numbers of privileged communications in their review universe, exponentially increasing the expense and burden of complying with otherwise proportional discovery requests.

D. Current privilege log practice does not address the disproportionate costs that defendants bear in asymmetrical litigation.

It also is problematic that current privilege log practice does not account for the disproportionate discovery burdens of asymmetric litigation. Many privilege disputes in civil litigation involve asymmetrical litigation, where one party has few, if any, privileged documents

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[12] Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment.

[13] *Id.* ("But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.").

[14] Order, *Cooper v. IBM Pers. Pension Plan*, No. 3:99-cv-829-GPM, at 4 (S.D. Ill. Oct. 31, 2002), ECF No. 139; *see also CS Bus. Sys., Inc. v. Schar*, No. 5:17-cv-86-Oc-PGBPRL, 2017 WL 8948376, at *4 (M.D. Fla. June 15, 2017) (permitting categorial privilege log based on defendants' argument that "creating a privilege log collecting the relevant emails … would be unduly burdensome and expensive—exceeding one-hundred-thousand dollars in costs and over four-hundred hours in time ….").

and the other party has a large number of privileged documents that it must log. Courts have recognized that "asymmetric discovery burdens are often the byproduct of asymmetric information."[15] In class action litigation, for example, plaintiffs often have fewer documents to produce and log, while defendants typically have large amounts of ESI and bear most of the privilege log burden.[16] As the Seventh Circuit has observed, these plaintiffs sometimes "us[e] discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff[s] regardless of the merits of [their] suit."[17] The burdens of current privilege log practice are particularly unjust in this situation, where one party holds the majority of relevant documents and the opposing party insists on burdensome privilege log requirements.

In contrast, in large, complex corporate litigations—where both sides possess significant volumes of privileged documents—the parties are typically more cooperative and practical in their privilege log requests. In those cases, full document-by-document privilege logs are rarely used because privilege logs would impose an undue burden on both parties.

E. The lack of adequate and consistent standards related to privilege logging contributes to privilege disputes that burden courts with *in camera* reviews.

The deficient nature of prevailing privilege log rules and standards often leads to claims by requesting parties that a privilege log is insufficient, which in turn burdens the courts with time-consuming *in camera* review of documents.[18] But *in camera* review is not intended "as a substitute for a party's submission of an adequate record for its privilege claims."[19] As one court noted, although *in camera* inspections are increasingly common, these reviews are very burdensome[20] and should not be granted as a default; rather, courts should be free to decline *in camera* review absent a "well-founded basis for challenging [the other side's] privilege designations." *See Wier v. United Airlines, Inc.*, No. 19 CV 7000, 2021 WL 1517975, at *36 (N.D. Ill. Apr. 16, 2021) (alteration in original) (quoting *Crabtree v. Experian Info. Sols., Inc.*, No. 1:16-cv-10706, 2017 WL 4740662, at *3 (N.D. Ill. Oct. 20, 2017)); *see also Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008) ("*In camera* review … can be an

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[15] *McCleary-Evans v. Md. Dep't of Transp.*, 780 F.3d 582, 591 (4th Cir. 2015) (Wynn, J., dissenting in part).
[16] *See, e.g.*, *Babare v. Sigue Corp.*, No. C20-0894-JCC, 2020 WL 8617424, at *2 (W.D. Wash. Sept. 30, 2020) ("It is well-recognized that discovery in class actions is expensive and asymmetric, with defendants bearing most of the burdens.").
[17] *Am. Bank v. City of Menasha*, 627 F.3d 261, 266 (7th Cir. 2010).
[18] *See Weber v. Paduano*, No. 02 Civ. 3392(GEL), 2003 WL 161340, at *13 (S.D.N.Y. Jan. 22, 2003) ("[C]ourts often undertake in camera review in order to supplement the parties' privilege logs and determine the content of the documents.").
[19] *Id.* (quoting *Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 475 (S.D.N.Y. 1993)). *See also Lurensky*, 271 F.R.D. at 356 (noting *in camera* review "should be the exception, and not the norm").
[20] For example, even when *in camera* reviews are helpful in "testing the validity of the privilege assertions," one court had to first review a sample of the documents at issue and then further perform a full review of the documents chronologically and obtain an understanding of the context in which the documents were generated in order to determine whether privilege applies. *See In re Abilify (Aripiprazole) Prods. Liab. Litig.*, No. 3:16-md-2734, 2017 WL 6757558, at *4 n.4 (N.D. Fla. Dec. 29, 2017).

enormous burden to the court, about which the parties and their attorneys often seem to be blissfully unconcerned."). If the rules and standards for privilege logs were amended to make them clear, consistent, and reasonable in light of the realities of modern e-discovery, it likely would decrease the number of privilege disputes and lessen the burden on courts of *in camera* review.

II. The Committee Should Adopt Rule Amendments and Specific Reforms to Modernize Traditional Privilege Log Practice.

In light of the growing problems that stem from blind adherence to an outdated privilege log practice, the Committee should amend the rules to bring privilege logging into the era of modern e-discovery. In addition, there are two general principles that have been embraced in other areas of modern e-discovery that would be equally applicable and beneficial in the context of privilege and I would, therefore, urge the Committee to reflect these principles in any amendment.

First, as a guiding principle of privilege log practice, the Committee should embrace Sedona Principle 6, which states: "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."[21] Numerous courts have cited Sedona Principle 6 for the proposition that responding parties should be afforded relative autonomy in the procedures, methodologies, and technologies appropriate for producing documents.[22] The production of documents necessarily includes the decision to withhold documents deemed privileged and to defend that privilege claim. Thus, Sedona Principle 6, which affords deference to the producing party to determine the best method for complying with production requirements, should apply equally to privilege log practice. In other words, courts should recognize that the withholding party is in the best position to determine how to establish its claim of privilege and should be afforded deference in that process.

Second, particularly with respect to large document reviews, the Committee should adopt rules and standards that focus on whether the party claiming privilege engaged in a reasonable

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[21] Sedona Conf., *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 118 (2018), https://thesedonaconference.org/sites/default/files/publications/The%20Sedona%20Principles%20Third%20Edition.19TSCJ1.pdf.

[22] *See, e.g.*, *Hyles v. New York City*, 10 Civ. 3119 (AT)(AJP), 2016 WL 4077114, at *3 (S.D.N.Y. Aug. 1, 2016) (citing Sedona Principle 6 when declining to "force the City as the responding party to use TAR when it prefers to use keyword searching"); *Nichols v. Noom Inc.*, No. 20-CV-3677 (LGS) (KHP), 2021 WL 948646, at *2 (S.D.N.Y. Mar. 11, 2021) (stating that a responding party "could use its preferred software to collect email documents, finding that method reasonable and deferring to the principle that a producing party is best situated to determine its own search and collection methods so long as they are reasonable"); *see also Kleppinger v. Tex. Dep't of Transp.*, No. L-10-124, 2013 WL 12137773, at *3 (S.D. Tex. Jan. 24, 2013) ("Rule 26 provides very little guidance on discovery of ESI, and courts have used the ESI discovery principles published by the Sedona Conference as a guide in resolving ESI discovery disputes.").

and defensible *process* for logging privileged documents, and not whether every individual document on a log with tens of thousands of entries has been perfectly logged. It is undisputed that in modern e-discovery, the standard is reasonableness, not perfection.[23] Indeed, there are several examples within the Federal Rules that illustrate this principle.[24] Moreover, courts have repeatedly explained in the context of e-discovery that perfection is not attainable and not required: "Courts cannot and do not expect that any party can meet a standard of perfection."[25] Despite the overwhelming consensus that perfection in e-discovery is not the standard, some courts continue to impose an incredibly high burden on parties and require a standard akin to perfection in the logging process. Bringing privilege log practice in line with modern principles of e-discovery, the Committee should adopt the same reasonableness standard in the context of privilege logs that applies to the discovery process generally. There is no basis for holding privilege logging to a higher (and unachievable) standard than other aspects of modern e-discovery.

A. The Committee should make it clear to the bench and bar that traditional document-by-document privilege logs are presumptively unnecessary.

Nothing in the Federal Rules requires parties to individually log each document. The text of Rule 26(b)(5)(A)(ii) simply requires that a producing party describe withheld information so that the requesting party can assess the claim of privilege. Moreover, the 1993 Advisory Committee Note expressly recognizes alternatives to the traditional document-by-document privilege log in certain circumstances. As a general matter, this important guidance has been wholly overlooked by the courts and legal practitioners, most of whom continue to demand painfully detailed, document-by-document logs. Some courts, however, have cited the 1993 Note

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[23] *See, e.g.*, *In Malone v. Kantner Ingredients, Inc.*, No. 4:12CV3190, 2015 WL 1470334, at *3 (D. Neb. Mar. 31, 2015) ("The discovery standard is, after all, reasonableness, not perfection." (quoting Sedona Conf., *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 204 (2007))); *Da Silva Moore*, 287 F.R.D. at 191 ("[T]he Federal Rules of Civil Procedure do not require perfection."). *See also* Sedona Conf., *The Sedona Conference Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process* 5 (Sept. 2016 Public Comment Version), https://thesedonaconference.org/sites/default/files/publications/The%2520Sedona%2520Conference%2520Commentary%2520on%2520Defense%2520of%2520Process_Public%2520Comment%2520Version_Sept%25202016.pdf (Principle 1) ("An e-discovery process is not required to be perfect, or even the best available, but it should be reasonable under the circumstances."); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010) ("In an era where vast amounts of electronic information is available for review, discovery in certain cases has become increasingly complex and expensive. Courts cannot and do not expect that any party can meet a standard of perfection."), *abrogated in part on other grounds by Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012).

[24] *E.g.*, Fed. R. Civ. P. 26(g)(1) (requiring that certification of discovery responses be informed by "a reasonable inquiry").

[25] *Firefighters' Ret. Sys. v. Citco Grp. Ltd.*, No. 13-373-SDD-EWD, 2018 WL 276941, at *6 (M.D. La. Jan. 3, 2018) (alteration omitted) (quoting *Enslin v. Coca-Cola Co.*, No. 2:14-cv-06476, 2016 WL 7042206, at *3 (E.D. Pa. June 8, 2016)) (denying motion to compel production where defendants' efforts were reasonable).

as a basis for ordering production of a modified privilege log, explaining that, in the circumstances of the case, "a document-by-document privilege log would be unduly burdensome and inappropriate."[26] The significance of the Advisory Committee Note cannot be overstated—it clearly demonstrates the drafters' intent that courts should alleviate the burdens associated with a traditional log in favor of alternative privilege logs when dealing with large document populations. The Committee should amend the rules so that document-by-document logs are presumptively unnecessary in large matters or when the burden of composing a document-by-document log would violate proportionality.

B. The Committee should adopt a presumption in favor of categorical or metadata privilege logs.

As expressly contemplated by the 1993 Advisory Committee Note, the Committee should modernize privilege log practice by adopting a presumption that a withholding party may submit a categorical[27] or metadata[28] privilege log. Several district courts have already moved in this direction to modernize privilege logging. For example, the Southern District of New York's Local Rule 26.2 specifies 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. For example, when 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." S. & E.D.N.Y. Loc. Civ. R. 26.2(c) (emphasis added). The Committee Note accompanying this rule "recognizes that, with the proliferation of emails and email chains, traditional privilege logs are expensive and time-consuming to prepare" and encourages parties to "develop efficient ways to communicate the information required." *Brown v. Barnes & Noble, Inc.*, 474 F. Supp. 3d 637, 647 (S.D.N.Y. 2019), *aff'd*, No. 1:16-cv-07333 (MKV) (KHP), 2020 WL 5037573 (S.D.N.Y. Aug. 26, 2020).

Other jurisdictions similarly expect parties to develop efficient methods of logging privilege assertions. In September 2018, the Middle District of Tennessee released an Administrative Order laying out the default standard for e-discovery, which specified: "[T]he Court expects the parties to discuss foregoing using traditional document-by-document logs in favor of alternate logging methods, such as identifying information by category or including only information from particular metadata fields (e.g., author, recipient, date)." M.D. Tenn. Admin. Order No. 174-1, § 8(b) (Sept. 12, 2018).[29] Adoption of a consistent standard in favor of alternative privilege logs in large document cases would provide predictability to parties and further the goals of just, speedy, and inexpensive resolution of litigation.

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[26] *In re Imperial Corp. of Am.*, 174 F.R.D. 475, 479 (S.D. Cal. 1997).

[27] In a categorical log, a party identifies general types of privileged documents by subject matter or some other taxonomy.

[28] Metadata logs, also known as objective privilege logs, are built based on the documents' metadata.

[29] *See also Shufeldt v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.*, No. 3:17-cv-01078, 2020 WL 1532323, at *5 (M.D. Tenn. Mar. 31, 2020).

Courts have supported categorical and metadata logs as alternatives to traditional document-by-document logs as well. In some cases, courts have noted that alternative logs "reduce the potential burdens imposed by a document-by-document privilege log in cases involving high volumes of privileged material."[30] Courts also have allowed parties to employ categorical approaches where there was no benefit to gain from a detailed document-by-document log.[31] Metadata logs can save substantial time, providing an efficient method of asserting privilege while reducing the burden on producing parties.[32] In short, bringing privilege log rules into the modern era of e-discovery requires an abdication of the document-by-document privilege log as the *de facto* standard. As one court explained, "sometimes deciding a privilege dispute does not require the make-work of a document-by-document privilege log, so long as asserting categories of documents subject to the privilege is clear enough."[33]

C. The Committee should adopt a clear presumption that redacted documents do not need to be included on a privilege log.

Requiring redacted documents to be included on a privilege log would further increase the already-burdensome process of preparing a privilege log, and should not be required. There

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[30] *Auto. Club of N.Y., Inc.*, 297 F.R.D. at 63. *See also Games2U, Inc. v. Game Truck Licensing, LLC*, No. MC-13-00053-PHX-GMS, 2013 WL 4046655, at *7 (D. Ariz. Aug. 9, 2013) (approving of a categorical approach rather than a document-by-document listing); *Williams v. City of Albany*, No. 1:18-CV-1446 (LEK/DJS), 2019 WL 4071777, at *4 (N.D.N.Y. Aug. 28, 2019); *Mfrs. Collection Co. v. Precision Airmotive, LLC*, No. 3:12-cv-853-L, 2014 WL 2558888, at *3-5 (N.D. Tex. June 6, 2014); *MCC Mgmt. of Naples, Inc. v. Arnold & Porter LLP*, No. 2:07-cv-387-FtM-29SPC, 2010 WL 2431849, at *2 (M.D. Fla. June 16, 2010) ("The sheer number of documents … render[ed] a document-by-document log unduly burdensome and unnecessary.").

[31] *See, e.g.*, *SEC v. Thrasher*, No. 92 CIV. 6987 (JFK), 1996 WL 125661, at *1 (S.D.N.Y. Mar. 20, 1996); *Fed. Deposit Ins. Corp. v. Fid. & Deposit Co. of Md.*, No. 3:11-cv-19-RLY-WGH, 2013 WL 2421770, at *8 (S.D. Ind. June 3, 2013); *Mfrs. Collection Co.*, 2014 WL 2558888, at *2 ("As to AVCO's privilege log, the dispute over its adequacy turns on whether AVCO can properly submit a log that is organized categorically and not 'document-by-document.' The Court concludes that, under these particular circumstances, AVCO can properly do so consistent with Rule 26(b)(5)(A)."); *MCC Mgmt.*, 2010 WL 2431849, at *2 ("Accordingly, defendants' category-based log is sufficient.").

[32] *See, e.g.*, Joint Stipulation and Confidentiality and Protective Order, *Tawfeeq Almoayed Bldg. Co., W.L.L. v. Site Dev. Grp., Inc.*, No. 21-cv-01989-KPF, ¶ 23 (S.D.N.Y. June 21, 2021), ECF No. 36 (permitting metadata logs).

[33] *Fed. Deposit Ins. Corp. v. Crowe Horwath LLP*, No. 17 CV 04384, 2018 WL 3105987, at *14-15 (N.D. Ill. June 25, 2018). *See also Mfrs. Collection Co.*, 2014 WL 2558888, at *3-5 (finding a document-by-document listing to be unduly burdensome and of no material benefit); *Vasudevan Software, Inc. v. Microstrategy Inc.*, No. 11-cv-06637-RS-PSG, 2012 WL 5637611, at *7 (N.D. Cal. Nov. 15, 2012) (allowing party asserting privilege over requested communications between it and its counsel to "provide categorical logs, essentially grouping documents by type and indicating how each of those categories is privileged"); *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 109 (S.D.N.Y. 2008) (allowing a categorical log, but requiring producing party to "justify its assertion of privilege with regard to each category, and the description of each category must provide sufficient information for [the compelling party] to assess any potential objections to the assertions of attorney-client privilege").

are several reasons, grounded in Federal Rule 26(b)(5), to adopt a presumption that redactions do not need to be logged.

As a practical matter, where a document is produced in redacted form the produced portion of the document itself provides information and context as to the content of the redaction, which allows the reviewing party to assess the claim as required by Rule 26(b)(5).[34] The presumption that redacted documents need not be logged may be overcome, of course, where the document is heavily redacted to the point where the basis for the privilege claim cannot be ascertained from the produced portions of the document. But where there are limited redactions and/or the produced portion sheds light on the basis of the privilege claim, logging should not be required.

Where the redacted document provides sufficient context for the privilege claim, a logging requirement is not only unnecessary but also in violation of Rule 26(b)(2)(C)'s prohibition on duplicative discovery. Rule 26(b)(2)(C) states that "the court must limit the frequency or extent of discovery … if it determines that: (i) the discovery sought is unreasonably cumulative or *duplicative, or can be obtained from some other source* that is more convenient, less burdensome, or less expensive."[35] If the information required to be included in the privilege log (e.g. date, author, recipient, etc.) is ascertainable from the produced document, then the redacted document itself is the "other source" and asking the producing party to log what can already be ascertained from the document is "duplicative" under Rule 26(b)(2)(C). Further, in a redacted document, it can be difficult to adequately describe the reason the privilege is being asserted without revealing the content of the redacted portion of the document (thus violating Rule 26(b)(5)'s admonition to not reveal information itself privileged or protected and potentially waiving the privilege).[36]

Although various courts have grappled with the issue, in most jurisdictions there is no binding authority that requires parties to create a redaction log or describe redactions in a privilege log. The issue is mostly left within the discretion of the court.[37] Given the need for consistency and predictability, the Committee should amend the rules to establish a presumption that logging redactions is not required.

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[34] *See Mid-State Auto. v. Harco Nat'l Ins. Co.*, No. 2:19-cv-00407, 2020 WL 1488741, at *4 (S.D.W. Va. Mar. 25, 2020) (holding that the privilege logs—which omitted any notes on redactions—were sufficient because the requesting party could still ascertain all the necessary information from the document itself).

[35] Fed. R. Civ. P. 26(b)(2)(C) (emphasis added).

[36] *Thrasher*, 1996 WL 125661, at *1 (more detailed disclosure would "reveal the very information that may be privileged").

[37] *Id.* (explaining that a court retains discretion to permit a party to categorize withheld information in the privilege log when "a document-by-document listing would be unduly burdensome").

D. In those cases where a document-by-document log is required, the Committee should amend the rules to make clear that logging only one communication thread constitutes a presumptively reasonable measure to reduce the burdens of preparing a privilege log.

In an effort to conserve time and money and to make litigation more efficient for both parties, producing parties in modern e-discovery often use email threading.[38] Despite the general acceptance of threading in the production of documents, there has been an emerging trend of reviewing parties requesting that each email in a particular thread be logged separately when creating a privilege log. Such a request is extremely burdensome and wholly unnecessary, requiring the creation of a separate entry for each lesser-included email as opposed to simply one entry for the most-inclusive thread. This burden will only increase as office instant messaging applications, such as Slack or Skype, and various collaboration tools, like Microsoft Teams, became more prevalent in business communications.

To address the sheer volume and duplicative nature of ESI in modern e-discovery and the burdens it brings, the Committee should adopt a clear presumption that threading (whether for email or other communication tools) is an acceptable means of achieving reasonable and proportionate discovery in the digital era. The Federal Rules do not prohibit the use of threading in privilege log practice. Rather, the Rules require only that the party asserting privilege makes the claim expressly and "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."[39] A party can most efficiently and effectively meet this requirement by providing all information relevant to the privilege claim for an entire email chain in a single privilege log entry.

Historically, courts have been divided on whether to allow threading on privilege logs,[40] but more recently, prohibitions on threading have fallen out of favor in light of the immense burden of separately listing all lesser-included emails on a privilege log in a progressively digital world.[41] Courts have recognized the benefits of threading and have ruled that threads "may be

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[38] Email threading, sometimes referred to as stringing, is an algorithmic process that groups emails and accompanying attachments from the same conversation for review and production purposes. Threading algorithms categorize emails, as well as email threads, as either most-inclusive or lesser-included. The benefits of email threading include avoiding duplicative production of the same document, minimizing the risk that the same document is coded differently, and allowing for batch coding of documents and correspondence, which exponentially reduces review time and the expenditure of resources.

[39] Fed. R. Civ. P. 26(b)(5)(A)(ii).

[40] *Compare, e.g., United States v. Davita, Inc.*, 301 F.R.D. 676, 684-85 (N.D. Ga. 2014) (collecting cases where threading was prohibited), *on reconsideration in part*, 2014 WL 11531065 (N.D. Ga. May 21, 2014), *with Muro v. Target Corp.*, 250 F.R.D. 350, 362-63 (N.D. Ill. 2007) ("A party can therefore legitimately withhold an entire e-mail *forwarding* prior materials to counsel, while also disclosing those prior materials themselves."), *aff'd*, 580 F.3d 485 (7th Cir. 2009).

[41] *See, e.g.*, *Rabin v. PricewaterhouseCoopers LLP*, No. 16-cv-02276, 2016 WL 5897732, at *2 (N.D. Cal. Oct. 11, 2016) ("[A] Party is only required to produce the most inclusive message and need not produce earlier, less inclusive

logged in a single entry provided that such entry identifies all senders and recipients appearing at any point in the thread."[42] Some courts, however, have continued to limit the use of email threading, calling the validity of this practice into doubt.[43] Thus, to promote efficiency, predictability, and consistency across federal practice, the Committee should provide a clear rule or statement in the Committee Note supporting the use of email threading in privilege log practice.

Sincerely,

Robert D. Keeling
Partner

email messages or 'thread members' that are fully contained, including attachments and including identical senders and recipients, within the most inclusive email message.").

[42] *Id.*

[43] *See, e.g.*, *In re Morgan Stanley Data Sec. Litig.*, No. 20 Civ. 5914 (AT), 2020 U.S. Dist. LEXIS 231432, at *27 (S.D.N.Y. Dec. 9, 2020) (holding that the "Producing Party may not use e-mail threading to suppress prior-in-time emails from production; however, the Producing Party may use email threading as a review efficiency tool").

From: Lawrence Anderson
To: RulesCommittee Secretary
Subject: Proposed Changes to Rule 26(b)(5)(A)
Date: Saturday, July 31, 2021 11:02:15 AM

Dear Members of the Rules Committee:

I wish to object to the proposed changes to Rule 26(b)(5)(A).

I have been practicing law for 46 years, representing people against large institutional, corporate and governmental interests. Specifically, my practice involves quite a bit of federal Rule 23 litigation against insurers involving coverage and claims practices that harm insureds. Through these years, I have ascended through all the offices of my state trial lawyers' organization, and chaired its amicus committee for over 21 years. Additionally, I have served as a state governor on the AAJ Board of Governors for over 20 years.

Over the years, the federal rules have sought to impose civility in the pre-trial discovery process by requiring informal conferences via Rule 16 and Rule 26. The proposed change to Rule 26(b)(5)(A) represents yet another example of imposition of informal conferences and loosened standards. Rather than resolve conflicts, these rules merely prolong conflicts and end up shifting the burden from those who seek to avoid discovery to those who seek to enforce discovery. This process invariably results in benefiting the large defendants whose interests is to avoid judgment day and who can afford to engage in every conceivable means to avoid judgment day. Using routinized and stereotypic privilege assertions involving nonspecific documents in Rule 26(b)(5)(A) and 26(c)(1)(G) is now a problem in every case I have in federal court. Rather than solve this problem, the proposed change to Rule 26(b)(5)(A) merely institutionalizes it.

For example, Rule 26(c)(1)(G) has good jurisprudence regarding the specificity required for designations of "trade secret and other confidential commercial information. Nevertheless, routinized, stereotypic over-designation of "trade secret or other confidential research, development or commercial information" is a routine defense tactic under Rule 26(c)(1)(G). The meet and confer provisions meant to impose civility and informal resolution of disputes now only buy time for defendants.

Busy judges seek to avoid these disputes, and often times shift to the plaintiffs the burden of dealing with this type dispute. Rather than fight this problem at its inception, lawyers who simply want the evidence accede to inappropriate protective orders. This results in a multiplicity of inappropriate over-designations sanctioned by the judiciary in stereotypic protective orders involving inappropriately designated "privilege" documents that actually have no business being so designated.

Such inappropriate protective orders merely protect information that a product or service is defective or harmful to the public, rather than a true trade secret. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1012, N.15, 104 S. CT. 2862, 81 L. Ed.2d 815 (1984) (Information that a product is harmful is not a trade secret, because it is not about giving company a competitive

edge. If disclosed, profits may decrease, but that is because the value of the product decreases, not because of loss of competitive advantage.) Id. As a result, the harmful nature of the product or service continues to be shrouded in secrecy, further injuring the public and other future litigants. Presently, I am dealing with the fourth case involving this problem.

If the Committee approves the changes to Rule 25(b)(5)(A), the changes will further allow the stereotypic over-designation of evidence under the rubric of "privilege," and deny litigants access the evidence to show products and services are dangerous and harmful to the public's interest.

Thank you for your work on this committee.

Larry Anderson

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July 30, 2021

VIA ELECTRONIC MAIL ***RulesCommittee_Secretary@ao.uscourts.gov***

Dear Discovery Subcommittee Members:

As a practicing trial attorney with nearly thirty years of experience, I write to provide my experience with allegations of privilege and privilege logs. I have had many cases where a party initially claims a blanket privilege on a number of individual documents or on categories of documents but then backs off and withdraws the claim once pushed to provide more details to support the alleged privilege. It is my sincere belief that too many attorneys use this practice as a litigation strategy in an effort to hide damaging evidence under a guise of asserted privilege. After an opposing counsel pushes back and requires the production of a privilege log with sufficient details to assess the appropriateness of the privilege, counsel often relents and produces the documents that should have been produced all along. This problem will be exacerbated further if the rule changes permitting a lawyer to designate a category of documents as privileged without detail. Such a rule would be ripe for abuse and gamesmanship, with little lawyer accountability, and will not serve the goal of the just, efficient and inexpensive resolution of claims.

Boilerplate objections are common and too frequently used as a litigation tactic to avoid or at least delay the production of appropriate and relevant (but damaging) discovery.

These problems are not limited to document-heavy cases but may be more pronounced in such cases. In cases with fewer documents, the burden of creating a detailed log is smaller. The burden will depend on the number of documents a party asserts are privileged, not the overall number of documents in the case.

Sincerely,

FRIED GOLDBERG LLC

JOSEPH A. FRIED

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July 31, 2021

Re: "Invitation for Comment on Privilege Log Practice: FRCP 26(b)(5)(A)"

Dear Members of the Discovery Subcommittee of the Advisory Committee on Civil Rules:

I am a Plaintiff trial lawyer who typically represents catastrophically injured individuals in single event, commercial motor vehicle, cases.

I have offices in Tennessee, California, and Washington employing 3-5 lawyers at any given time.

I am often in federal court and have been involved in cases in 44 states to date.

1. PROBLEMS UNDER THE CURRENT RULE

I am surprised that defendants' claim trouble complying with the privilege log requirement as in my experience the rule is ignored more than it is followed. This places a burden on the courts to determine the status of the documents BECAUSE an improper privilege log was produced without sufficient details to see if the privilege is properly asserted.

It is critical to obtain privilege logs in my cases because insurance company "Rapid Reaction/Response Teams" are often at the wreck scene before my clients can be taken to the hospital or the morgue obtaining irreplaceable evidence. I often have to pierce work product, amongst other asserted privileges, to obtain photographs, measurements, and other facts that the defendants agent obtained while the police were still present. Having an adequate log helps me determine if the privilege requirements have been met, or if they have not been met. An inadequate privilege log requires the whole issue to be placed before the Court.

In a case I handled recently, *Merriweather v. United Parcel Serv., Inc.,* 3:17-CV-349-CRS-LLK, 2018 WL 3572527, at *19 (W.D. Ky. July 25, 2018), we pierced work product and I was able to obtain both party and witness statements from the Defendants as well as other

materials that were critical to the case. The Court in *Merriweather* went on to address typical issues in inadequate privilege logs that require a Motion to Compel and the Court's time:

> The objecting party must be specific enough in its objections to support its privilege, but not too specific so as to divulge privileged information. Id. "In order to meet the requirements of the Federal Rules and justify a claim of privilege, therefore, a privilege log must contain sufficient factual content to allow the court to reach the conclusion that each element of that privilege is fulfilled." *Mafcote, Inc. v. Federal Ins. Co.,* No. 3:08-CV-11, 2010 WL 1929900, at *5 (W.D. Ky. May 12, 2010). Courts in this circuit and elsewhere have explained that privilege logs should include the following elements: "(a) The author(s) and all recipients (designated so as to be clear who is the sender and who the receiver), along with their capacities/roles/positions;
>
> (b) The document's date;
>
> (c) The purpose and subject matter of the document; and
>
> (d) The nature of the privileged asserted, and why the particular document is believed to be privileged."

See *Polylok, Inc. v. Bear Onsite, LLC*, 2017 WL 1102698, at *6 (W.D. Ky. Mar. 23, 2017); *Madison v. Nationwide Mut. Ins. Co.,* No. 1:11-CV-157-R, 2012 U.S. Dist. LEXIS 141319, at *8 (W.D. Ky. Sep. 28, 2012); *Mafcote, Inc. v. Fed. Ins. Co.*, 2010 WL 1929900 (W.D. Ky. May 12, 2010); see also *Osborn v. Griffin*, No. 11-89-WOB-CJS, 2013 WL 5221663, at *2 (E.D. Ky. Sep. 17, 2013); *Brubaker v. Encompass Prop. & Cas. Co.*, 2008 U.S. Dist. LEXIS 40133, at *2 (E.D. Mich. May 19, 2008); *Jones v. Hamilton County Sheriff's Dep't,* 2003 WL 21383332, at *4 (S.D. Ind. June 12, 2003); *Allen v. Chicago Transit Auth.,* 198 F.R.D. 495, 498 n. 1 (N.D. Ill. 2001); *Allendale Mut. Ins. Co. v. Bull Data Sys.,* 145 F.R.D. 84, 88 (N.D. Ill. 1992); *Smith v. Logansport Cmty. Sch. Corp.,* 139 F.R.D. 637, 648-49 (N.D. Ind. 1991).

Here, while Defendant UPS' privilege log includes one receiver per document, it does not indicate whether it includes all of the receivers. Knowing the identity of each receiver of the document(s) is helpful in determining whether the documents are protected by privilege. See *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999) (quoting *Burkhead & Scott, Inc. v. City of Hopkinsville*, No. 5:12-CV-00198-TBR, 2014 WL 6751205, at *3, 2014 U.S. Dist. LEXIS 166374, at *7 (W.D. Ky. Dec. 1, 2014) (The attorney-client privilege is waived by voluntary disclosure of private communications by an individual or corporation to third parties)).

*20 Additionally, the produced privilege log does not explain which documents correspond to each request to produce. Defendant UPS has asserted objections to a total of fourteen requests to produce (only five of which are at issue in this motion) based on attorney-client and/or work-product privilege, and has listed fourteen documents on the

produced privilege log. Since the burden is on Defendant UPS to be "specific enough in its objections to support its privilege," it is incumbent on Defendant UPS to match the alleged privileged documents to the responses to requests to produce. See *Polylok, Inc. v. Bear Onsite, LLC*, 2017 WL 1102698, at *7 (W.D. Ky. Mar. 23, 2017) (citing United States v. Moss, 9 F.3d 543, 550 (6th Cir. 1993) (The burden to establish the applicability of the privilege is upon the defendants.)). Therefore, in addition to the revisions listed above, Defendant UPS should supplement the privilege log with the required information or produce the documents.

The lack of a privilege log has been such a problem I have added introductory language to my discovery sets, specifically to address what is required, without much success. My, typically ignored, language:

> **CLAIMS OF PRIVILEGE:** If any privilege or immunity is claimed as to any document otherwise covered by this Request, Plaintiff hereby requests that each document for which a privilege or immunity is claimed be identified in a manner such that Defendant and the Court may determine whether or not each such document is entitled to be accorded such privileged status. Including:
>
> (a) The Title of the Document
> (b) author(s), all recipients (designated so as to be clear who is the sender and who the receiver), and to whom else the document was shown.
> (c) The Authors and recipients' capacities/roles/positions
> (d) The document's date
> (e) The purpose/subject matter of the document
> (f) The nature of the privileged asserted, and why the particular document is believed to be privileged.
> (g) The question (number) to which the document is responsive

I will also add that I work with defense lawyers that, once a proper privilege log is generated, will also provide a stack of materials that they concede are not actually covered by the original assertion of privilege. **I find a proper and complete privilege log is critical to fair discovery.**

2. <u>POSSIBLE RULE CHANGES TO SOLVE PROBLEMS</u>

I do think the Court's should have a form privilege log for uniformity. Currently what is, and is not, in a privilege log is based on case law and must be researched jurisdiction by jurisdiction. What is and is not in a privilege log is often a debated issue which frequently ends up in court. There is no uniformity among the various jurisdictions. **A privilege log should be detailed enough, by document, that all parties and the Court can easily see whether the asserted privilege is appropriate.**

3. OTHER CONSIDERATIONS

Disclosing only broad categories of documents would NOT be helpful and would make it much harder to for a party to determine if fighting for documents was an appropriate use of the Court's time and energy. In an abundance of caution, it is more likely a party would feel a Motion to Compel was necessary to ensure no document was missed BUT this approach comes at great cost as FRCP 37(5) states "the court must … require the [loosing] party… to pay the… reasonable expenses incurred in making the motion, including attorney's fees." (emphasis added)

I believe it is **patently unfair** to allow the side with the documents to self-categorize them in such a way that a Motion to Compel needs to be filed to simply see what is there. This vague, broad category approach, can easily be used as a "set up" of diligent counsel, forcing them to pay costs and fees under Rule 37 when an adequate privilege log would have prevented the Motion from being filed in the first place.

Respectfully Submitted,

Morgan Adams
Founder, Truck Wreck Justice, PLLC

BAILEY & OLIVER
LAW FIRM

July 31, 2021

Re: "Invitation for Comment on Privilege Log Practice"

Dear Members of the Discovery Subcommittee of the Advisory Committee on Civil Rules:

On behalf of Bailey and Oliver Law Firm, I respectfully write to express my concerns with attempts to reduce providing of basis for the assertion of privilege of documents in a privilege log. This is in direct response to considerations of amendment to Rule 26(b)(5)(A).

As a plaintiff trial lawyer specializing in personal and catastrophic injuries in a variety of contexts across the nation for more than 40 years, my experience with Rule 26 and its implications on privilege logs is storied. I have found privilege logs to be essential case determinants in many scenarios and have seen an abundance of approaches taken to limit their scope and ultimately reduce evidence collection measures, contrary to the goals of discovery.

Judges across the country have taken note of such attempts on multiple occasions. It is well understood that the use of "boilerplate" privilege objections is entirely common, and our firm has found that blanketed techniques of protecting crucial information under the guise of privilege are to be expected in most cases – regardless of magnitude and scope of the case. This has proven to be the case within our great state of Arkansas, but especially in cases we have tried in federal courts. We have found that clear, detailed, concise, and enforceable guidelines for privilege logs are a method of combatting malicious attempts of removing evidence.

Amending Rule 26(b)(5)(A) to allow for more broad designations in regard to categorization of documents allows for greater abuse and circumvention of evidence collection efforts. Even with detailed privileged logs, we have found improper claims of privilege to be mainstay, which then requires extensive effort to determine and prove that such is the case.

We have found that broad categorization of privileged documents often leads to packaged forms of protection that include improper designation of privilege for essential individual documents. In this manner, specific pieces of evidence are often buried. This is especially the case for emails and internal documents, which are usually improperly grouped into categories of "attorney communications" and claimed to be "work product in anticipation of litigation" respectively. Timing of creation of these documents is often blurred and claimed to be privileged when it is in fact not. The process of pinpointing what is rightfully privileged and what isn't can be especially difficult because of these methods of concealment. Without detailed privilege logs in many of these scenarios, it becomes nearly impossible to identify and uncover often critical evidence for a case.

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Plaintiff lawyers around the country tend to agree that evidence that is pushed by defendants to fall under the scope of privilege is oftentimes some of the most important evidence of a case. Broad attempts to mischaracterize evidence as privileged are often an indicator of fault on behalf of the defendant, and allowing for removal of this evidence would limit the goals of maintaining clear and open jury trials. Our firm has always taken the approach that evidence is to be presented clearly and quickly at its earliest possibility, regardless of its damaging impact on the plaintiff or defendant. Detailed privilege logs have allowed us to operate under this approach when defendants are uneager to work with us in the discovery process.

For the reasons outlined, our firm opposes any limitation in the requirement of identifying basis for claims of privilege and work product. Any amendment of Rule 26(b)(5)(A) is surely to be considered on a statewide basis and will undoubtably have sweeping effects across the country. Thoughts of amendment should be considered with such context and should consider the many shared opinions submitted by lawyers in all parts of the country.

Respectfully submitted on behalf of Bailey and Oliver Law Firm,

Frank H. Bailey
Trial Attorney

CLA | CONSUMER LITIGATION ASSOCIATES
Attorneys and Counselors at Law

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July 31, 2021

By email only

The Hon. John D. Bates
The Hon. Robert M. Dow, Jr.
Chairs Advisory Committee Rules
Committee Rules of Practice and Procedure of
the Judicial Conference of the United States
Washington, DC
RulesCommittee_Secretary@ao.uscourts.gov

Re: *Comment on Proposed Changes to Rule 26(b)(5)(A)*

Dear Judges Bates and Dow:

Please accept these comments regarding privilege-log practice and a suggestion to amend Federal Rule of Civil Procedure 26(b)(5)(A), which includes the possibility of permitting parties withholding information as privileged to log such information by category. I have spent more than 20 years in civil litigation, with the largest portion of that representing plaintiffs in federal court. This experience, covering more than 1,000 cases in which I have been lead or co-lead counsel in individual and class-action cases, gives me significant insight regarding the practical application and operation of the discovery rules. I firmly believe that clear requirements for privilege logging protect efficiency and fairness, while categorical logging does not conserve resources, invites additional disputes, and permits abuse of the unilateral ability to withhold relevant information by asserting claims of privilege that are questionable.

Most of the cases I regularly litigate would be characterized as "large document" cases described in the invitation for comments.[1] In my cases, many of which are filed in the Eastern District of Virginia, a document-by-document listing is demanded. While that District has not adopted a local rule setting out the requirements for a privilege log, the routine practice there is to include line-item descriptions of the documents withheld. Nothing about that is unusual or unexpected. Some Districts, as you are likely aware, have gone further, adopting practice guidelines explaining the courts' expectations for a proper privilege log:

> (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian,

[1] *See* https://www.uscourts.gov/sites/default/files/invitation_for_comment_on_privilege_log_practice_0.pdf at 2.

> and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.[2]

The District of Nebraska has adopted a similar process in its template Order for Initial Progression of Case, in which it sets out the precise information a privilege log must contain, as well as the requirement that such information be provided for each document.[3] Such guidance prevents boilerplate privilege logs, and forces those seeking to withhold documents on a claim of privilege to actually engage in some thoughtful analysis to ensure that assertions of privilege are valid and would withstand scrutiny. Proper, informative logging saves court dockets from the unneeded clutter of motions to compel, while simultaneously preserving court and party resources.

A recent, high-profile example presents the type of problems I expect a system of categorical logging would foster. In *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR (TSH) (N.D. Cal.), Apple sought to clawback three email documents that it claimed were privileged and inadvertently produced. *Epic* ECF 512. In each instance, an Apple in-house attorney was copied on the email, which Apple argued made the discussions protected by the attorney-client privilege. *Id.* Two of the documents, the court noted in disagreeing with Apple's arguments, were "a clear example of business people including a lawyer in an email chain in the incorrect belief that doing so makes the email privileged. It does not." *Id.* Indeed, the court further explained, both documents reflected purely business discussions, with no legal advice sought or provided in either message. *Id.* As to the third message, while Apple claimed that in-house attorneys provided legal advice when they edited and commented upon an attachment to the email, the court again disagreed because no legal advice was present nor could a reader "glean from this document what the legal advice or edits were (you can't), so it is not privileged." *Id.* It is not difficult to imagine similar, or even more egregious, occurrences should a more relaxed standard for logging documents be implemented.

As to any burden in separately logging documents, modern electronic discovery tools and vendor applications greatly reduce the difficulties of logging privileged documents. Documents can be electronically culled and segregated, privileges asserted across multiple documents, and logs created by software programs that permit detailed descriptions to be added with minimal effort. Further, such programs assist producing parties by permitting automatic searches of documents or ESI for key words such as "privilege," "advice," or the names of attorneys, which adds additional simplicity and automation to log creation. Such programs are commonplace if not ubiquitous, assuaging any concerns that continuing with the Rule's current structure is so burdensome or difficult that changes are necessary.

Along these same lines, Federal Rule of Evidence 502's clawback provisions reduce, if not eliminate, any possible concerns about difficulties in creating logs. FED. R. EVID. 502(d). That Rule provides that the producing party can first disclose documents and, if an error occurs, retrieve them and create the necessary logs.

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[2] https://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf at App. A, p. 120.
[3] https://www.ned.uscourts.gov/internetDocs/forms/ipo.pdf, ¶ 5.

Separately, I find stipulations useful to limit difficulties in logging documents. In my cases, for example, we regularly agree with opponents that no discovery requests should be interpreted as seeking attorney-client communications since the attorney was retained in the litigation. Thus, no such communications need be logged, providing additional relief from any purported burden in creating a privilege log.

Because the ability to identify and log privileged information is one-sided, with the decision making almost solely in the hands of the party who would prefer to disclose as little information as possible, a transparent system is paramount. I anticipate that permitting categorical logging will greenlight all manner of gamesmanship, if not outright malfeasance, from counsel who would view such a change as a license to abuse the assertion of privilege and make litigation more opaque. I therefore urge the Committee to refrain from any changes to the current process.

Thank you for permitting comments on this important proposal.

Very truly yours,

Leonard A. Bennett

LAB/ccm

August 1, 2021

Advisory Committee on Civil Rules
Attn: Discovery Subcommittee
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Invitation for Comment on Privilege Log Practice

Dear Members of the Discovery Subcommittee of the Advisory Committee on Civil Rules,

The American Association for Justice ("AAJ") hereby submits these comments in response to the Subcommittee's Invitation for Comment on Privilege Log Practice. AAJ, with members in the United States, Canada, and abroad, works to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or wrongdoing of others. AAJ advocates to ensure that all plaintiffs, including employees, consumers, patients, families, shareholders, and businesses injured by corporations, receive proper access to the courts under fair, just, and reasonable rules.

AAJ members, who represent plaintiffs in individual personal injury cases, class actions, and mass torts, regularly use the Federal Rules of Civil Procedure, including Rule 26(b)(5)(A), in their practices. AAJ members commonly encounter issues with privilege logs, the use of which spans across practice area and case size. Recognizing that this Subcommittee is in its initial stages of considering whether a rule change is needed to address perceived problems with privilege logs, AAJ submits that it is not. The detailed privilege logs that are typically used in civil litigation are an essential tool for completing discovery. A change to the Federal Rules of Civil Procedure to further address privilege logs is likely to do more harm than good by making it easier for key documents to be hidden, slowing down cases, and burdening the courts with unnecessary ancillary litigation.

I. Rule Changes Are Not Needed To Address Privilege Logs.

Privilege logs are often the most reliable way to identify and challenge improper designations of privilege and prevent discovery abuse. Access to information is a key component of discovery, especially in high-volume document cases: one party has all of the relevant information at their disposal and the other does not know what information exists. Attorneys requesting documents need to be able to demonstrate instances in which the party asserting

privilege has over-withheld relevant material; privilege logs are necessary to mount challenges and obtain those pertinent documents.

To that end, Rule 26(b)(5)(A) is working as it currently exists. The Rule requires a party claiming privilege to disclose enough information about withheld documents to allow the other party to assess the claim of privilege and determine whether the claim should be challenged. As intended, the Rule serves as a check against a party that wants to avoid full disclosure or production of information and is effective at protecting against baseless assertions of privilege. If the party claiming privilege was not required *by Rule* to disclose the specifics of those materials they claim privilege over (including details such as the authors, recipients, and subject matter), receiving attorneys would have little recourse to compel disclosure or otherwise challenge such designations.

When disagreements occur, such as a dispute over documents not being produced or whether privilege was correctly asserted, privilege logs serve as a starting point to formulate an objection. Parties are generally able to resolve these matters by conversing and negotiating amongst themselves, including by creating claw-back agreements and ESI protocols. In the event agreement is not reachable or in the case of serious wrongdoing, courts are able to sufficiently handle problems that arise. For example, courts have assisted parties with oversight and review of documents and even awarded sanctions for egregious misconduct.[1] Finally, members of AAJ have filed comments with this Subcommittee discussing their cases in which defendants' privilege logs contained wrongfully withheld documents.[2]

A change to Rule 26 is likely to create new problems. For example, addressing issues faced by high-volume document cases by limiting what is required in a privilege log creates unnecessary problems for smaller-volume document cases, such as making it difficult to identify key documents, and would open the door to even more gamesmanship by the party completing the privilege log. And, there is no way to determine a meaningful threshold for what constitutes a high-volume document case. Such changes will only lead to additional litigation between parties attempting to obtain or withhold documents. These "problems" are all the type that can be (and often are) easily worked out by parties. While there may be some common overlap in the type of issues experienced by parties, AAJ posits that it is nearly impossible for a rule change that will work for all without harming some.

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[1] *See, e.g.*, *In re Capital One Bank Credit Card Interest Rate Litig.*, 286 F.R.D. 676 (N.D. Ga. 2012) (credit card issuer engaged in bad faith with respect to privilege log entered, warranting waiver of its attorney-client privilege as a sanction); *Fox v. California Sierra Fin. Servs.*, 120 F.R.D. 520 (N.D. Cal. 1988) (finding monetary sanctions warranted for defendants' failure to comply with order regarding privilege logs).

[2] Examples include *Vioxx Prods. Liab. Litig.*, MDL 1657 (E.D. La.), in which the court found only 491 of 30,000 documents to be privileged; *In re Avandia Marketing Sales Practices & Prods. Liab. Litig.*, MDL No. 1871 (E.D. Pa.), where defendant was eventually ordered to redo its privilege log and produce improperly withheld documents; *In re Marriott Data Breach Litig.*, MDL No. 2879 (D. Md.), in which, after categorical logging failed, over 13,000 relevant documents were produced; *In re Case Associated with Zaremba v. Biomet, Inc.* (Fla. 12th Cir. Ct.), in which over 73,000 documents were claimed to be privileged, including attachments to emails that were designated categorically (which designation the court later rejected)—over 71,000 withheld documents were later produced.

II. Possible Rule Changes Under Consideration.

This Subcommittee has outlined possible rule amendments that it is considering, including a revision to require categories of documents instead of document-by-document listings and a revision that would enumerate categories of documents that need not be identified. Detailed privilege logs are supremely important in litigation. In cases where tens of thousands of documents are produced, there are often tens of thousands more that are withheld on the basis of privilege. Once a detailed privilege log outlining these documents is produced and examined, however, many of the documents initially withheld are determined not to in fact be privileged, and are produced. The amendments being considered by the Subcommittee would frustrate the production of a detailed privilege log and, therefore, AAJ opposes either such amendment.

a. A revision to Rule 26(b)(5)(A) to require categories of documents.

A suggestion has been made to revise Rule 26(b)(5)(A) to require *categories* of documents to be listed rather than reference to specific documents, or indicating that a document-by-document listing is not routinely required. The purpose of providing a privilege log is to provide a specific description of documents to aid the opposing party and courts in substantiating a claim of privilege.[3] Requiring only categories, or indicating that documents do not routinely need to be listed, would frustrate the main purpose of the Rule and privilege log practice by allowing parties to circumvent providing a specific factual description of documents.

Categorical logging does not allow the parties to address the issues of whether a document is truly protected. A privilege log featuring only categories would take away the specific details surrounding each document, which are needed to allow the party receiving the log to adequately investigate and determine whether an incorrect claim of privilege has been made. The creation of a privilege log is no doubt much more onerous in those cases with a massive library of documents. However, requiring far less information than the current Rule would make it easier for the party claiming privilege to hide key documents, a harm that does not outweigh any burden of production.

AAJ heard anecdotally from members that a case in which categorical logging was attempted resulted in months of disagreement about how those categories should be defined, only to lead to the parties completing traditional document-by-document logging in the end. Plaintiffs then challenged designations and defendants produced thousands more relevant documents that were initially marked as privileged. Categorical logging complicates discovery. It allows the producing party to group documents into general categories, claim privilege, and makes it much more difficult for the receiving party to timely access the most accurate information it needs to evaluate the privilege claim. As a result, privilege disputes become more burdensome, time consuming, and costly, negatively impacting the just, speedy, and inexpensive resolution of litigation.

[3] Fed. R. Civ. P. 26, Notes of Advisory Committee on Rules—1993 Amendment. *See also Waymo LLC v. Uber Tech., Inc.*, 319 F.R.D. 284 (N.D. Cal. 2017); *FMC Corp. v. Trimac*, 2000 WL 1745179, at * 1 (N.D. Ill. Nov.27, 2000) ("The purpose of a privilege log is to enable the opposing party and the Court to evaluate the applicability of the asserted privilege...").

b. Amendment to Rule 26(b)(5)(A) that enumerates categories of documents that do *not* need to be identified.

A rule change written in the negative is a flawed approach. Not only would the Advisory Committee become bogged down in disagreements over what documents do not need to be included and how to draft such a proposal, but there will be cases where specifically excluding documents impacts a document that is not technically privileged, but is now excluded by the rule. No two cases are the same, and there cannot be certainty that any one case is *not* going to involve information that is part of a category excluded by rule.

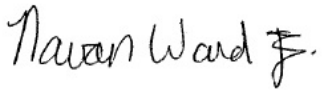
When discussing privilege logs, AAJ members have almost universally shared one main issue that arises in such situations: when a General Counsel or other legal counsel is improperly added to an email or part of a discussion for the sole purpose of attempting to protect items that are not otherwise privileged. In such scenarios, the privilege log producing party will claim attorney-client privilege when, in reality, counsel was only added for the improper purpose of forcing the document to become "privileged." In this scenario, a rule that for example specifically excludes documents that mention the General Counsel or emails where the General Counsel or member of a legal department is copied even though the document or email is not related to a legal matter nor mentions a legal issues would allow the producing party to hide otherwise discoverable documents.

Excluding by rule certain documents from a privilege log will make investigations by the party receiving the log nearly impossible. Such a rule would invite gamesmanship in attempts to slow down cases, raise litigation costs for plaintiffs without deep pockets, and make it easier for parties to hide relevant material. Finally, this would be a problem in business-to-business commercial litigation, with large corporations on both sides of a case.

* * *

AAJ thanks the Subcommittee for its work on reviewing this important issue, however respectfully requests that the Subcommittee remove from consideration any changes to the Federal Rules of Civil Procedure to address privilege logs. While perhaps a more arduous task in the age of digital media, the creation of privilege logs remains a vital tool to helping litigation reach a just result. Please direct any questions regarding these comments to Susan Steinman, AAJ Senior Director of Policy and Senior Counsel, at susan.steinman@justice.org or (202) 944-2885.

Respectfully submitted,



Navan Ward, Jr.
President
American Association for Justice

From: kaw_wexlerwallace.com
To: RulesCommittee Secretary
Subject: Proposed amendments to Rule 26(b)(5) re privilege logs
Date: Sunday, August 01, 2021 9:53:53 AM

To Whom This May Concern:

My name is Kenneth A. Wexler. I have represented plaintiffs in complex litigation for more than 30 years. Privilege logs are an important tool intended to ensure that the alleged wrongdoer cannot improperly conceal evidence of its liability. The current Rule 26(b)(5) provides a clear, workable standard. The parties meet and confer before and after privilege logs are produced; they are able to resolve most disputes because the rule requires the producing party to share a baseline, minimum amount of information. The information currently required under Rule 26(b)(5) allows plaintiffs to identify the subset of documents that may have been improperly withheld, resulting in a narrower set of disputes over a specific number of documents, which, in my experience, can typically be resolved without judicial intervention. In many cases, this process leads defendants to reconsider their privilege assertions in whole or in part, providing plaintiffs' with access to key documents and information.

Amending the rule to provide less information, or to forgo a document-by-document analysis in favor of broad categories or labels, will jeopardize plaintiffs' substantive discovery rights by frustrating their ability to meaningfully challenge the privilege assertions as to specific, key documents. In addition, it will unnecessarily multiply the time and expense of litigation for all parties and the judiciary.

A rule allowing defendants to serve privilege logs that describe documents only in broad labels or categories would undermine, for example, plaintiffs' ability to analyze whether key witnesses authored and/or received documents during critical periods of the case, whether the nature of the communication was relevant to any key issues in dispute, and whether, in fact, the communication involved an attorney (thus potentially justifying assertions of attorney-client privilege or work product). Such an amendment would make disputes over privilege assertions broader, not narrower, and potentially require more judicial involvement to address more documents – i.e., an entire category as opposed to a few documents/entries. It would also result in many, many more hours of attorney time conferring about discovery matters simply to ascertain the scope of documents withheld under a broad category or label, including to obtain the type of information typically disclosed on privilege logs under current Rule 26(b)(5), rather than focusing on the substantive work of the case. As the existing rule provide the possibility for a producing party to seek a protective order that modifies the rules requirements in unduly burdensome situations, there is no logical reason to make the proposed changes.

Respectfully,

Kenneth A. Wexler

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From: Cristin Traylor
To: RulesCommittee Secretary
Cc: drcohen_reedsmith.com; kaylee@edrm.net; mary@edrm.net
Subject: Comment on Privilege Log Practice
Date: Sunday, August 01, 2021 11:15:28 AM
Attachments:

Dear Members of the Discovery Subcommittee of the Advisory Committee:

This is in response to your request for comments to the Discovery Subcommittee of The Judicial Conference Advisory Committee on Civil Rules, on whether to change FRCP 26(b)(5)(A). We are submitting these comments on behalf of the EDRM Privilege Log Team. As you may be aware, EDRM is a volunteer multidisciplinary organization that includes lawyers (some of whom primarily represent plaintiffs and some of whom primarily represent defendants), as well as current and former judges, and other legal professionals (including paralegals, e-discovery analysts, IT, privacy, security, information governance and other professionals).

We have two current contributions for your Subcommittee's consideration:

1. The EDRM Streamlined Privilege Protocol

There is a broad consensus among litigation attorneys and judges that current practices for privilege logging are not optimal for many cases. In cases with large productions and a significant number of privileged documents, the traditional preparation of privilege logs is burdensome, time consuming, and frequently not particularly useful for requesting parties to evaluate the privilege claims. In response to these concerns, the EDRM Privilege Log Team drafted the attached Privilege Log Protocol, aimed at reducing costs and burdens for producing parties while providing more useful information for receiving parties. That includes broader use of FRE 502(d) non-waiver orders, advance identification of "gray area" issues, removing any need to log certain kinds of documents (including those prepared after the litigation begins and documents produced in redacted form), and reliance on metadata-generated logs for electronic documents, but with an opportunity for the receiving party to request and obtain additional information about a sample of documents they select, to help them evaluate and test the overall accuracy of privilege determinations. The protocol also encourages more communications between parties, and the use of Special Masters to resolve any privilege issues the parties are unable to resolve themselves, with courts able to apportion costs based on whether the privilege claims and challenges are substantially justified.

The EDRM Privilege Log Protocol was presented to a panel of judges at last November's Georgetown Advanced E-Discovery Conference and received

unanimous “buy-in” from the four Federal District Judges and Magistrate Judges who volunteered to review new/innovative ideas as part of that program.

We recommend that the Discovery Subcommittee consider revising Rule 26(b)(5)(A), or the comments thereto, to incorporate some or all of the principles reflected in the EDRM Privilege Log Protocol, and to encourage the use of such protocols.

2. The EDRM Privilege Log Survey

In order to obtain more systematic feedback from practitioners about privilege procedures, and potential amendment of Rule 26(b)(5)(A), we surveyed EDRM participants with regard to their views and experiences and also made the survey available to the public via social media over a three-day period. To date, 115 professionals have responded to the survey, and we have summarized those results below.

Demographics

The vast majority of the respondents were located in the United States, and the roles were almost evenly split between attorneys and other legal professionals. Large law firms were approximately half of the attorney respondents, with the other half coming from a mix of medium law firms, small law firms, in-house legal departments, ALSPs/consultants, government and other organizations. Half of the respondents primarily represent producing parties, while the other half represent both producing and requesting parties. 75% primarily represent business entities. Seven respondents primarily represent requesting parties, and only 6 primarily represent individuals.

Summary

Although 70% of the respondents support amendment of Rule 26(b)(5)(A), the vast majority believe that a privilege log in **some** format (including alternatives to document-by-document logs with manually drafted descriptions) generally improves accountability about privilege determinations. There were a mix of responses as to whether privilege logs have led to disclosures that actually impacted the outcome of a matter or were used as trial exhibits. Interestingly, 63% of respondents are already using “metadata only” privilege logs in their matters and 88% said that parties have been willing to negotiate alternatives. The respondents themselves were overwhelmingly in favor of a protocol such as the EDRM Privilege Log Protocol, that starts with a metadata log and then allows the requesting party to obtain more information about a sample of documents. The write-in comments contain a number of helpful suggestions about issues to consider, including threading, redacted documents, name normalization, and whether privilege logs should be created in the first instance.

To the extent more data is helpful to your deliberations, we have included the total results of the survey to date.

All the referenced materials are included in the attached zip file.

We hope this information is helpful to the analysis that the Discovery Subcommittee currently is undertaking. If we can be of further assistance in your further deliberations, please do not hesitate to be in touch.

Best,
Cristin Traylor, Chair of the EDRM Privilege Log Committee

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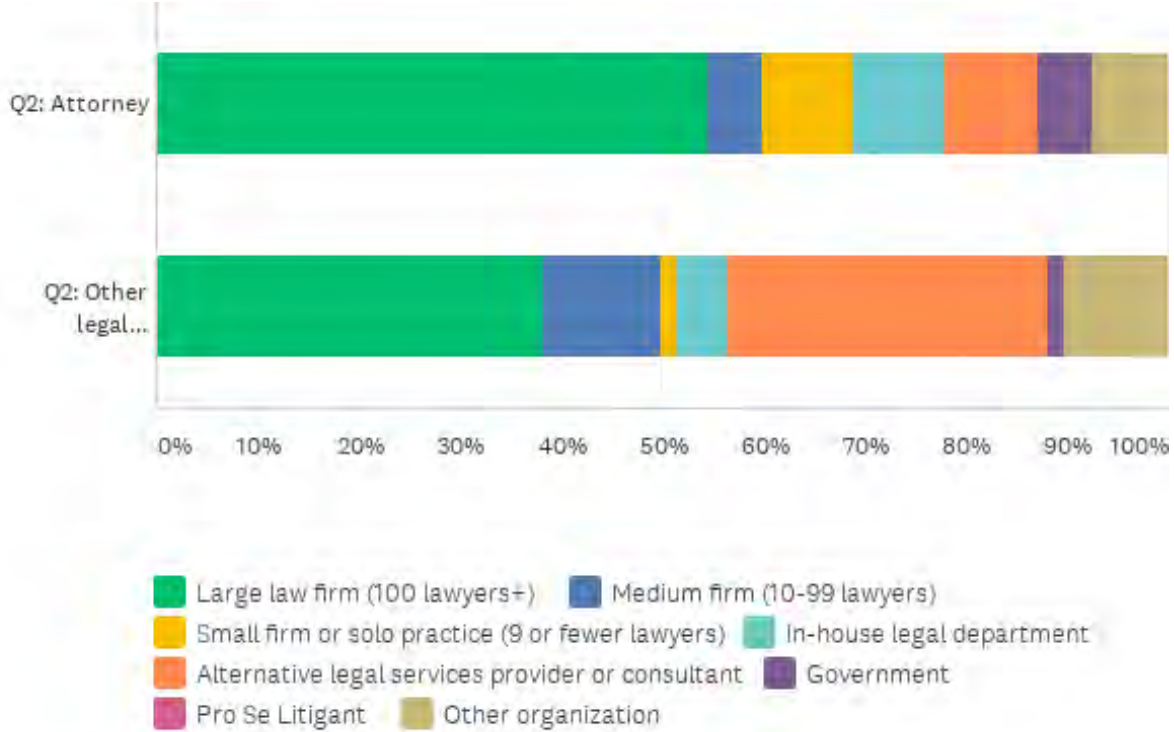
EDRM Global Privilege Log Survey Results

Survey conducted 7/28/21-7/30/21

115 Total Responses

Q1: What type of organization do you work in?

Answered: 115 Skipped: 0



Q1: What type of organization do you work in?

Answered: 115 Skipped: 0

	LARGE LAW FIRM (100 LAWYERS+)	MEDIUM FIRM (10-99 LAWYERS)	SMALL FIRM OR SOLO PRACTICE (9 OR FEWER LAWYERS)	IN-HOUSE LEGAL DEPARTMENT	ALTERNATIVE LEGAL SERVICES PROVIDER OR CONSULTANT	GOVERNMENT	PRO SE LITIGANT	OTHER ORGANIZATION	TOTAL
Q2: Attorney	54.55% 30	5.45% 3	9.09% 5	9.09% 5	9.09% 5	5.45% 3	0.00% 0	7.27% 4	47.83% 55
Q2: Other legal professional	38.33% 23	11.67% 7	1.67% 1	5.00% 3	31.67% 19	1.67% 1	0.00% 0	10.00% 6	52.17% 60
Total Respondents	53	10	6	8	24	4	0	10	115

Q2: What is your role?

Answered: 115 Skipped: 0

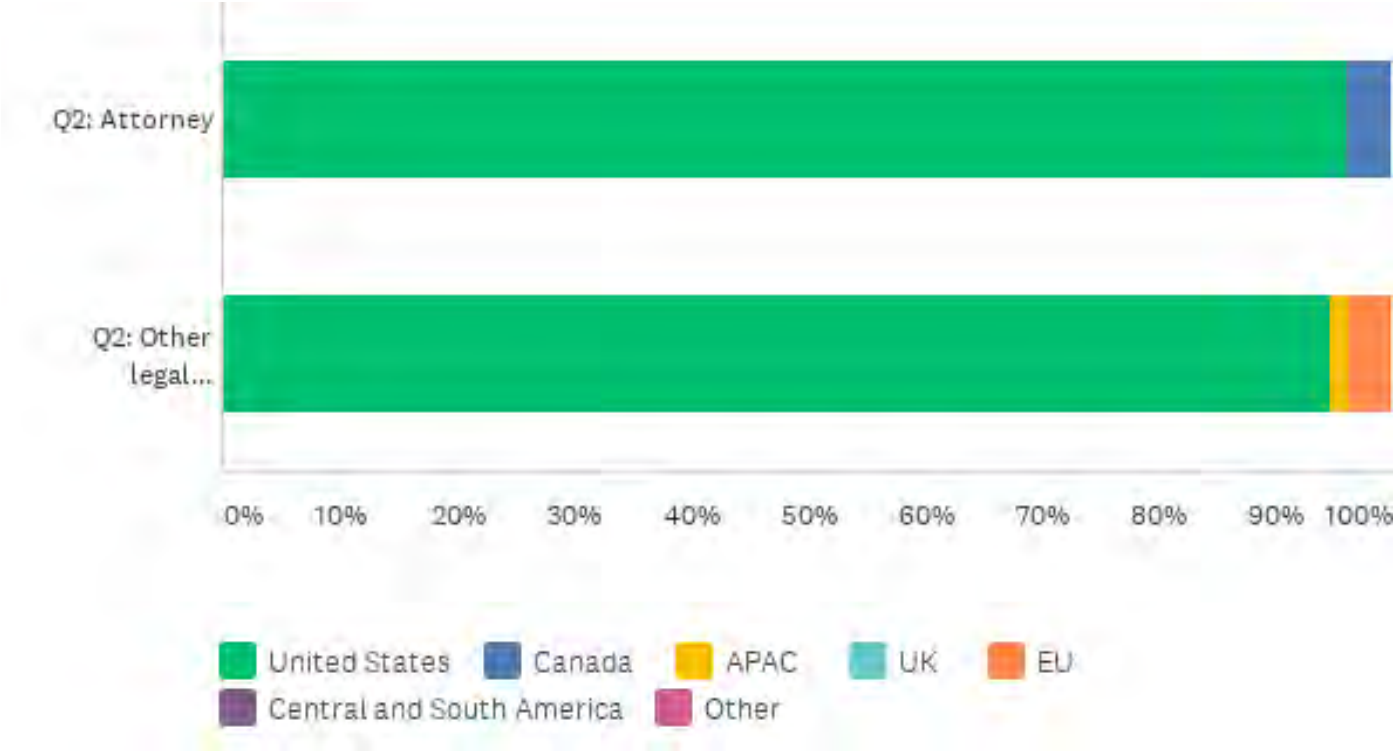
Q2: What is your role?

Answered: 115 Skipped: 0

	ATTORNEY	OTHER LEGAL PROFESSIONAL	TOTAL
Q2: Attorney	100.00% 55	0.00% 0	47.83% 55
Q2: Other legal professional	0.00% 0	100.00% 60	52.17% 60
Total Respondents	55	60	115

Q3: Where are you located?

Answered: 115 Skipped: 0



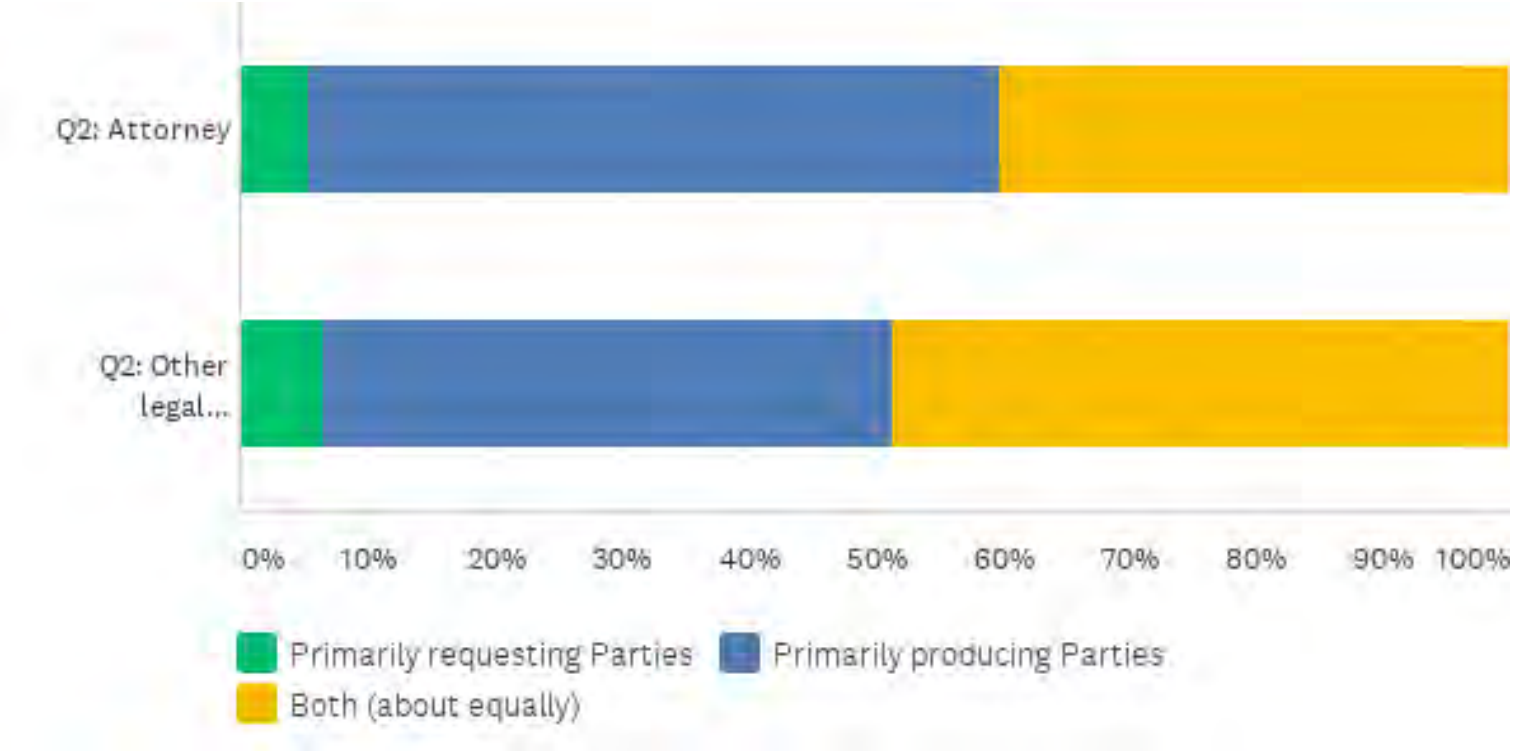
Q3: Where are you located?

Answered: 115 Skipped: 0

	UNITED STATES	CANADA	APAC	UK	EU	CENTRAL AND SOUTH AMERICA	OTHER	TOTAL
Q2: Attorney	96.36% 53	3.64% 2	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	47.83% 55
Q2: Other legal professional	95.00% 57	0.00% 0	1.67% 1	0.00% 0	3.33% 2	0.00% 0	0.00% 0	52.17% 60
Total Respondents	110	2	1	0	2	0	0	115

Q4: Do you primarily represent requesting or producing parties, or both?

Answered: 115 Skipped: 0



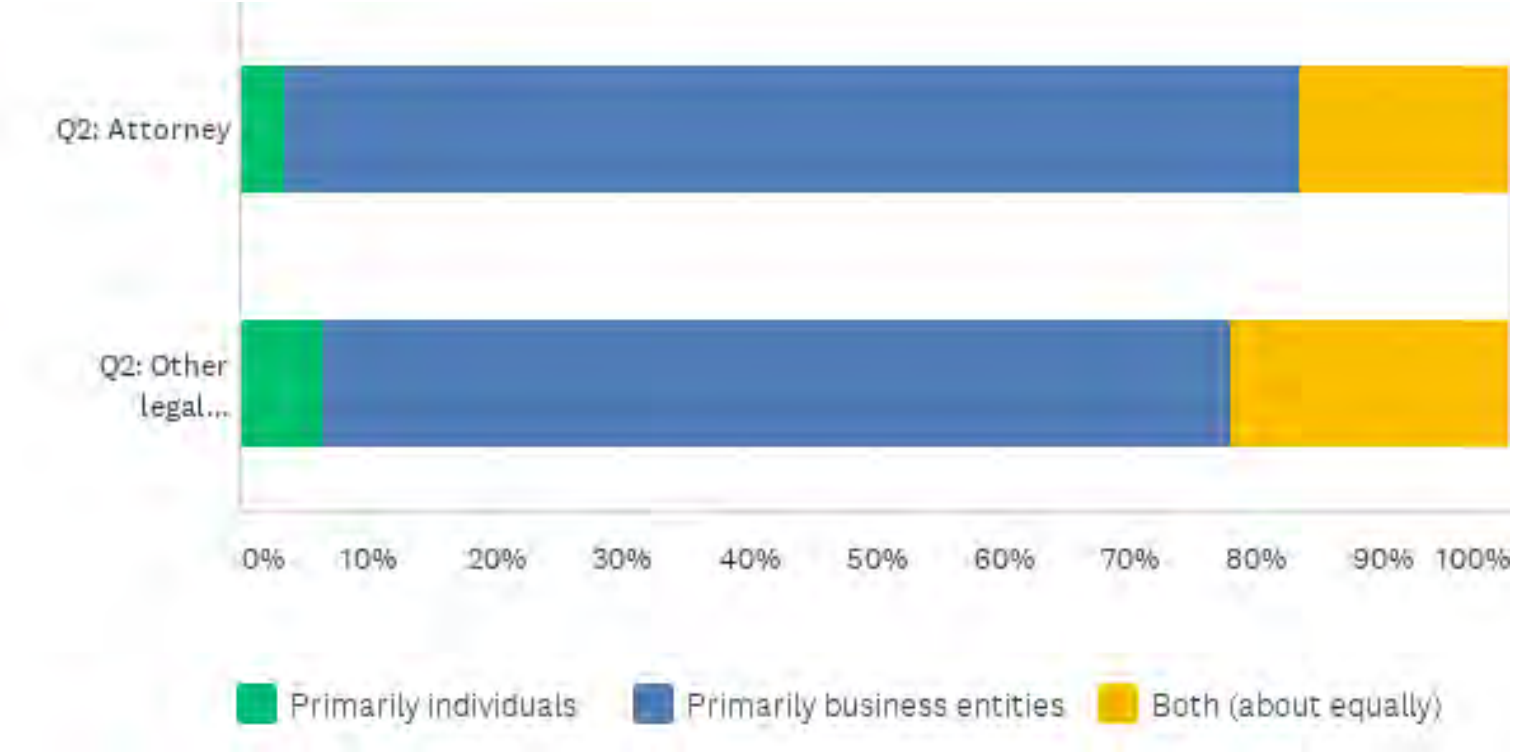
Q4: Do you primarily represent requesting or producing parties, or both?

Answered: 115 Skipped: 0

	PRIMARILY REQUESTING PARTIES	PRIMARILY PRODUCING PARTIES	BOTH (ABOUT EQUALLY)	TOTAL
Q2: Attorney	5.45% 3	54.55% 30	40.00% 22	47.83% 55
Q2: Other legal professional	6.67% 4	45.00% 27	48.33% 29	52.17% 60
Total Respondents	7	57	51	115

Q5: Do you primarily represent individuals or business entities in litigation, or both?

Answered: 115 Skipped: 0



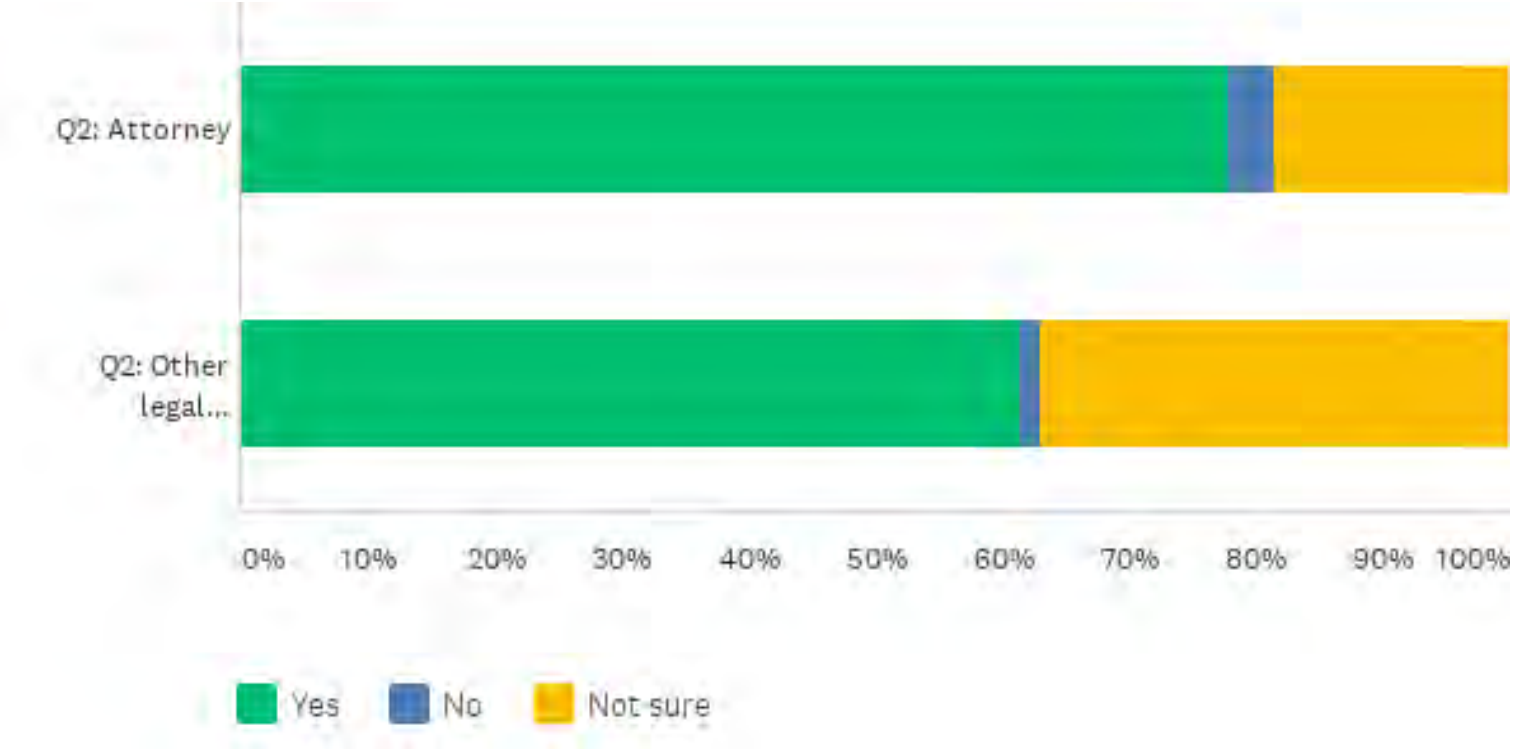
Q5: Do you primarily represent individuals or business entities in litigation, or both?

Answered: 115 Skipped: 0

	PRIMARILY INDIVIDUALS	PRIMARILY BUSINESS ENTITIES	BOTH (ABOUT EQUALLY)	TOTAL
Q2: Attorney	3.64% 2	80.00% 44	16.36% 9	47.83% 55
Q2: Other legal professional	6.67% 4	71.67% 43	21.67% 13	52.17% 60
Total Respondents	6	87	22	115

Q6: Do you believe the language of Rule 26(b)(5)(A) can be improved?

Answered: 115 Skipped: 0



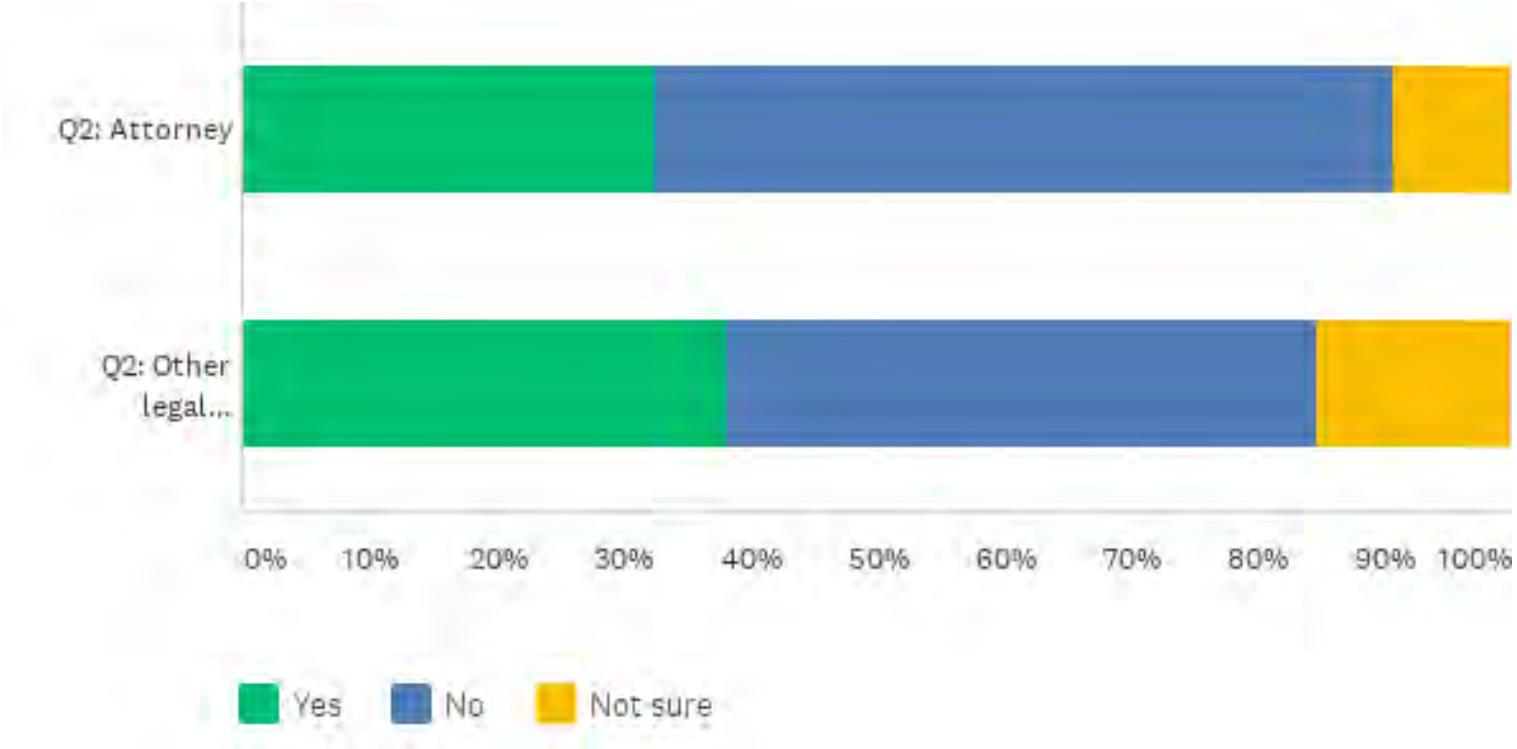
Q6: Do you believe the language of Rule 26(b)(5)(A) can be improved?

Answered: 115 Skipped: 0

	YES	NO	NOT SURE	TOTAL
Q2: Attorney	78.18% 43	3.64% 2	18.18% 10	47.83% 55
Q2: Other legal professional	61.67% 37	1.67% 1	36.67% 22	52.17% 60
Total Respondents	80	3	32	115

Q7. Do you believe that, in most cases, the value the requesting party receives from a privilege log outweighs the burden on the producing party to prepare the privilege log?

Answered: 115 Skipped: 0



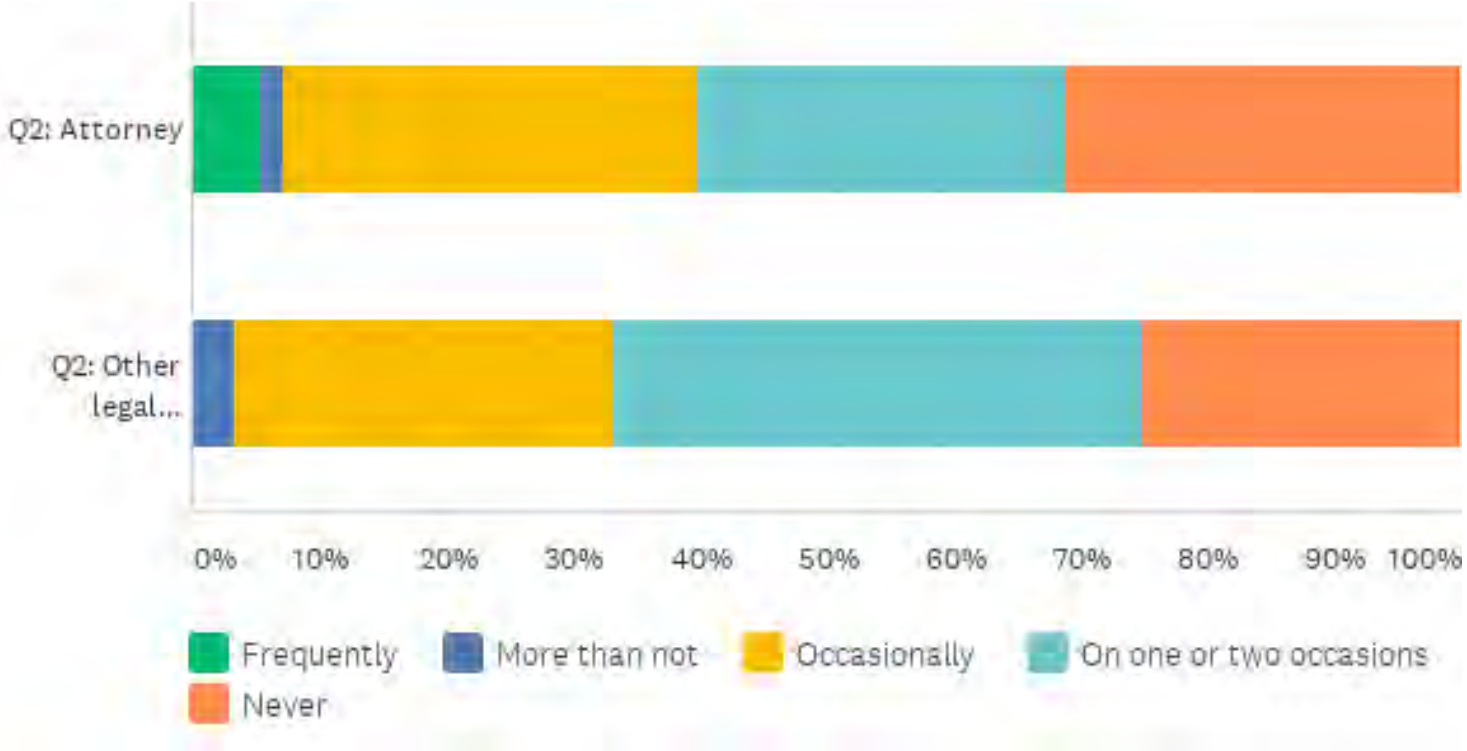
Q7. Do you believe that, in most cases, the value the requesting party receives from a privilege log outweighs the burden on the producing party to prepare the privilege log?

Answered: 115 Skipped: 0

	YES	NO	NOT SURE	TOTAL
Q2: Attorney	32.73% 18	58.18% 32	9.09% 5	47.83% 55
Q2: Other legal professional	38.33% 23	46.67% 28	15.00% 9	52.17% 60
Total Respondents	41	60	14	115

Q8: In your experience, how often have privilege logs led to additional disclosures that actually impacted the outcome of a litigation matter?

Answered: 115 Skipped: 0



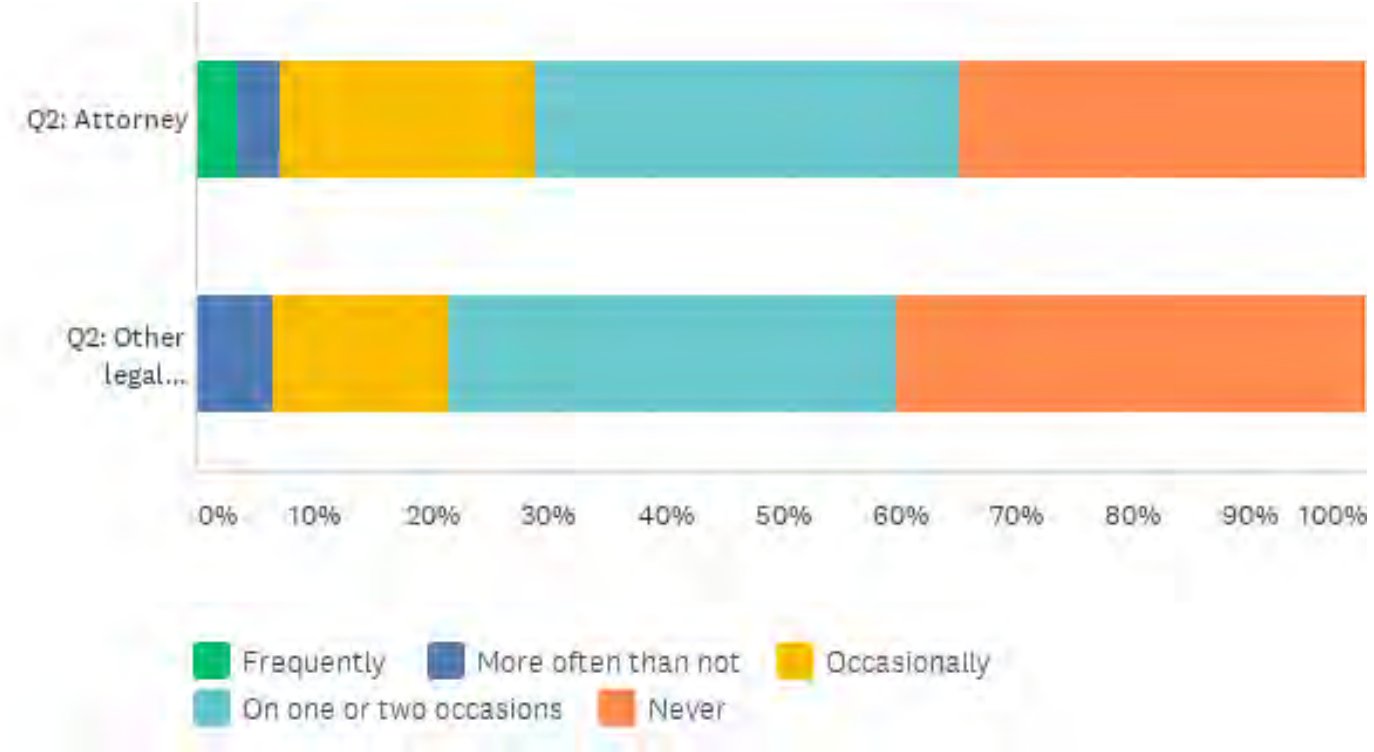
Q8: In your experience, how often have privilege logs led to additional disclosures that actually impacted the outcome of a litigation matter?

Answered: 115 Skipped: 0

	FREQUENTLY	MORE THAN NOT	OCCASIONALLY	ON ONE OR TWO OCCASIONS	NEVER	TOTAL
Q2: Attorney	5.45% 3	1.82% 1	32.73% 18	29.09% 16	30.91% 17	47.83% 55
Q2: Other legal professional	0.00% 0	3.33% 2	30.00% 18	41.67% 25	25.00% 15	52.17% 60
Total Respondents	3	3	36	41	32	115

Q9: In your experience, how often have privilege logs led to disclosures of documents that ended up as trial exhibits?

Answered: 115 Skipped: 0



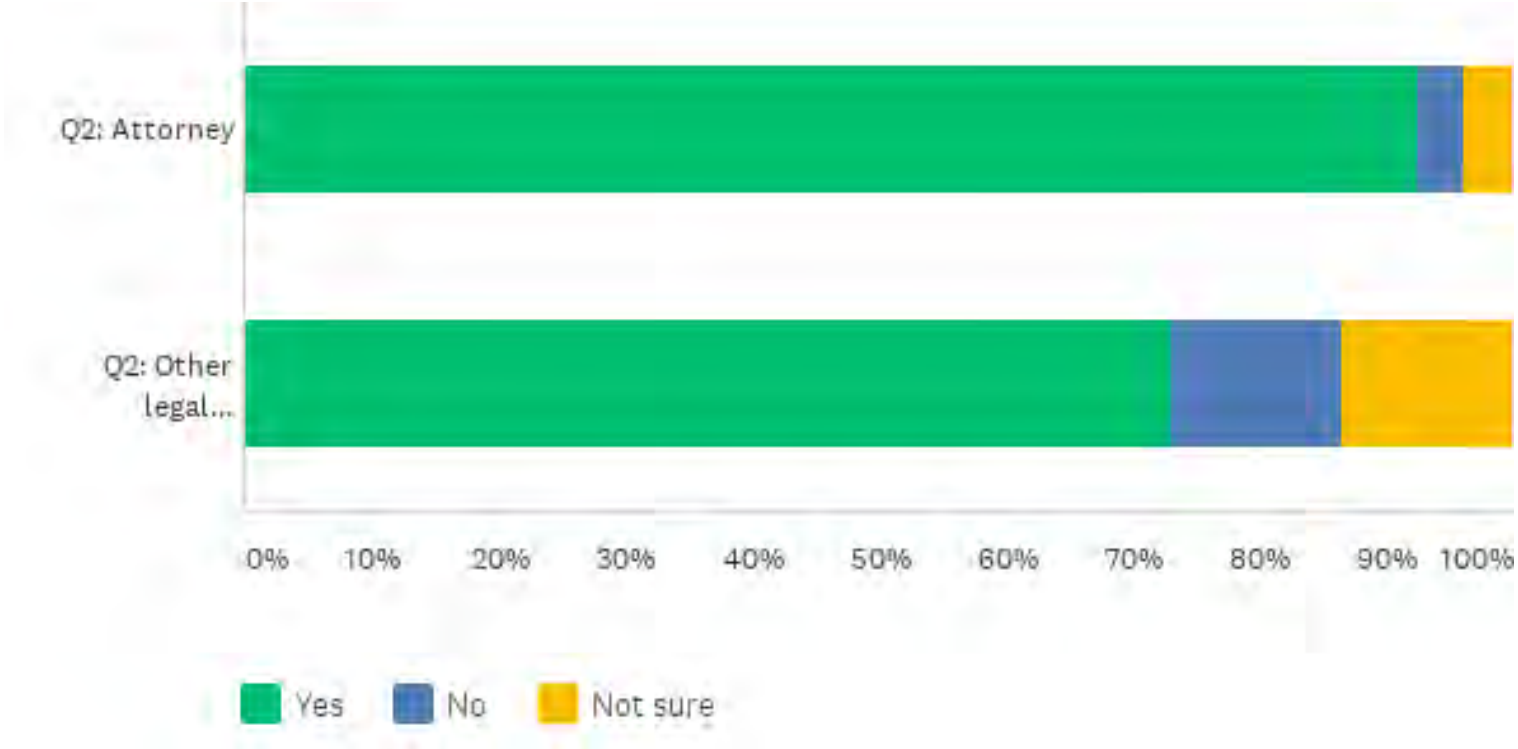
Q9: In your experience, how often have privilege logs led to disclosures of documents that ended up as trial exhibits?

Answered: 115 Skipped: 0

	FREQUENTLY	MORE OFTEN THAN NOT	OCCASIONALLY	ON ONE OR TWO OCCASIONS	NEVER	TOTAL
Q2: Attorney	3.64% 2	3.64% 2	21.82% 12	36.36% 20	34.55% 19	47.83% 55
Q2: Other legal professional	0.00% 0	6.67% 4	15.00% 9	38.33% 23	40.00% 24	52.17% 60
Total Respondents	2	6	21	43	43	115

Q10: Do you believe that some type of privilege log (in whatever format) generally improves accountability about privilege determinations?

Answered: 115 Skipped: 0



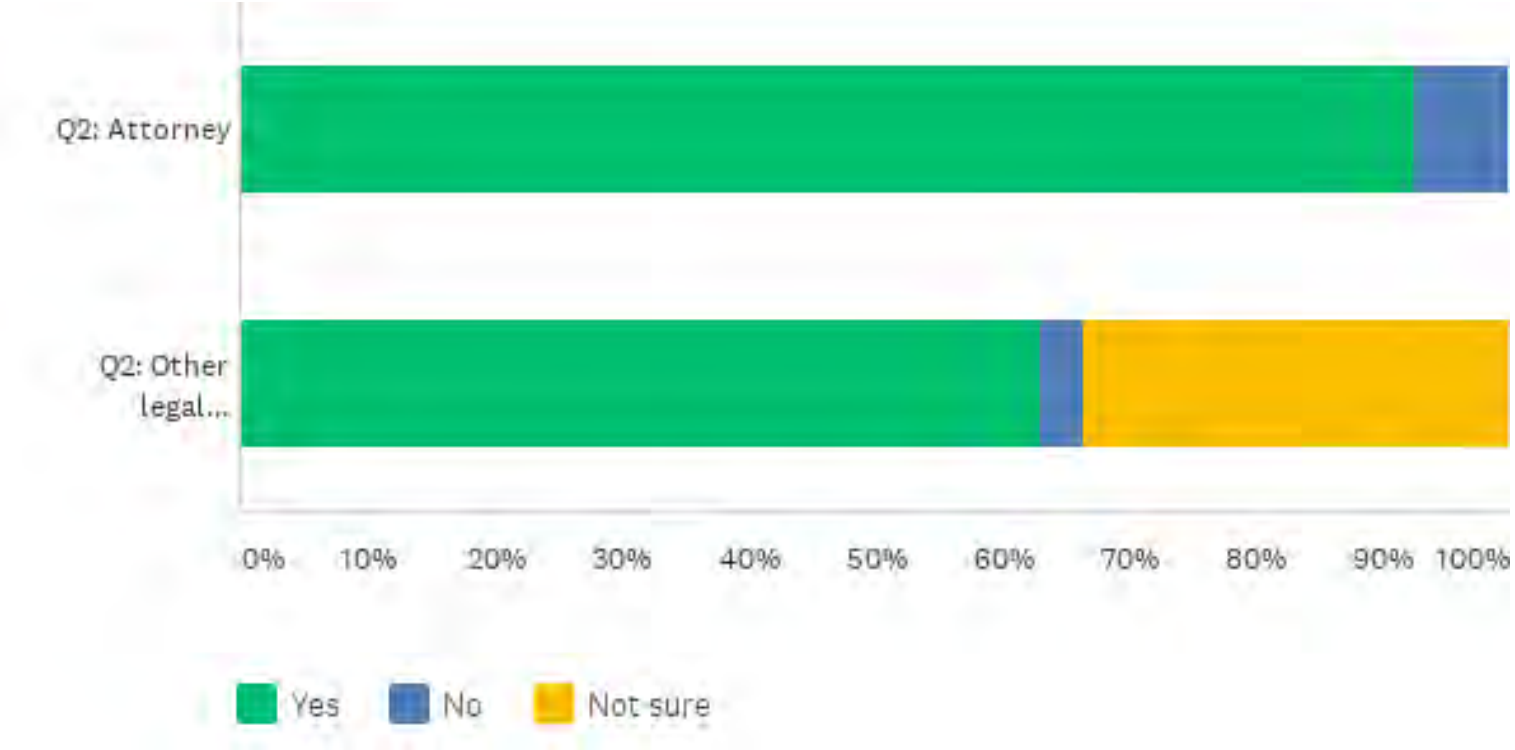
Q10: Do you believe that some type of privilege log (in whatever format) generally improves accountability about privilege determinations?

Answered: 115 Skipped: 0

	YES	NO	NOT SURE	TOTAL
Q2: Attorney	92.73% 51	3.64% 2	3.64% 2	47.83% 55
Q2: Other legal professional	73.33% 44	13.33% 8	13.33% 8	52.17% 60
Total Respondents	95	10	10	115

Q11: Do you believe that there are alternatives to document-by-document privilege logs that maintain a reasonable level of accountability about privilege determinations?

Answered: 115 Skipped: 0



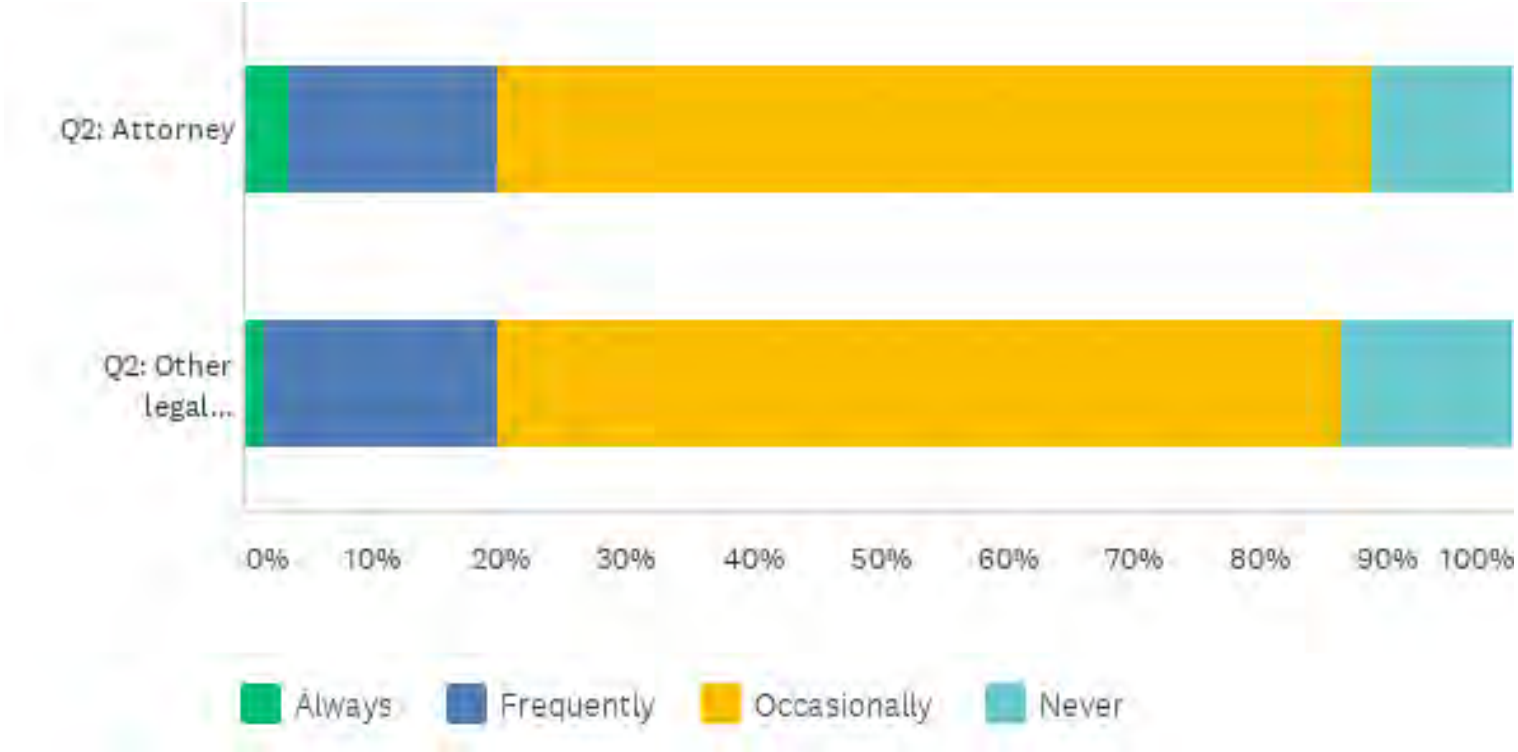
Q11: Do you believe that there are alternatives to document-by-document privilege logs that maintain a reasonable level of accountability about privilege determinations?

Answered: 115 Skipped: 0

	YES	NO	NOT SURE	TOTAL
Q2: Attorney	92.73% 51	7.27% 4	0.00% 0	47.83% 55
Q2: Other legal professional	63.33% 38	3.33% 2	33.33% 20	52.17% 60
Total Respondents	89	6	20	115

Q12. In your experience, are parties willing to negotiate alternatives to traditional privilege logs (which usually include manual document-by-document descriptions)?

Answered: 115 Skipped: 0



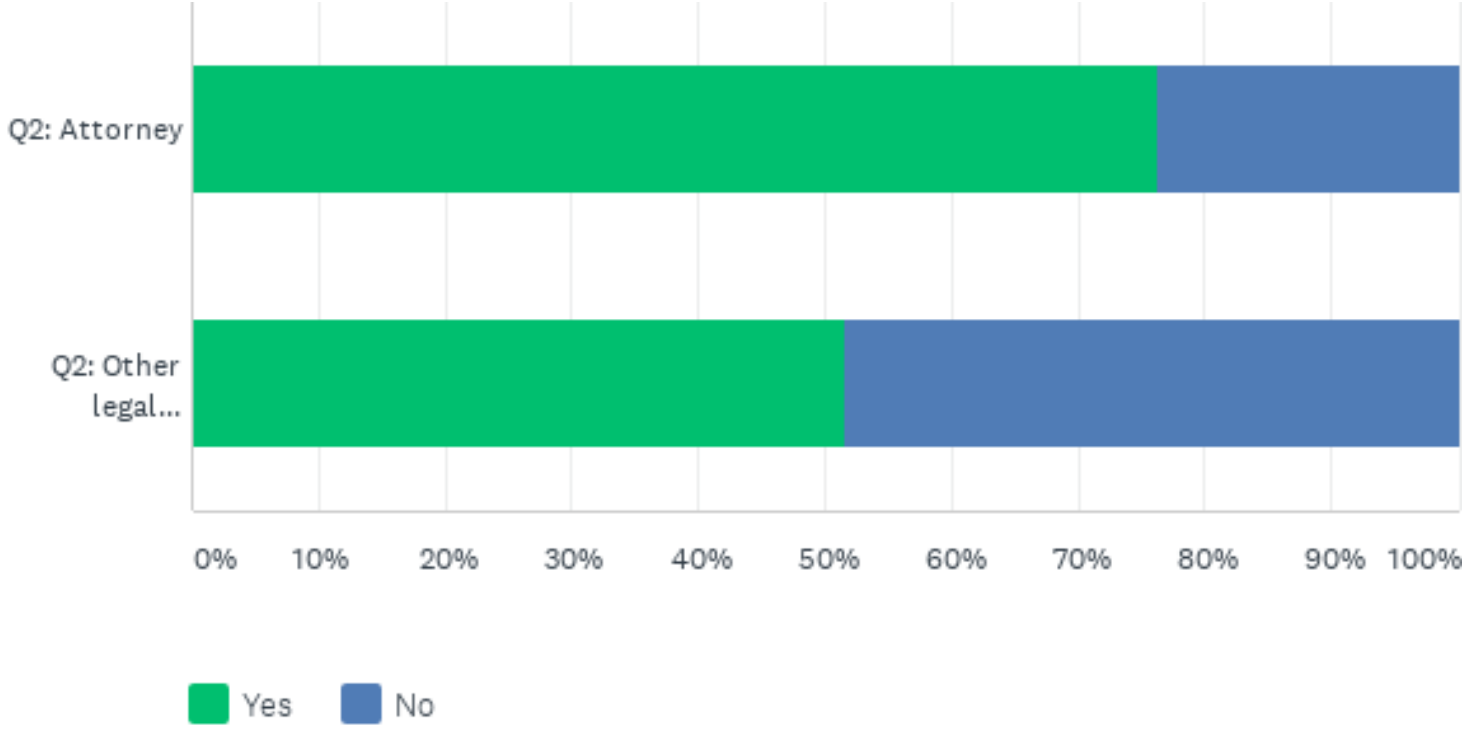
Q12. In your experience, are parties willing to negotiate alternatives to traditional privilege logs (which usually include manual document-by-document descriptions)?

Answered: 115 Skipped: 0

	ALWAYS	FREQUENTLY	OCCASIONALLY	NEVER	TOTAL
Q2: Attorney	3.64% 2	16.36% 9	69.09% 38	10.91% 6	47.83% 55
Q2: Other legal professional	1.67% 1	18.33% 11	66.67% 40	13.33% 8	52.17% 60
Total Respondents	3	20	78	14	115

Q13: Have you ever produced or received a “metadata only” privilege log that did not contain manually created descriptions for most entries?

Answered: 115 Skipped: 0



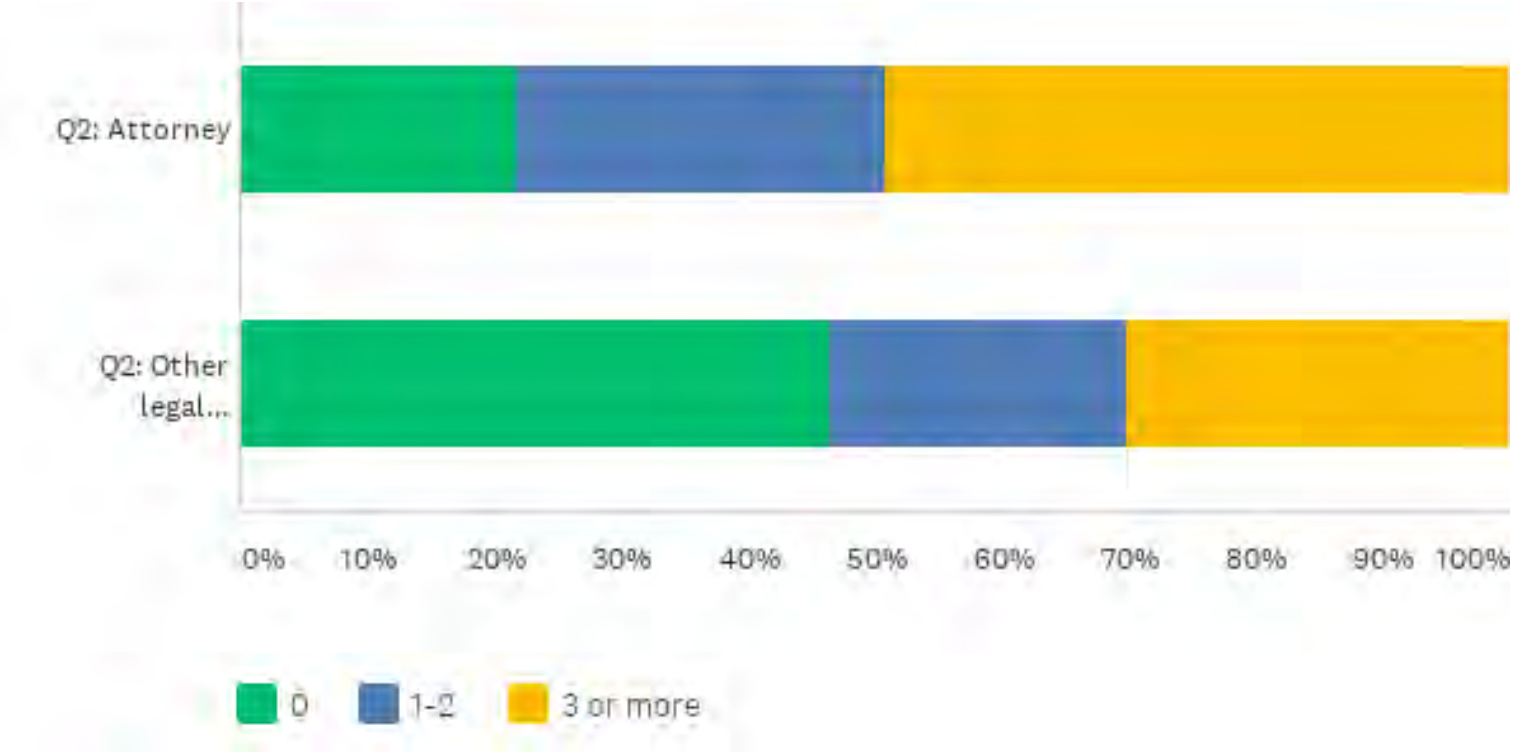
Q13: Have you ever produced or received a “metadata only” privilege log that did not contain manually created descriptions for most entries?

Answered: 115 Skipped: 0

	YES	NO	TOTAL
Q2: Attorney	76.36% 42	23.64% 13	47.83% 55
Q2: Other legal professional	51.67% 31	48.33% 29	52.17% 60
Total Respondents	73	42	115

Q14: If so, in how many cases?

Answered: 115 Skipped: 0



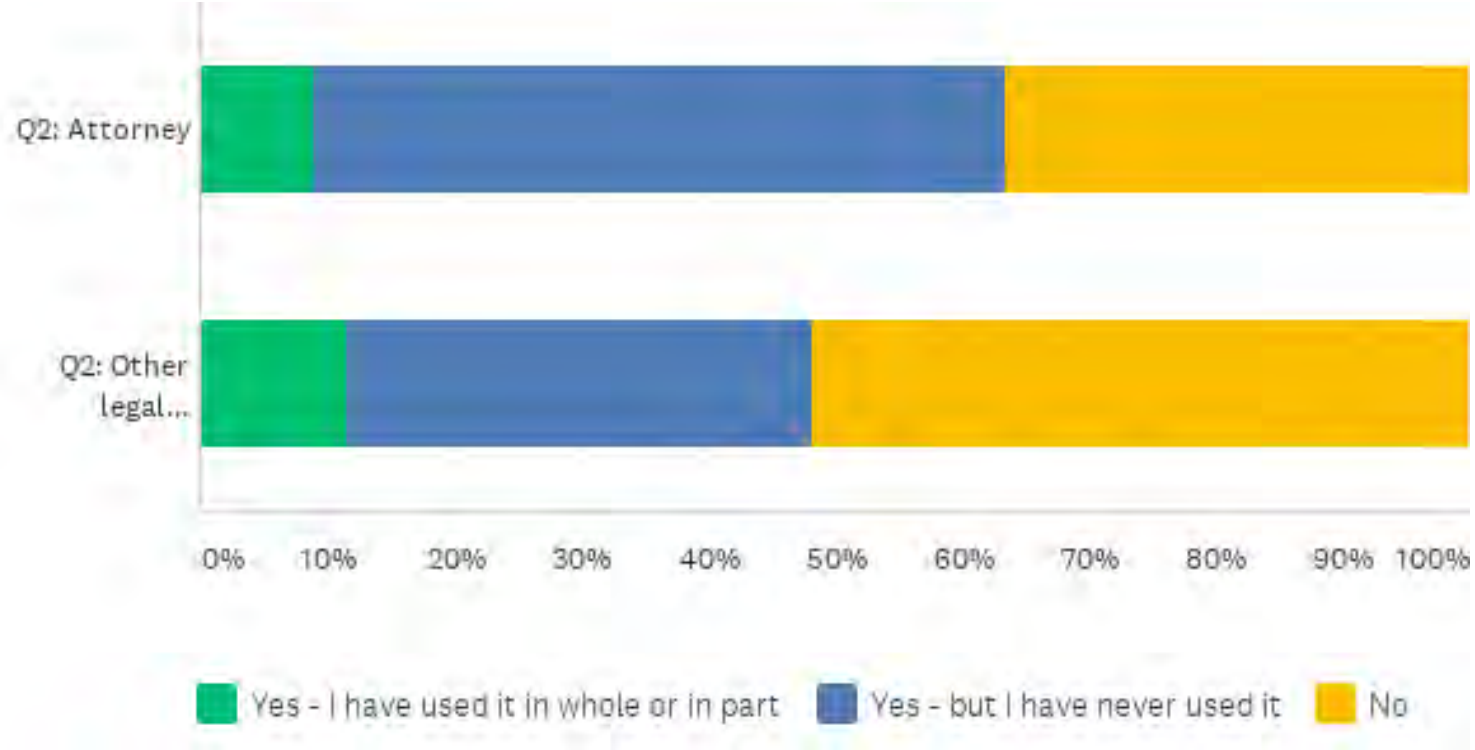
Q14: If so, in how many cases?

Answered: 115 Skipped: 0

	0	1-2	3 OR MORE	TOTAL
Q2: Attorney	21.82% 12	29.09% 16	49.09% 27	47.83% 55
Q2: Other legal professional	46.67% 28	23.33% 14	30.00% 18	52.17% 60
Total Respondents	40	30	45	115

Q15: Are you familiar with the EDRM Privilege Log Protocol?

Answered: 115 Skipped: 0



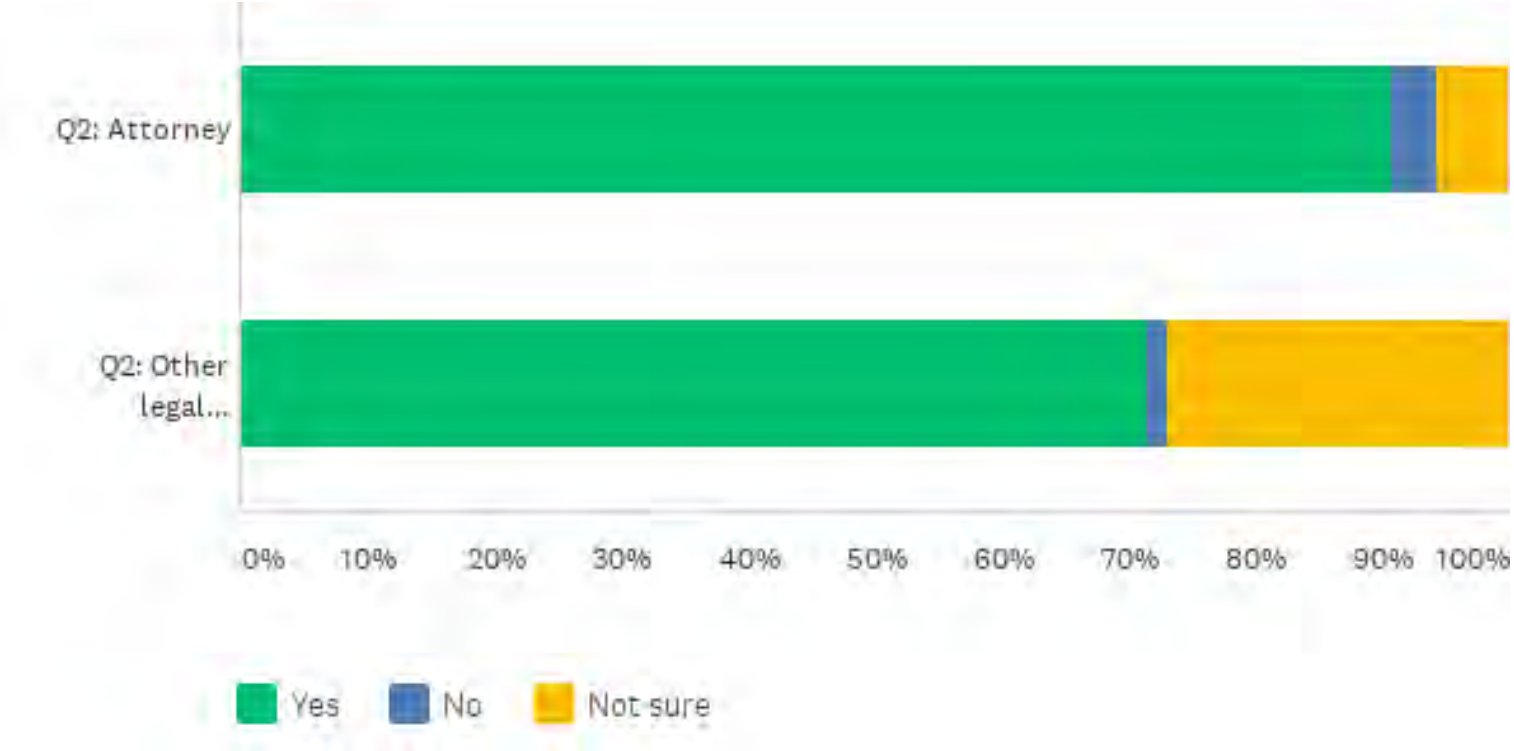
Q15: Are you familiar with the EDRM Privilege Log Protocol?

Answered: 115 Skipped: 0

	YES - I HAVE USED IT IN WHOLE OR IN PART	YES - BUT I HAVE NEVER USED IT	NO	TOTAL
Q2: Attorney	9.09% 5	54.55% 30	36.36% 20	47.83% 55
Q2: Other legal professional	11.67% 7	36.67% 22	51.67% 31	52.17% 60
Total Respondents	12	52	51	115

starts with information from metadata and then allows requesting parties to obtain more information about a sample of documents that they may select?

Answered: 115 Skipped: 0



starts with information from metadata and then allows requesting parties to obtain more information about a sample of documents that they may select?

Answered: 115 Skipped: 0

	YES	NO	NOT SURE	TOTAL
Q2: Attorney	90.91% 50	3.64% 2	5.45% 3	47.83% 55
Q2: Other legal professional	71.67% 43	1.67% 1	26.67% 16	52.17% 60
Total Respondents	93	3	19	115

Responses	Tags
As written, RUle 26(b)(5)(A) only requires that the witholding party "describe the nature of the [ESI]" - it does NOT require a privilege log ! It does NOT require parties to follow any set protocol ! The rule is broad and flexible, as it should be. The comments to the rule explain very explicitly that the rule does NOT require privilege logs. In my experience, the problem is that attorneys don't read the rule or its comments, and assume that privilege logs are required because that is the way it is always done. Please don't mess with the rule - educate attorneys instead !	
We've had some success with categorical privilege logs, which I think could be a nice alternative to document-by-document logging on a privilege log once done a couple times to get in the rhythm of doing it.	
I've found that a lot of protocols or instructions are created by people who aren't always doing this in practice. Getting input from those who will need to do the work will be essential.	
Metadata information would not necessarily give reason to the claim of privilege and so such descriptions are still needed.	
The problem with category logs or metadata logs is at the end of the day, you do have to have people validate the privilege calls on all the documents and when they do that, it is sometimes just as easy to quickly do a log entry. The real burden is the volume of privileged documents that are pulled into large reviews. The only way to alleviate the burden is to stop allowing such massive discovery and/or get rid of logs altogether. A metadata log is a bit less burdensome but then you will just have fights about the metadata and you may have more documents improperly logged if a privilege log team doesn't look at each privileged document again (and if they do that, they might as well log it....)	
Metadata fields are not subjective whereas attorney contemplated descriptions are. If metadata field priv logs were considered an approved alternative, it would ease the burden on the producing party while also get data in front of the requesting party in a format for easier review for any file/doc that may not meet muster of of the asserted privilege.	
Further clarification in Comments or actual Rule text regarding the applicability of Rule 26's withholding disclosure/log requirements to Rule 45 (3rd party subpoenas.)	
Re: metadata logs, since Subject lines can sometimes contain privileged information, any protocol should accommodate an alternate treatment, at the option of the producing party, for such items, including creation of a separate, more traditional privilege log entry. Re: the language of 26(b)(5)(A), while the language is general, I do not see a fair way to make it more specific and still consistent with principles of proportionality and fairness. That being said, the rule should back away from "documents, communications, or tangible things" in favor of language that would more clearly authorize alternative unitization for log entries (e.g. threads, categories, documents, elements of an email chain as appropriate), while also indicating that this unitization is a material issue to consider when determining the burden/fairness of a particular approach.	
Defined handling of families, categorical by default, no names normalization, defined lists of metadata presumptively sufficient.	
Privilege log practice needs to be reformed. A great deal of time and money is currently wasted on preparing privilege logs that are not very helpful to requesting parties.	
I prefer a separate redaction log that covers all types of redactions, privilege and other. I believe a redaction log needs only Bates numbers and descriptions/explanations of the reasons for the redactions.	
When possible, I try to exclude redacted documents from privilege log, because the basis of the privilege assertion is presumably clear from the unredacted portion of the document.	
I think privilege logs should be signed by counsel for the party producing the privilege log	
More discussion at Meet & Confer sessions to agree on what the log should contain.	
Threading is a complication. Some judges allow one entry per thread, but where the full thread may not be privileged, the receiving party doesnt have enough information to determine if privilege is appropriate. And descriptions for the basis aren't specific enough when in-house counsel are involved.	
In civil cases where I am based, privilege logs are almost entirely metadata based, with additional classification in terms of the type of privilege claimed added. Its generally only for regulatory disclosures that a "full" privilege log with manually added descriptions of the nature of privilege is expected and required	
Metadata only would be great	
It is difficult to say how a privilege log might or might not be prepared in a vacuum. In most cases, I think attorneys are going to want to confer with their client to make final decisions on how to handle privilege logs.	
Acceptance of and increased use of analytics as a validation method for priv designations	
Privilege is anathema to the principles that all must give their evidence. They should set a high bar for suppression and lawyers should be vigilant not to lower the hurdles required to deny relevant evidence in discovery. If anything SHOULD be burdensome, it's the effort to hide relevant evidence on thin and often-bogus claims of privilege.	
Great topic	
Use of categorical logs	
In Canada, we don't use the same type of privilege logs, but we do provide a schedule of documents withheld for privilege. We now generally tag documents privilege during a review, with the grounds for privilege and provide a list with the metadata. If any metadata is altered to protect privilege (i.e. subject line of an email) that document is identified as having modified metadata. We also don't have the same risk of putting a non-relevant document on a privilege log - it doesn't make it relevant, it is just accepted as an error.	
We use metadata generated privilege logs almost exclusively. Never has a party complained about format. It saves so much time and the attorneys like that that it reduces time on the bill.	
utilizing technology generates greater efficiency and accuracy versus traditional manual logs, relying on metadata is most useful.	
Consider two pass. Minimal on initial and then, upon reasonable request of specific entries, more detail on the specified docs.	
Balanced	

EDRM PRIVILEGE LOG PROTOCOL

1. Parties need not include on privilege logs any documents that meet the criteria for privilege or work product protection, prepared after inception of litigation, such as the date suit was filed.

2. Parties will agree to the entry of a privilege non-waiver order that provides broad non-waiver protection under FRE 502(d) and any analogous state laws**.**

3. As part of pre-discovery conferences, parties should discuss the timing of the production of privilege logs—including whether they should be produced on a rolling basis, at the end of all productions, or at specific intervals.

4. Once parties start reviewing documents for responsiveness and privilege, they should each notify opposing parties of any unique or "gray area" issues that could be resolved up front to reduce the likelihood of later disputes and/or having to re-do logs later. Such issues may include:

   a. when in-house counsel are acting in a non-lawyer capacity;

   b. whether there are particular third parties that the producing party considers not to be "privilege breakers" because of their relationship to the client or counsel;

   c. the applicability of any privileges beyond traditional attorney-client and/or work product protection;

   d. the applicability of any privilege waiver issues, such as subject matter waiver or where a party intends to invoke an advice of counsel defense;

   e. any claim by requesting parties that any non-opinion work product should be produced because the requesting party has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means (see, e.g., FRCP 26(b)(3)(A) and analogous state rules); and

   f. any other issues that could streamline the privilege evaluation process or help avoid future privilege disputes if raised early in the matter.

5. Parties need not include on privilege logs any partially privileged documents that are produced in redacted form, with the redactions clearly indicated. The unredacted portions of such documents generally include most of what is typically logged (plus more) and usually provide sufficient information to understand the privilege claim. Requesting parties may, however, request more information about such redacted documents as part of the sampling process set forth in paragraph 10 below.

6. In lieu of traditional privilege logs, producing parties may initially produce metadata privilege logs. Such logs shall include: (i) unique identification numbers for each included

document (which can be the original Bates number or a newly created unique ID number); (ii) the date the document was prepared, last modified and/or sent; (iii) file types; (iv) authors; (v) recipients (including, where applicable, addressees, copyees, and blind copyees); (vi) email address domain names for those authors and recipients (where applicable); (vii) the document title or subject (which may be redacted if it reveals privileged information or the producing party may instead create a non-privileged description); (viii) attachment indicators; and (ix) the nature of privilege claimed (attorney-client, work product, or both). See Exhibit C for a sample metadata privilege log.

7. Most of the above fields are easily generated from the metadata and known attorney and client name lists, with the nature of the privilege added based upon coding that can be recorded at the time privilege is assessed. However, for the initial metadata log there is no requirement that the producing party otherwise edit or enhance the log—for example to research or list the identity or affiliation of all names or aliases that may be included in name metadata, or to expand document titles that may not be fully descriptive. Traditional privilege log entries must still be provided for withheld hard copy documents.

8. Logs should be produced in Excel format that allows for text searching, sorting, and organization of data, and shall be produced either: (a) in a cumulative manner, so that each subsequent privilege log includes all privilege claims from prior logs; or (b) in installments using a consistent format so that the installments can be merged into a cumulative Excel spreadsheet by the requesting parties.

9. Together with the production of its metadata log, the producing party shall also produce any non-privileged list(s) of known in-house and outside attorneys, law firms, or others in a legal role (e.g. non-lawyer professionals acting under the direction of attorneys and alleged to be part of a privileged relationship with the producing party) that the producing party used when making privilege determinations in the instant litigation. The list(s) may be supplemented, as appropriate. However, inadvertent failure to include any particular individuals, firms, or current employers on those lists shall not waive any privilege.

10. The producing party shall also produce other readily available lists or documentation helpful in assessing privilege claims, such as the domains of law firms that have represented the withholding party, lists of persons included under commonly used email aliases, and/or other readily-available non-privileged lists used by the producing party in making the privilege determinations in the instant litigation.

11. Once any privilege log is produced[1], the requesting party shall notify the producing party, within 30 days, whether it would like to meet and confer to discuss the initial log. The requesting party has discretion to select a sample of log entries to further inquire about. For example, the requesting party could focus on documents that are more difficult to assess because of a lack of clarity about the identity of all recipients or the subject matter of the documents. However, for each privilege log produced where there are more than 100 logged documents, this

[1] In the case of rolling production of logs, this may be an iterative process. However, by discussing many of the "gray-area" issues up-front, parties will hopefully be able to address and alleviate most concerns at an early stage.

initial sampling[2] should not include more than the lesser of 10% of the withheld documents (including partially redacted documents produced in the associated production) or a maximum of 300 documents.

12. The producing party shall, within 30 days, produce additional information sought by the requesting party. Such requested information could relate to, for example, the identity and/or roles of individuals authoring, receiving or mentioned in the documents; more detail about the subject matter of the documents (without revealing privileged information); and/or reasons for the claimed privilege or other protection.

13. After receiving the additional information, the requesting party has fifteen (15) days to review the additional information and to notify the producing party if it has any remaining issues relating to the privilege claims.

14. If issues remain that the parties cannot successfully resolve through negotiation, they may need to seek court intervention. To the extent that the resolution may require the review of any documents in camera or other use of scarce court resources, the parties and/or the court should consider retaining the assistance of a Special Master. At the discretion of the court, the associated costs of the Special Master may be apportioned based on whether the privilege claims and challenges are substantially justified or not substantially justified by the actual review.

15. If a party is found to have made unsubstantiated privilege claims or challenges, then appropriate remedies may be granted, including, but not limited to:

a. a determination that the producing party reassess privilege in regard to some or all other withheld documents and/or provide additional detail to justify privilege claims made as to some or all of them; and/or

b. an order for further in-camera review by the court or Special Master;

c. a determination that the offending party shall defray some or all reasonable costs (including attorneys' fees) of the privilege dispute process; and

d. in extreme cases, such as where a producing party has intentionally attempted to conceal important non-privileged information, or where a requesting party has repeatedly lodged unfounded privilege challenges, the court may order privilege waiver, objection waiver, and/or other appropriate remedies.

16. In cases where a determination has been made by a Special Master, parties must either abide by the decisions of the Special Master or take exceptions to the court and be governed by the resulting ruling.

[2] There may be individual circumstances where additional sampling may be agreed to or requested. However, since those circumstances are likely to be case-specific, no attempt has been made in this protocol to detail the process.

Exhibit A: Sample Privilege Log Guidance Used by a Project Manager for an Actual Matter in which the Traditional Document-by-Document Logging Method was Used[1]

This exhibit is provided to show the amount of time-intensive detail that is often required in a traditional document-by-document logging method. The method in this exhibit is not recommended by this committee, but rather is provided for illustrative purposes to show why this committee is recommending the alternative approach of a metadata log.

1. The Privilege Description or Narrative

Example descriptions for Attorney/Client documents:

- Attorney-client communications concerning [inventory reserves/ . . .].
- Attorney memo/notes concerning [inventory reserves/ . . .].
- Attorney research concerning [inventory reserves/ . . .].

Example descriptions for Work Product documents:

- Attorney work product prepared/compiled in response to [subpoena/litigation].
- Work product prepared/compiled by non-attorney at the request of counsel in response to [subpoena/litigation].

2. Mechanics [in a particular document review platform]:

1. Enter/edit the Privilege Description in the Text view so it can be done document-by-document without propagation across the family (which it will do in Quick Edit).
2. Ensure you are in the Privilege Description field and not the Attorney Notes field. It is the top field in text view (and Quick Edit).
3. When you have completed a privilege description on a document, check the "Privilege log Description Complete" tag.
4. If you use a copy/paste method, please be careful that your template material is correct and has no typos. I would suggest that you do not copy and paste. Read the existing privilege descriptions carefully; they have many typos and truncations, etc. due to poor copy/paste methods used previously.

3. Formatting/Language for Consistency

**Please clean up existing privilege descriptions that have any of the following problems.

- For the purpose of consistency across reviewers, please:

[1] This illustrates how much effort goes into training a privilege log team and keeping their work consistent.

  - Begin each privilege log description with a capital letter.
  - End each privilege log description with a period.
  - For the phrase "attorney-client" as in "attorney-client communications", please include the hyphen.
  - Please do not use abbreviations; do not use e.g., atty. or [xxx] or even [ABCD]--just spell things out on the privilege log description.

- The privilege description should match the coding; i.e., Work Product language for documents coded Work Product and Attorney/Client language for documents coded Attorney/Client.
- While we are not limited to the examples provided or even the issue tags that were used, keep the topic part brief to 2-3 words; it is fine to say "shrink reserves" or "used inventory reserves," but you don't need to specify that the document pertained to a reserve *calculation* or something more specific. Likewise, you need not say the [xxxx] was *in [xxxx]* etc. "Less is more" in a privilege log. [Law Firm] prefers more general descriptions.
- You need not specify the file type as “spreadsheet” or “presentation”; we will export the file extension for the privilege log.
- Finally, for draft SEC filings/statements: just use the document title as the brief insert for the type of document as "10-K" or "10-Q" or "press release" or "earnings release" rather than other variations like "SEC filings" or "Statement filings." Per [attorney name deleted]: “draft filings should be described as such, and not using one specific issue tag as a description. For example, I have seen several draft 10-Qs described as communications related to “[xxxx].” Though this may be the topic that made the document responsive, we should describe it in more general terms because of the breadth of topics covered in the document.”
- Likewise, you need not specify who the attorney is or who the client is in "attorney-client" communications; i.e., do not say "attorney-client communications with [law firm]."
- Likewise, the appropriate Work Product phrasing (depending on whether an attorney or non-attorney prepared it) re: that a document was prepared *in response to the subpoena/litigation* is sufficient to describe a document that is re: the litigation hold or document collection or document production etc. (We should not have these in this set of documents.) You need not specify that it was re: a collection or production or the date of production, etc.
- For Work Product, we don’t need to specify the topic of the work product that has been prepared [e.g., [xxxx]], merely that it has been “prepared in response to a subpoena”, or “in response to litigation”, etc. Plus, we would have already provided the general topic in the parent email description.
- Clearly claim Attorney Client or Work Product. Make a specific claim to Attorney Client or Work Product per document. It is not so important which choice of language is used (as long as it is coded for that), but the language should be a little precise in describing each document as a communication/research/memo/notes rather than just using “communications” across the entire family.
- Do not convolute the Attorney Client language of "concerning [x topic]" with the Work Product language of "in response to [x]" and vice versa. That is--"Attorney Client ... in response to subpoena" and "Work Product ... concerning [xxxx]" etc.

- Do not convolute attorney versus non-attorney work on Work Product descriptions. That is, do not say "attorney work product prepared by non-attorney" instead of just "work product prepared by non-attorney at the request . . ." Clean up entries that have this mix up.
- Do not use language that you may have used on other projects but that is not under the parameters of the language expected on this project. E.g., do not use language such as "Email *involving counsel reflecting legal advice*" OR "*Email involving counsel requesting legal advice* " OR "Email *involving counsel facilitating legal advice* "). Please clean up existing descriptions that do not follow the expected language.

4. Specific Issues

Child documents:

The Privilege Log Description for the child(ren) should be similar to that of the parent, e.g., Spreadsheet concerning [xxxx] for a child whose parent is described as Attorney-client communications concerning [xxxx].

--all child documents should also begin with an explicit claim to Attorney/Client or Work Product and not merely "Spreadsheet concerning [xxxx]."

Redacted documents:
The phrasing is the same for wholly privileged or withheld documents.

Documents that are both Work Product and Attorney/Client Privileged:

You need not have two sentences or a combination of Attorney/Client and Work Product in one sentence. One or the other is cleaner. It usually works best to use the Attorney Client language for the parent and Work Product language for the children.

Document that is Responsive only by virtue of a Responsive family:

- You can write a privilege description that is appropriate for the subject matter that a given document deals with. For example, if a child is Not Responsive on its face and is Responsive only by virtue of its family status, then write a privilege description that is appropriate to the subject matter on the face of the child--e.g.,
    - the description for the parent could be: "Attorney-client communications concerning financial information."
    - the child could be: " . . . concerning acquisition of [xxx]."

The topic of the child need not be that of the parent if it deals with something else.

Exhibit B: Creating a Traditional Document-by-Document Privilege Log

1. Compiling the Log in Excel from Metadata Fields Exported from Review Platform

Begnum (BATES No.)	Privileged	Privilege Asserted (Privilege Reason)	Privilege Description	Privilege Log	Privilege Commcats /Issues	PrivLog Custodian	PrivLog Author	PrivLog LeadDate	PrivLog Sender	PrivLog Recipients (addresseeTo)	PrivLog Sent CC (Copied TO)	PrivLog Sent BCC	Document Characteristics
e.g., [FIRST 3 LETTERS OF CUSTODIAN + c or p (electronic or paper) + 7 or more digits	Yes	--Attorney-Client Privilege --Attorney Work Product --Attorney-Client Privilege; Attorney Work Product --Attorney-Client Privilege; Attorney Work Product; Common Interest Doctrine --Attorney-Client Privilege; Common Interest Doctrine --Attorney Work Product; Common Interest Doctrine	See 'Priv Desc' sheet; basically: Type of doc + seeking/giving + legal advice from + inhouse/outside counsel + re:_____.	--After [X] Date --Categorical Privilege Log		[Last Name, First Name]	in the first draft of the priv log it may be metadata (e.g., email username) that may not be regular name format AND final version may be properly formatted name [first name last name] with an asterisk if an attorney		--initially can take form of [first name] [last name] <username@co.com>; [first name] [last name] <first.last@co.com> etc.---after cleanup it will be [first name] [last name] with an asterisk for an attorney --OR [last name], [first name] [mid init.] <username@co.com> --OR [Exchange Resource] <username@co.com> ---x.500 address in legacyExchangeDN attribute in Active Directory e.g., [mailbox username] </O=ORGANIZATION/ OU=ADMINISTRATIVE GROUP/ CN= RECIPIENTS/ CN=USERNAME>	multiple entries exported in the 1 field, separated by a semicolon--initially can take form of [first name] [last name] <first.last@co.com>; [first name] [last name] <first.last@co.com> etc.---after cleanup it will be [first name] [last name] with an asterisk for an attorney --OR [last name], [first name] [mid init.] <username@co.com> --OR [Exchange Resource] <username@co.com> ---x.500 address in legacyExchangeDN attribute in Active Directory e.g., [mailbox username] </O=ORGANIZATION/ OU=ADMINISTRATIVE GROUP/ CN= RECIPIENTS/ CN=USERNAME>	multiple entries exported in the 1 field, separated by a semicolon--initially can take form of [first name] [last name] <first.last@co.com>; [first name] [last name] <first.last@co.com> etc.---after cleanup it will be [first name] [last name] with an asterisk for an attorney --OR [last name], [first name] [mid init.] <username@co.com> --OR username@co.com <username@co.com> --OR [Exchange Resource] <username@co.com> ---x.500 address in legacyExchangeDN attribute in Active Directory e.g., [mailbox username] </O=ORGANIZATION/ OU=ADMINISTRATIVE GROUP/ CN= RECIPIENTS/ CN=USERNAME>		e.g., marginalia, h/w, illegible

Privilege log Library: For corporations that have different matters involving same custodians over time, use of hash value to identify privileged files from other matters and add to privilege log in new matter. For example, if privilege documents were logged in matter "x" and the same custodian collected for matter "y," use hash value to add privileged documents from matter "x" to matter "y" log without additional review work.

2. Creating the Narrative Column for the Privilege log: Parsing out the Elements

*Note some example entries that begin with "house" should read "in-house."

Attorney/Client Priv	attached	draft	Redacted	pleading/letter/document/spreadsheet/presentation/article/MD&A/memo/news release/securities filing/license agreeement	requesting/seeking/responding to request for/reflecting/providing/containing/containing request for	legal advice of/mental impressions in anticipation of litigaiton	oustide/in house	counsel/ litigation manager(s)	re:	____
Attorney/Client Priv				chain/cover email attaching [draft] [doc type]/email with attachment	prepared by/prepared at direction of					
Attorney/Client Priv				correspondence/discussion/draft text/email chain/information from [or provided by]/text	prepared for the purposes of obtaining					
Attorney/Client Priv					sent to [counsel] seeking/transmitted for the purpose of obtaining					
Attorney/Client Priv					provided to counsel for purposes of obtaining					
Work Product					prepared in anticipation of litigation					
Work Product					reflecting mental impressions					litigation strategy/settlement agreements/patent infringment/draft securities filing/litigation costs/legal budget/contract
Examples:				Letter from outside counsel providing trial-preparation materials to consulting expert.						
				house litigation manager regarding financial disclosure obligations.						
				house litigation managers regarding financial disclosure obligations						
				E-mail seeking advice of in-house litigation manager re: annual report.						
				Litigation status chart prepared at the direction of in-house counsel.						
				Memorandum reflecting advice of in-house litigation manager regarding litigation status.						
				securities filings that show previously provided legal advice.						
				Non-responsive cover e-mail between in-house counsel attaching securities filing.						
				cases and insurance policy and information provided by in-house litigation manager regarding legal expenses used to obtain legal advice rendered in connection with the underlying litigations and various legal matters.						
				house litigation manager regarding settlement agreement disclosure						

Exhibit D: Sample Order

UNITED STATES DISTRICT COURT
DISTRICT OF [INSERT]

_____ _ IN RE: [INSERT] _____	: : : : : : :	NO. [INSERT] Master Docket No. [INSERT] JUDGE [INSERT]

CASE MANAGEMENT ORDER NO. __
(Protocol for Treatment of Privileged and Work Product Materials)

This Order shall govern the treatment of all privileged or work-product materials in this action. This Order applies equally to all parties, who for the purposes of below shall be designated as either the "Producing Party" or the "Requesting Party."

1. **Definitions**

   a. The term "Producing Party" shall mean any Party or nonparty to this Litigation, including its counsel, retained experts, directors, officers, employees, and/or agents, who designates any discovery material produced in this Litigation pursuant to this Confidentiality Order.

   b. The term "Requesting Party" shall mean any Party, including its counsel, retained experts, directors, officers, employees, or agents, who receives any discovery material in this Litigation.

   c. When used in this Order, the word "document" encompasses, but is not limited to, any type of document or testimony, including all documents or things described in Federal Rule of Civil Procedure 34 and Federal Rule of Evidence 1001.

   d. As used in this Order, "discovery material" refers to all items or information, regardless of the medium or manner generated, stored, or maintained, including, among other things, documents, testimony, interrogatory responses, transcripts, depositions and deposition exhibits, responses to requests to admit, recorded or graphic matter, electronically stored information, tangible things, and/or other information produced, given, exchanged by, or obtained from any Party or non-party during discovery in this Litigation.

2. **General Principles.** Privilege logs shall comply with Federal Rule of Civil Procedure 26(b)(5), which requires a party to:

   a. Expressly identify the privilege asserted; and

   b. "[D]escribe the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess this claim." *See* FED. R. CIV. P. 26(b)(5).

3. Specific Principles.

a. The Producing Party bears the burden of establishing that any relevant document, communication, information, or other content that is withheld from discovery in whole or part on the basis of an asserted privilege is in fact privileged and/or otherwise properly withheld. None of the following shifts or changes this burden.

b. In order to avoid unnecessary cost, once Producing Parties start reviewing documents for responsiveness and privilege, parties will meet and confer to identify any "gray area" issues which could be resolved up front to reduce the likelihood of later disputes and/or having to re-do logs later. If the issues cannot be resolved by the parties up front, they may be raised with the court for a determination prior to preparing the privilege log.

c. Pursuant to the Federal Rule of Civil Procedure, all relevant documents entirely withheld from production on the grounds of attorney-client privilege, work product protection, or similar grounds (each encompassed by the term "privilege" as used hereafter), must be logged. Partially privileged documents must be produced with redactions but need not be logged [INSERT and logged].

d. Parties need not include on privilege logs any documents, otherwise meeting the criteria for privilege or work product protection, that were prepared by or sent to counsel for parties in the litigation, after inception of litigation [INSERT inception date].

e. Privilege logs of documents identified or reviewed prior to productions and withheld from such productions based on privilege grounds shall be served thirty (30) days following any such productions. [OR INSERT A Privilege log of documents reviewed and withheld from productions based on privilege grounds shall be served thirty (30) days after the completion of the final production.]

f. Privilege Logs shall be produced in spreadsheet or similar format that allows for text searching, sorting, and organization of data, and shall be produced either: (a) in a cumulative manner, so that each subsequent privilege log includes all privilege

claims from prior logs; or (b) in installments using a consistent format so that the installments can be merged into a cumulative spreadsheet by the requesting parties.

g. For documents withheld on the basis of privilege or work product, the Producing Party shall provide a separate entry for each document as to which the Producing Party asserts a privilege. [CONSIDER INSERT Where a most inclusive email thread is withheld for privilege, the Producing Party need only include the most inclusive email threads on a privilege log and need not produce or log the prior or lesser-included emails within the same thread.]

h. Metadata Logs for ESI Documents: In lieu of traditional privilege logs, producing parties may initially produce privilege logs for withheld electronically stored information automatically generated from ESI metadata.

Each document on the Metadata Log shall be assigned a unique identification number. To the extent available in metadata, each log entry shall also include:

1. the date the document was prepared, last modified and/or sent,
2. file type(s),
3. author(s),
4. recipient(s) (including, where applicable, addressees, copyees, and blind copies),
5. email address domain names for those authors and recipients (where applicable),
6. the document title or subject (which may be redacted if it reveals privileged information or the producing party may instead create a non-privileged description),
7. attachment indicators,
8. and the nature of each privilege claimed (i.e., attorney-client, work product).

i. Traditional Logs for hard copy (non ESI) documents: Traditional privilege log entries must still be provided for hard copy documents.

Such Traditional Logs shall include:

1. unique identification numbers for each included document,

and to the extent reasonably available,

2. the date the document was prepared,

3. author(s),

4. recipient(s) (including, where applicable, addressees, copyees, and blind copies),

5. email address domain names for those authors and recipients (where applicable),

6. a short description describing the general nature of the legal advice requested or provided or an explanation of the work-product claim that, without revealing information itself privileged or protected, will enable other parties to assess the claim,

7. attachment indicators,

8. and the nature of each privilege claimed (i.e., attorney-client, work product).

c. Together with the production of the privilege log, the producing party shall also produce any non-privileged list(s) of known in-house and outside attorneys, law firms, or others in a legal role (e.g. non-lawyer professionals acting under the direction of attorneys and alleged to be part of a privileged relationship with the producing party) that the producing party used when making privilege determinations in the instant litigation. The list(s) may be supplemented, as appropriate. However, inadvertent failure to include any particular individuals, firms, or current employers on those lists, shall not waive any privilege. Such lists will be treated as Highly Confidential.

d. The producing party shall also produce other readily available non-privileged lists or documentation helpful in assessing privilege claims, such as the domains of law firms that have represented the withholding party, lists of persons included under commonly used email aliases, and/or other readily-available non-privileged lists used by the producing party in making the privilege determinations in the instant litigation.

e. Metadata Log, Meet and Confer, and Sampling Process:

   i. Once any metadata privilege log is produced, the Requesting Party shall notify the Producing Party, within 30 days, whether it would like to "meet and confer" to discuss the initial log. This will be an opportunity for the requesting party to ask questions that may emanate from review of the initial metadata log and to ask for enhanced information about a sampling of documents from the log to more completely justify the privilege claim. The requesting party has discretion to select a random or targeted sample or some mixture. For example, the requesting party could focus more on documents that are more difficult to assess because of a lack of clarity about the identity of all recipients or the subject matter of the documents. However, for each privilege log produced where there are more than 100

logged documents, this initial sampling should not include more than the lesser of 10% of the withheld documents (including partially redacted documents produced in the associated production) or a maximum of 300 documents.

ii. The producing party shall, within 30 days, produce additional information sought by the requesting party. Such requested information could relate to, for example, the identity and/or roles of individuals authoring, receiving or mentioned in the documents, more detail about the subject matter of the documents (without revealing privileged information) and/or reasons for the claimed privilege or other protection.

iii. After receiving the additional information, the requesting party has fifteen (15) days to review the additional information and to notify the producing party if it has any remaining issues relating to the privilege claims.

iv. Parties shall meet and confer to attempt to resolve remaining issues. If such issues cannot amicably be resolved by the parties, parties may elect to seek court intervention.

3. **Challenges to Privilege and/or Work Product Claims.**

a. Traditional and Metadata Privilege Log Entries: If the Requesting Party seeks to challenge a claim of privilege, parties shall meet and confer in an attempt to resolve the issue(s) prior to submitting a challenge to the court.

b. To the extent that the resolution may require the review of any documents in camera or other use of scarce court resources, the parties and/or the court should consider retaining the assistance of a Special Master.

c. The Producing Party shall have the opportunity, at the court or Special Master's discretion, to provide affidavits, argument, and/or *in camera* explanations of the privileged nature of the documents at issue to ensure that the court has complete information upon which to base its privilege determinations. The Requesting Party shall have the opportunity to respond and/or reply to any such affidavits, argument, and/or *in camera* explanations.

d. If a party is found to have made unsubstantiated privilege claims or challenges, then appropriate remedies may be granted, including:

i. a determination that the producing party reassess privilege in regard to some or all other withheld documents and/or provide additional detail to justify privilege claims made as to some or all of them; and/or

ii. an order for further in-camera review by the court or Special Master;

iii. a determination that the offending party shall defray some or all reasonable costs (including attorneys' fees) of the privilege dispute process; and

iv. in extreme cases, such as where a Producing Party has intentionally attempted to conceal important non-privileged information, or where a Requesting Party has repeatedly lodged unfounded privilege challenges, the court may order privilege waiver, objection waiver, and/or other appropriate remedies.

e. In cases where a determination has been made by a Special Master, parties must either abide by the decisions of the Special Master or take exceptions to the court and be governed by the resulting ruling.

_____

HON. [INSERT]

Privilege ID	Family ID	Family Status	Begin Bates	End Bates	Created Date	st Modified / Em	File Type	From / Author	To	CC	BCC	Filename	Privilege Basis	Privilege Treatment
PRIV_00001	FAMILY_00001	Child	PROD000219628	PROD000219629	12/9/2014	12/10/2014	Document					Business Standar	Attorney-Client	Withheld
PRIV_00002	FAMILY_00001	Child	PROD000219629	PROD000219629	12/10/2014	12/11/2014	Document					draft 10 Decemb	Attorney-Client	Withheld
PRIV_00003	FAMILY_00001	Child	PROD000219629	PROD000219629	12/10/2014	12/12/2014	Document					draft 10 Decemb	Attorney-Client	Withheld
PRIV_00004	FAMILY_00002	Standalone	PROD000219821	PROD000219821	12/15/2014	12/15/2014	Email	Carmen Consultant (carmen.consult	Rajiv Manager (rajiv.manager @domain2.com			Fwd: Letter	Attorney-Client	Redacted
PRIV_00005	FAMILY_00003	Standalone			12/15/2014	12/15/2014	Email	Sasa Associate (sasa.associate @domain.com)	Carmen Consultant (carmen.consultant@domain.com); Andrea Assistant (andrea.assistant@domain2.com); Sanjeev Secretary (sanjeev.secretary@domain3.com); Haribabu Finance (haribabu.finance@domain3.com); Walt Officer(walt.officer@domain2.com); Marcie E Mananger (marcie.manager@domain2.com); Wayne Compliance(wayne.compliance@domain2.com); Deborah M. Attorney (deborah.attorney@domain.com); Reem Marketing (reem.marketing@domain.com); Peter Manager (peter.manager @domain.com); John Digital	Tanvi Talent (tanvi.talent@domain.com); Brian Counsel (brian.counsel@domain.com); Mehmet Paralegal (mehmet.paralegal@domain.com)		week 51 summar	Attorney-Client	Withheld
PRIV_00006	FAMILY_00004	Standalone	PROD000219672	PROD000219672	12/16/2014	12/16/2014	Email	(/o=exchangelabs/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients /cn-david director)	David A Manager (david.manager @domain.com); Lisa Partner (lisa.partner@domain2.com)	Jason Information (jason.information@domain2.com); Colin Director (colin.director@domain.com); John S. Human		RE: Privileged	Attorney-Client	Withheld

PRIV_00007	FAMILY_00005	Standalone	PROD000219672	PROD000219672	12/16/2014	12/16/2014	Email	David Partner (/o=exchangelabs/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn-david partner)	David A Manager (david.manager@domain.com); Lisa Partner (lisa.partner@domain2.com)	Jason Information (jason.information@domain2.com); Colin Director (colin.director@domain.com); John S. Human		RE: Privileged	Attorney-Client	Withheld
PRIV_00008	FAMILY_00006	Standalone			12/16/2014	12/16/2014	Email	Sasa Associate (sasa.associate@domain.com)	Carmen Consultant (carmen.consultant@domain.com); Rajiv Manager (rajiv.manager@domain2.com); Andrea Assistant (andrea.assistant@domain2.com); Sanjeev Secretary (sanjeev.secretary@domain3.com); Haribabu Finance (haribabu.finance@domain3.com); Peter Manager (peter.manager@domain.com); Walt Officer(walt.officer@domain2.com); Wayne Compliance(wayne.compliance@domain2.com); Marcie E Mananger (marcie.manager@domain2.com); Deborah M. Attorney (deborah.attorney@domain.co	(sandra.boardmember@domain.com); Thomas P. Marketing (thomas.marketing@domain.com); Matthew T. Associate (matthew.associate@domain.com); Tanvi Talent (tanvi.talent@domain.com)		week 51 summar	Attorney-Client	Withheld
PRIV_00009	FAMILY_00007	Standalone	PROD000219881	PROD000219881	12/17/2014	12/17/2014	Email	Joseph Paralegal (joseph.Paralegal@domain.com)	Kelsey Adminstration (kelsey.administ	David A Manager (david.manager		RE: Matters iden	Attorney-Client	Withheld
PRIV_00010	FAMILY_00008	Standalone	PROD000219886	PROD000219886	2/9/2015	2/9/2015	Email	Richard B. Associate (richard.associate@domain2.com)	John S. Human Resources (john.humanresources@domain.com); Lisa Partner (lisa.partner@domain2.com)	Dana Director (dana.director@domain.com); David A Manager (david.manager@domain.com); Katie Marketing (katie.marketing		RE: Follow-up - P	Attorney-Client	Withheld

PRIV_00011	FAMILY_00009	Standalone	PROD000159521	PROD000159522	12/26/2014	12/26/2014	Email	Nitin Finance (nitin.finance@domain3.com)	Samir Partner (samir.partner@domain.com); Madhusha D. Director (madhusha.director@domain.com); Anil Scientist (anil.scientist@domain.com); Walt Officer(walt.officer@domain2.com); Abhijit Director (abhijit.director	Wayne Compliance(wayne.compliance@domain2.com); Marcie E Mananger (marcie.manager@domain2.com); Rajiv Manager (rajiv.manager@domain2.com); Haribabu Finance (haribabu.finance@domain3.com)		Fwd: Inquiry for	Attorney-Client	Redacted
PRIV_00012	FAMILY_00010	Standalone	PROD000219821	PROD000219821	1/6/2015	1/6/2015	Email	Angela R. VicePresident (/o=exchangelabs/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients	Carmen Consultant (carmen.consultant@domain.com)	Rajiv Manager (rajiv.manager@domain2.com)		RE: Efforts	Attorney-Client	Withheld
PRIV_00013	FAMILY_00011	Parent			12/30/2014	12/30/2014	Email	Sasa Associate (sasa.associate@domain.com)	Lisa Partner (lisa.partner@domain2.com)	Jason Information (jason.information@domain2.com); Colin Director (colin.director@domain.com); David A Manager (david.manager@domain.com);		Pipeline optimiza	Attorney-Client	Withheld
PRIV_00014	FAMILY_00011	Child			12/30/2014	12/30/2014	Presentation					Pipeline optimiza	Attorney-Client	Withheld
PRIV_00015	FAMILY_00012	Standalone	PROD000219881	PROD000219881	12/31/2014	12/31/2014	Email	Russell J. Board Member (russell.boardmember@domain.com)	Lisa Partner (lisa.partner@domain2.com)	Jason Information (jason.information@domain2.com); Colin Director (colin.director@domain.com); Sasa Associate (sasa.associate@domain.com);		06_Pipeline opti	Attorney-Client	Withheld
PRIV_00016	FAMILY_00013	Standalone			1/6/2015	1/6/2015	Email	Douglas Mananger (douglas.manager@domain.com)	Tony Manager (tony.manager@domain2.com); Joseph Compliance(joe.compliance@domain2.com); Mark Talent (mark.talent@domain.com);	Jill M. Paralegal (jill.paralegal@domain2.com)		Update - Privileg	Attorney-Client;	Withheld

PRIV_00017	FAMILY_00014	Standalone	PROD000219881	PROD000219881	1/9/2015	1/9/2015	Email	Joseph J. Supervisor (joseph.supervisor@domain.com)	Dan SeniorVP (dan.seniorvp@domain2.com); Adam Admininstrator (adam.administrator@domain.com); Samir Partner (samir.partner@domain.com); Colin Director (colin.director@domain.com); David A Manager (david.manager@domain.com); Teresa Compliance(teresa.compliance@domain2.com); Kevan L President (kevan.president@domain2.com); Alison Attorney (alison.attorney@domain2.com); Abhijit Director (abhijit.director@domain3.com); Walt Officer(walt.officer@domain2.com); David C.	Wayne Compliance(wayne.compliance@domain2.com); Marcie E Mananger (marcie.manager@domain2.com); Duana Secretary (duana.secretary@domain2.com)		FW: list updates	Attorney-Client	Withheld
PRIV_00018	FAMILY_00015	Standalone			1/9/2015	1/9/2015	Email	Ryan Director (domain-admin@domain-inc.hosted.jives	Robert S. Talent (robert.talent@domain2.com)			[Privileged and C	Attorney-Client	Withheld

PRIV_00019	FAMILY_00016	Standalone			1/12/2015	1/12/2015	Email	Sasa Associate (sasa.associate@domain.com)	Carmen Consultant (carmen.consultant@domain.com); Andrea Assistant (andrea.assistant@domain2.com); Sanjeev Secretary (sanjeev.secretary@domain3.com); Haribabu Finance (haribabu.finance@domain3.com); Peter Manager (peter.manager@domain.com); Walt Officer(walt.officer@domain2.com); Marcie E Mananger (marcie.manager@domain2.com); Wayne Compliance(wayne.compliance@domain2.com); Deborah M. Attorney (deborah.attorney@domain.com); Reem Marketing (reem.marketing@domain.com)	Tanvi Talent (tanvi.talent@domain.com); Shazia Vice President (shazia_vicepresident@domain.com); Mehmet Paralegal (mehmet.paralegal@domain.com)		week 2 summary	Attorney-Client	Withheld

PRIV_00020	FAMILY_00017	Standalone			1/13/2015	1/13/2015	Email	Sasa Associate (sasa.associate@domain.com)	Carmen Consultant (carmen.consultant@domain.com); Rajiv Manager (rajiv.manager@domain2.com); Andrea Assistant (andrea.assistant@domain2.com); Sanjeev Secretary (sanjeev.secretary@domain3.com); Haribabu Finance (haribabu.finance@domain3.com); Peter Manager (peter.manager@domain.com); Walt Officer(walt.officer@domain2.com); Marcie E Mananger (marcie.manager@domain2.com); Wayne Compliance(wayne.compliance@domain2.com); Deborah M. Attorney (deborah.attorney@domain.co	Matthew T. Associate (matthew.associate@domain.com); Thomas P. Marketing (thomas.marketing@domain.com); Sandra Finance (sandra.finance@domain2.com); Tanvi Talent (tanvi.talent@domain.com)		summary	Attorney-Client	Withheld
PRIV_00021	FAMILY_00018	Parent			1/13/2015	1/13/2015	Email	Christine CEO (christine.ceo@domain.com)	Rajiv Manager (rajiv.manager@domain2.com); Tony Manager (tony.manager@domain2.com); John D. Digital (john.digital@domain.com); Mark Talent (mark.talent@domain.com); Debra K. Counsel	Nina Director (nina.director@domain.com); Ashley Director (ashley.director@domain2.com); Claire Consultant (claire.consultant@domain.com); Renee P. Manager (renee.manager@domain2.com		FOR REVIEW: lau	Attorney-Client	Withheld
PRIV_00022	FAMILY_00018	Child			1/12/2015	1/15/2015	Document					01.12.15 Launch	Attorney-Client	Withheld
PRIV_00023	FAMILY_00018	Child			1/12/2015	1/15/2015	Document					01.12.15_Backgr	Attorney-Client	Withheld

PRIV_00024	FAMILY_00019	Standalone	PROD000219822	PROD000219822	1/14/2015	1/14/2015	Email	John D. Digital (john.digital@domain.com)	Christine CEO (christine.ceo@domain.com); Rajiv Manager (rajiv.manager@domain2.com); Tony Manager (tony.manager@domain2.com); Mark Talent (mark.talent@domain.com); Debra K. Counsel	Nina Director (nina.director@domain.com); Ashley Director (ashley.director@domain2.com); Claire Consultant (claire.consultant@domain.com); Renee P. Manager (renee.manager@domain2.com		RE: FOR REVIEW:	Attorney-Client	Withheld
PRIV_00025	FAMILY_00020	Standalone	PROD000219669	PROD000219669	1/14/2015	1/14/2015	Email	Joseph Paralegal (joseph.Paralegal@domain.com)	Rodney Executive (rodney.executive@domain.com); Stafford Strategy			RE: Information I	Attorney-Client;	Withheld
PRIV_00026	FAMILY_00021	Standalone	PROD000219669	PROD000219670	1/14/2015	1/14/2015	Email	Joseph Paralegal (joseph.Paralegal@domain.com)	Rodney Executive (rodney.executi	Tom W. Director (tom.director@domain.com)		RE: Information I	Attorney-Client;	Withheld
PRIV_00027	FAMILY_00022	Standalone			1/16/2015	1/16/2015	Email	Carmen Consultant (carmen.consultant@domain.com)	Rajiv Manager (rajiv.manager@domain2.com)	Marcie E Mananger (marcie.manager@domain2.com); Deborah M. Attorney		Compliance Issue	Attorney-Client	Withheld
PRIV_00028	FAMILY_00023	Standalone			1/20/2015	1/20/2015	Email	Deborah M. Attorney (deborah.attorney@domain.com)	Rajiv Manager (rajiv.manager@domain2.com); Sanjeev Secretary (sanjeev.secretary@domain3.com); Reem Marketing (reem.marketing@domain.com); Carmen			meeting pre-calls	Attorney-Client	Withheld
PRIV_00029	FAMILY_00024	Standalone			1/23/2015	1/23/2015	Email	Ryan Director (domain-admin@domain-inc.hosted.jives	Robert S. Talent (robert.talent@domain2.com)			[Privileged and C	Attorney-Client	Withheld
PRIV_00030	FAMILY_00025	Standalone			1/23/2015	1/23/2015	Email	Colin Director (colin.director@domain.com)	Lisa Partner (lisa.partner@domain2.com)	Teresa Compliance(teresa.compliance@domain2.com); Jason Information (jason.information@domain2.com); David A Manager (david.manager@domain.com); Russell J. Board Member (russell.boardm		Projects - Privileg	Attorney-Client	Withheld

EDRM Streamlined Privilege Log Protocol Background

I. *Introduction*

Federal Rule of Civil Procedure 26(b)(1) establishes a distinction between "privilege" and "nonprivileged" matters and permits a party to obtain discovery only of "*nonprivileged* matters . . . relevant to any party's claim or defense." Rule 26(b)(5) states:

> (A) *Information Withheld.* When 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.

Accordingly, Rule 26 does not specify the form of "privilege logs," beyond the requirement of enabling other parties to assess privilege. The burden is on the producing party to support their claims of privilege, but the rule provides wide leeway to determine the optimal means of privilege logging. This has given rise to debates regarding the format and scope of privilege logs. While there is no national consensus, some courts have recognized this issue and established local rules or guidelines that set forth certain parameters for privilege logs.

Current practices for privilege logging are not optimal for many cases. In cases with large productions and a significant number of privileged documents, the traditional preparation of privilege logs is burdensome, time consuming, and frequently not particularly useful for requesting parties to evaluate the privilege claims. Some earlier ideas to streamline the logging process, such as the creation of "group logs" or "category logs," may work for some cases, but may suffer from some of the same problems identified above, including the potential for disputes about what information should be included, time consuming preparations, and insufficient data for requesting parties to fully evaluate privilege claims.

Accordingly, a committee was created under the auspices of EDRM to try to devise potential alternatives to traditional privilege logging. The committee includes lawyers who most often represent producing parties, lawyers who most often represent requesting parties, technical specialists and other professionals at law firms and service providers who regularly deal with privilege issues and privilege logs. The result was this EDRM Streamlined Privilege Protocol.

The below 15-step protocol will help lead to "the just, speedy, and inexpensive determination" of disputes, in accordance with FRCP 1, through streamlined privilege logging. It leverages enhanced communications, readily-available technology and the science of statistical sampling, to bring five important improvements to the privilege logging and assessment process:

1. Setting up more communications and transparency between parties, to address privilege issues up front, and then providing tools for requesting parties to better evaluate privilege logs and claims;

2. Allowing producing parties to use metadata privilege logs in the first instance, to reduce the time and expense of logging and to allow requesting parties to obtain privilege logs more quickly;

3. Allowing requesting parties to obtain more detailed information about a sample of documents they select, to better test privilege decisions that are being made. This sampling methodology takes a fraction of the time required to prepare and assess privilege through traditional detailed logs, and yields additional information about the sampled documents, which can then be considered when assessing whether privilege claims generally are or are not well-founded.

4. Providing greater incentives for parties to make careful and correct privilege determinations and privilege challenges in the first instance. Incorrect privilege claims or frivolous privilege challenges are more likely to be exposed in the aforementioned sampling process. Any inability to justify privilege claims or challenges could forfeit the time and cost savings that this streamlined logging system otherwise yields; and

5. Reducing the likelihood of privilege disputes or the need for courts or special masters to resolve such disputes because of the increased communication and transparency and the incentives for making correct privilege decisions in the first instance.

It is anticipated that parties, judges, special masters and/or other dispute resolution tribunals may choose to adopt this protocol in its existing form, or with appropriate modifications, for particular cases.

II. *Traditional Format of Privilege Logs: Document-by-Document*

In order to more fully understand why the traditional method of creating privilege logs may need improvements, this section discusses the process and components of a traditional privilege log in more depth. A privilege log is a table of those documents or other items which have been withheld from production or redacted based on attorney-client privilege or work product protection. The table generally contains the type of information listed below:

a. Bates range of each document withheld or redacted
b. Filename of the document
c. Type of Document (letter, memo, report, handwritten note)
d. Date of document
e. Subject of the document
f. Author /From
g. To/recipients/cc/ bcc/
h. Custodian
i. Withheld or redacted
j. Privilege Type (e.g., attorney-client or work product)

k. Privilege description

The traditional method of privilege logging is to log every single document that has been withheld for privilege with objective information (author, date, etc.) about the document as well as the basis for the privilege claim. Notably, requirements were nationally articulated in the 1993 amendment of the Federal Rules of Civil Procedure with the language of 26(b)(5) which specified logging requirements.

Typically, there will be a privilege log layout in the review platform to assist reviewers in reviewing the documents slated to be withheld for privilege. This layout will contain all of the fields that will appear in the final privilege log. When preparing a privilege log, attorneys will search for documents that have been tagged within the document review platform's database[1] as entirely privileged and partially privileged. They will create QC searches to ensure that privileged documents are properly withheld from production and logged. Such searches will check for things like whether the documents fall within the relevant time period of "anticipation of litigation" in order to claim work product protection and that families are coded consistently (if required), etc. Then, the metadata fields for the documents retrieved in the search for the documents to be withheld for privilege are typically exported to an application such as Excel where name normalization and formatting consistency is achieved via macros, find and replace, etc. Some teams use a process that combines multiple fields from metadata[2] to automate the description field as much as possible. Still, it traditionally is a labor-intensive process.

A. Name normalization is a pain point

Though reviewers can use the metadata from Sender[3] and Recipient[4] fields to assist in privilege log creation, the data as it exists in the fields may need to be cleaned up for formatting consistency and name normalization. For example, the field data may contain:

- Jane Doe <jane.doe@clientco.com>
- Jane Doe </O=CLIENTCO/OU=HR/CN=RECIPIENTS/CN=BB1JDOE>
- Jane Doe (jdoe@gmail.com)<jdoe@gmail.com>

All of the above represent the same person and may be normalized to Doe, Jane or Jane Doe for production on the privilege log.

B. Creation of the narrative/description is a pain point

Creation of the narrative or description field on a privilege log involves parsing of various required elements. The document needs to be identified and the claim of privilege must be substantiated. This information must be provided in a manner that will allow, without divulging the privileged material, opposing counsel and/or the court to evaluate the claim of privilege.

[1] Also referred to as a workspace or repository.
[2] Also known as concatenation.
[3] Also referred to as the From field.
[4] This includes the fields: To, CC, and BCC.

Below are some narrative examples.

- Document seeking advice of in-house litigation manager re: *** development.
- Document reflecting advice of in-house litigation manager regarding *** litigation.
- Email chain containing advice of counsel regarding settlement agreement negotiations.
- Redacted text containing information provided by in-house litigation manager regarding litigation costs.
- Slide prepared for comment by in-house litigation regarding underlying patent litigations.

See Exhibits A and B for detailed examples that show how costly, laborious, and time-intensive the preparation of privilege logs can be using traditional methods. For those reasons, this committee considered alternative formats for privilege logs.

III. *Alternative Privilege Log Formats*

Technology has assisted legal practitioners in developing efficiencies in the process. Unfortunately, these efficiencies may come at the expense of efficacy.

Non-traditional privilege logs typically have a couple of things in common. First, they seek to avoid a document-by-document accounting of the privileged records being withheld. A categorical log is one type of non-traditional privilege log. A party identifies categories of privileged documents by subject-matter, a custodian limitation or some other objective grouping and discloses the total number of documents being withheld for a given category. The categorical log appeals for its simplicity, but there is very little visibility into the privilege claims, which inhibits the requesting party's ability to assess or test the producing party's privilege claims.

Second, if a producing party is required to provide a document-by document log, avoiding the manual, narrative description of each record is important. The metadata log is an export, in table format, of the objective metadata for each document being withheld for privilege. This includes basic date and bibliographic metadata (author/recipient/date/subject/file type). However, exporting metadata to generate a privilege log does not account for non-electronic, scanned documents. In such instances, the producing party must resort to manual logging methods.

IV. *Producing Parties' Burden to Support its Claims of Privilege via a Privilege Log*

In litigation, the producing party has the burden to satisfy Federal Rule 26. As the amount of information collected, produced and withheld as privileged has increased over the years, many different methods have been used to create a privilege log. This committee suggests the proposed metadata log streamlines the process for the producing party, and offers the requesting party useful information to assess the privilege claim. This section discusses the burden on the producing party following some of the more common approaches and the benefits of a metadata log.

A. Data Entry

The data entry component of a privilege log involves capturing information, found within the privileged document, that is informative about the document's origin(s) and creation.

Examples: From, Author, TO, CC, BCC and Date.

1. Historically two different approaches have been used to take the information from these fields and add it to the privilege log.
    a. Databases used to host documents can extract these fields for emails and non-email documents (where applicable). For emails this typically includes the Date, From, TO, CC, BCC of the most recent in time email only. The information is then formatted to be consistently displayed. This formatting process can be time consuming.
    b. Many times, the privilege log agreement requires a date range for an email thread and/or all names in the thread to be listed on the log. This may require reviewers to expend more time-per-document searching for dates and typing in names. Technology exists to extract the names and can be used to speed up this process, but the formatting process is still time consuming.
2. For either of the above approaches the producing party ends up spending a large amount of time looking for information to add in these fields when they are blank or incomplete.
3. Depending on the complexity of the approach used and technology used, the data entry process can be a time-consuming part of the process.
4. This committee recommends a metadata log approach, which is simply extracting a document's metadata and including it on the privilege log as-is, with no manipulation. This process is quick and can be beneficial to both parties. Part of the burdensome work with the historical approaches include formatting names for consistency.

B. Description or Category

Often the most time-consuming step when creating a privilege log is the description. The description references the withheld privileged information without revealing the substance of the information itself. Its purpose is to support the privilege asserted.

1. Historical approach: The description typically includes: 1) a description of the type of document (spreadsheet, email or etc.) 2) a description of the legal action (reflecting counsel's legal advice) and 3) the subject matter of the document (standard operating procedures or government investigation). The description can be typed by a reviewer or created using fields that have pre-populated choices. Yet both approaches are limited in that the descriptions are canned and may not accurately describe the document(s).
2. Categorical Privilege Log. Categorical privilege logs group documents into several agreed upon categories to reduce the need to write individual descriptions for each document. Typically, these categories are broad and provide the

requesting party with little or no added value as compared to individual descriptions.

3. The description or categorical step can be a substantial component of the overall work required to complete a privilege log.
4. Metadata Log Approach: Our committee recommends using the email subject and/or document title, available as an export from metadata, to avoid any need to create a separate description for the privilege log. The information in the email subject and/or document title is often more useful for the requesting party than a manual description when assessing the claim of privilege. The producing party may redact the email subject and/or document title if it reveals privileged information, but this should be an extremely rare occurrence, and in those instances the producing party has the option to instead create a non-privileged description.

C. Name and Party Information

Historically, many different approaches have been used to identify privileged names, third parties and in rare occurrences all parties on a privilege log.

1. A common approach is to put a qualifier such as an * or ^ next to a privileged name. Parties may also agree to use a similar but different qualifier for third parties. Adding this information can be very time consuming. Technology is available to make this process more automated but with the automation typically comes formatting which removes other helpful information.
2. Another approach that is used is to provide a list of the privilege names contained in the documents. This approach requires a check to verify which attorneys appear in the documents on the privilege log.
3. Personnel List. Sometimes the requesting party requests a list of all people and titles that appear on a privilege log. This is rarely agreed to as it can double the cost of creating a privilege log. Additionally, in large document reviews employees change roles and responsibilities quite regularly and these lists are rarely as useful as the requesting party anticipates.

D. Metadata Log Approach

This committee recommends the producing party provide the requesting party any list(s) of privilege names the team used when reviewing the logged documents. Most, if not all, producing parties maintain large lists for their clients. This list could be shared very easily. The requesting party benefits because they are notified of all the potential privilege actors that may appear on the privilege log. The producing party can update the list as new privileged names are identified.

V. *The Protocol*

1. Parties need not include on privilege logs any documents that meet the criteria for privilege or work product protection, prepared after inception of litigation, such as the date suit was filed.

2. Parties will agree to the entry of a privilege non-waiver order that provides broad non-waiver protection under FRE 502(d) and any analogous state laws**.**

3. As part of pre-discovery conferences, parties should discuss the timing of the production of privilege logs—including whether they should be produced on a rolling basis, at the end of all productions, or at specific intervals.

4. Once parties start reviewing documents for responsiveness and privilege, they should each notify opposing parties of any unique or "gray area" issues that could be resolved up front to reduce the likelihood of later disputes and/or having to re-do logs later. Such issues may include:

   a. when in-house counsel are acting in a non-lawyer capacity;

   b. whether there are particular third parties that the producing party considers not to be "privilege breakers" because of their relationship to the client or counsel;

   c. the applicability of any privileges beyond traditional attorney-client and/or work product protection;

   d. the applicability of any privilege waiver issues, such as subject matter waiver or where a party intends to invoke an advice of counsel defense;

   e. any claim by requesting parties that any non-opinion work product should be produced because the requesting party has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means (see, e.g., FRCP 26(b)(3)(A) and analogous state rules); and

   f. any other issues that could streamline the privilege evaluation process or help avoid future privilege disputes if raised early in the matter.

5. Parties need not include on privilege logs any partially privileged documents that are produced in redacted form, with the redactions clearly indicated. The unredacted portions of such documents generally include most of what is typically logged (plus more) and usually provide sufficient information to understand the privilege claim. Requesting parties may, however, request more information about such redacted documents as part of the sampling process set forth in paragraph 10 below.

6. In lieu of traditional privilege logs, producing parties may initially produce metadata privilege logs. Such logs shall include: (i) unique identification numbers for each included document (which can be the original Bates number or a newly created unique ID number); (ii)

the date the document was prepared, last modified and/or sent; (iii) file types; (iv) authors; (v) recipients (including, where applicable, addressees, copyees, and blind copyees); (vi) email address domain names for those authors and recipients (where applicable); (vii) the document title or subject (which may be redacted if it reveals privileged information or the producing party may instead create a non-privileged description); (viii) attachment indicators; and (ix) the nature of privilege claimed (attorney-client, work product, or both). See Exhibit C for a sample metadata privilege log.

7. Most of the above fields are easily generated from the metadata and known attorney and client name lists, with the nature of the privilege added based upon coding that can be recorded at the time privilege is assessed. However, for the initial metadata log there is no requirement that the producing party otherwise edit or enhance the log—for example to research or list the identity or affiliation of all names or aliases that may be included in name metadata, or to expand document titles that may not be fully descriptive. Traditional privilege log entries must still be provided for withheld hard copy documents.

8. Logs should be produced in Excel format that allows for text searching, sorting, and organization of data, and shall be produced either: (a) in a cumulative manner, so that each subsequent privilege log includes all privilege claims from prior logs; or (b) in installments using a consistent format so that the installments can be merged into a cumulative Excel spreadsheet by the requesting parties.

9. Together with the production of its metadata log, the producing party shall also produce any non-privileged list(s) of known in-house and outside attorneys, law firms, or others in a legal role (e.g. non-lawyer professionals acting under the direction of attorneys and alleged to be part of a privileged relationship with the producing party) that the producing party used when making privilege determinations in the instant litigation. The list(s) may be supplemented, as appropriate. However, inadvertent failure to include any particular individuals, firms, or current employers on those lists shall not waive any privilege.

10. The producing party shall also produce other readily available lists or documentation helpful in assessing privilege claims, such as the domains of law firms that have represented the withholding party, lists of persons included under commonly used email aliases, and/or other readily-available non-privileged lists used by the producing party in making the privilege determinations in the instant litigation.

11. Once any privilege log is produced[5], the requesting party shall notify the producing party, within 30 days, whether it would like to meet and confer to discuss the initial log. The requesting party has discretion to select a sample of log entries to further inquire about. For example, the requesting party could focus on documents that are more difficult to assess because of a lack of clarity about the identity of all recipients or the subject matter of the documents. However, for each privilege log produced where there are more than 100 logged documents, this

[5] In the case of rolling production of logs, this may be an iterative process. However, by discussing many of the "gray-area" issues up-front, parties will hopefully be able to address and alleviate most concerns at an early stage.

initial sampling[6] should not include more than the lesser of 10% of the withheld documents (including partially redacted documents produced in the associated production) or a maximum of 300 documents.

12. The producing party shall, within 30 days, produce additional information sought by the requesting party. Such requested information could relate to, for example, the identity and/or roles of individuals authoring, receiving or mentioned in the documents; more detail about the subject matter of the documents (without revealing privileged information); and/or reasons for the claimed privilege or other protection.

13. After receiving the additional information, the requesting party has fifteen (15) days to review the additional information and to notify the producing party if it has any remaining issues relating to the privilege claims.

14. If issues remain that the parties cannot successfully resolve through negotiation, they may need to seek court intervention. To the extent that the resolution may require the review of any documents in camera or other use of scarce court resources, the parties and/or the court should consider retaining the assistance of a Special Master. At the discretion of the court, the associated costs of the Special Master may be apportioned based on whether the privilege claims and challenges are substantially justified or not substantially justified by the actual review.

15. If a party is found to have made unsubstantiated privilege claims or challenges, then appropriate remedies may be granted, including, but not limited to:

a. a determination that the producing party reassess privilege in regard to some or all other withheld documents and/or provide additional detail to justify privilege claims made as to some or all of them; and/or

b. an order for further in-camera review by the court or Special Master;

c. a determination that the offending party shall defray some or all reasonable costs (including attorneys' fees) of the privilege dispute process; and

d. in extreme cases, such as where a producing party has intentionally attempted to conceal important non-privileged information, or where a requesting party has repeatedly lodged unfounded privilege challenges, the court may order privilege waiver, objection waiver, and/or other appropriate remedies.

16. In cases where a determination has been made by a Special Master, parties must either abide by the decisions of the Special Master or take exceptions to the court and be governed by the resulting ruling.

[6] There may be individual circumstances where additional sampling may be agreed to or requested. However, since those circumstances are likely to be case-specific, no attempt has been made in this protocol to detail the process.

VI. *Conclusion*

The privilege logging process is time-consuming and expensive, and the end product often does not provide enough information for the requesting party to assess the validity of the privilege claims. The goal of this protocol is to provide a framework for parties to cooperatively and collaboratively address privilege assertions in the most efficient way possible. The Committee recognizes that this protocol may need to be customized to fit particular cases. The protocol aims to provide instructive alternatives to lessen the burden on the producing party and to provide the requesting party with a useful mechanism to evaluate privilege claims.

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BAILEY GLASSER'S COMMENT IN OPPOSITION TO PROPOSED AMENDMENTS TO RULES 26(b)(5)(A) and 45(e)(2) to the ADVISORY COMMITTEE ON CIVIL RULES

August 1, 2021

Bailey Glasser engages in complex discovery throughout the country, in mass tort actions, multidistrict antitrust and products liability litigation, consumer class actions, and lawsuits between sophisticated, commercial adversaries. We represent both plaintiffs and defendants. And we routinely prepare and assess privilege logs in an array of cases ranging from document-intensive litigation involving millions of documents to smaller cases involving hundreds. We have successfully challenged the sufficiency of, and individual privilege claims within, privilege logs and in doing so obtained documents that have materially altered the outcome of cases. It is with these perspectives that we respectfully submit this comment in opposition to the suggested rulemaking, which is at best a solution in search of a problem and at worst an obstruction to our collective pursuit of truth in litigation.

I. INTRODUCTION

Most data points in a privilege log (e.g., document date, author, recipients, title) are automatically generated from metadata. But subject matter classifications and privilege designations are the product of human review. Human review is, without question, the most burdensome aspect and will necessarily occur even if the proposed rule is adopted because, ultimately, lawyers—not machines—decide whether to invoke privilege. Thus, producing privilege logs by summary classifications will not obviate the need for document-by-document human review. Moreover, 1) the Federal Rules currently provide for flexibility in achieving collaborative, case-specific discovery solutions, including those related to privilege disclosures, before and during discovery; 2) eDiscovery platforms allow parties to prepare privilege logs more efficiently than ever before; and 3) the requested rulemaking contravenes a fundamental principal of American jurisprudence, that privileges must be narrowly construed—and justified—because we favor access to facts, not privileges.

II. THE FEDERAL RULES CURRENTLY PROVIDE FOR FLEXIBILITY IN ACHIEVING CASE-SPECIFIC DISCOVERY SOLUTIONS.

The Federal Rules of Civil Procedure presently direct parties and courts to work collaboratively "to secure the just, speedy, and inexpensive determination of every action . . . ." Fed. R. Civ. P. 1 & advisory committee's note to 2015 amendment. Additionally, Rules 16, 26, 37, and 45 of the Rules of Civil Procedure, and Rule 502 of the Rules of Evidence, all promote collaborative efforts to reduce the time and expense of litigation, particularly in the context of eDiscovery. These rules also offer protections for the inadvertent production of privileged and protected information.

Rule 16 promotes early judicial case management and, as a result, more efficient, cost-effective litigation. Notably, Rule 16 does not limit the courts or the parties to mundane scheduling exercises, but instead allows for "a wide range of other matters" to be addressed. Fed. R. Civ. P. 16 advisory committee's note to 1983 amendments. This includes "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements under Federal Rule of Evidence 502." Fed. R. Civ. P. 16(b)(3)(B)(iv); *see also* Fed. R. Civ. P. 16(c)(2)(F) (matters for consideration at a scheduling conference include "controlling and scheduling discovery, including orders affecting disclosures and discovery under Rules 26 and Rules 29-37.").

Rule 26(b)(5)(A), as currently drafted, provides a malleable standard for disclosure depending on the complexity and demands of the case and the volume of documents at issue.

Rule 26(f)(3)(D) expressly mandates early collaboration on "any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502 . . . ."

The advisory committee's note to the 2000 amendment to Rule 26(f) acknowledges the burden of reviewing for privilege, litigants' concerns about waiver of privilege and work product protections, but also the fact that "privilege review can substantially delay access for the party seeking discovery." Accordingly, the committee affirmatively pointed to the efficacy of agreements, including "clawback" agreements, to "facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party." These agreements have become standard in the intervening twenty years.

"The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case." R. Civ. P. 26(f) advisory committee's note to 2000 amendment (citing *Manual for Complex Litigation* (4th) § 40.25(2)). And the Rules currently contemplate that parties will meet and confer regarding privilege reviews and disclosures, so that cases can be determined as quickly and as cost-effectively as possible without relegating the other interest under Rule 1—a just determination—to inferiority.

III. E-DISCOVERY PLATFORMS ALLOW PARTIES TO PREPARE PRIVILEGE LOGS MORE EFFICIENTLY THAN EVER BEFORE.

If a party asserting privileges can review documents for the purpose of categorizing those documents, that party can also rely on any number of eDiscovery platforms to efficiently create a privilege log sufficient to meet existing legal requirements and/or an agreement with her adversary.

We, for example, manage cases with libraries that house millions of documents. When analyzing client materials, our eDiscovery software allows us to analyze conversation strings concurrently and to organize privilege reviews in an effective and cost-conscious manner.

Our lawyers can complete all necessary steps for a privilege review during the review phase, including the insertion of privilege notes and review of conversation strings. This saves time and expense. We then utilize our software to export a metadata privilege log that includes the information necessary to defend all privilege claims.

E-discovery platforms render the disclosure of withheld materials easier, not harder, because they afford litigants the capacity to efficiently generate reports capturing key metadata upon which privilege and work product assertions rely. If parties are willing and able to conduct review for the purpose of placing documents in certain "buckets," they should also be fully capable of preparing a log that provides information necessary for a meaningful evaluation of an adversary's bases for withholding otherwise discoverable documents.

IV. THE REQUESTED RULEMAKING CONTRAVENES A FUNDAMENTAL PRINCIPLE OF AMERICAN JURISPRUDENCE: PRIVILEGES MUST BE NARROWLY CONSTRUED—AND JUSTIFIED—BECAUSE WE FAVOR ACCESS TO FACTS, NOT PRIVILEGES.

On numerous occasions, we have challenged privilege logs listing documents with no attorney participants, logs designating email attachments as privileged for no

apparent reason apart from the fact that they are attached to a privileged email, as well as logs asserting facially dubious privilege claims involving communications between in-house counsel and corporate employees. In these instances, but particularly in the last scenario where the distinction between legal advice and business advice is salient in determining the propriety of the privilege claim, a document-by-document assessment is undoubtedly required. In these scenarios, categorical "bucketing" of documents would inherently cloud a requesting party's visibility as to the key facts for assessment of individual documents and, by extension, increase the likelihood that discoverable materials will be improperly withheld.

The Rules, which currently promote collaborative solutions for the speedy and inexpensive determination of every action, should not be amended to render the third interest under Rule 1—the just determination of every action—subservient to the interest of convenience. While Lawyers for Civil Justice ("LCJ") characterizes document-by-document privilege logs as "indiscriminate," this characterization distracts from the reality that parties review documents for privilege *only* when those documents are responsive to proportional discovery. LCJ Rulemaking Suggestion 4 (Aug. 4, 2020). And while LCJ also claims without evidence that "document-by-document privilege logs are, by their nature, rarely proportional to the case[,]" this position betrays the time-honored expectation that it is the party asserting a privilege claim that has the burden to justify it. *Id.* at 5.

After all, "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). "As such, they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

For this reason alone, our Rules of Civil Procedure should not be amended to flip this fundamental principle on its head.

V. CONCLUSION

Litigants are, and should be, encouraged to reach agreements as to the disclosure and content of privilege logs. The Rules currently embrace this idea. But where agreements cannot be realized, the Rules should not implicitly or expressly increase convenience and reduce costs at the sole expense of fair access to the facts necessary to assess privilege claims or, by extension, discoverable facts. Currently available tools of

efficiency, including those found in the Rules, as well as those provided within widely accessible eDiscovery platforms, are sufficient to address concerns of efficiency, cost, and burden without hampering a party's ability to assess the propriety of privilege claims on a document-by-document basis. Privileges in American jurisprudence are strictly construed because we favor access to facts over privileges. So, when privileges are asserted, we should accept the inconvenience of justifying those claims, one-by-one. Doing less would impose a far greater burden on our collective pursuit of the truth in litigation.

We appreciate the opportunity to share our thoughts with the Committee.

Respectfully Submitted,
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PRIV-0086

August 1, 2021

VIA ELECTRONIC MAIL
MEMBERS OF THE JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

Re: Comment on Privilege Log Practice

To the Members of the Advisory Committee on Civil Rules:

I am the founding and senior partner of Irpino Avin Hawkins – a New Orleans law firm with nine attorneys handling a range of cases on behalf of injured individuals and businesses. I have been an attorney since 1996, primarily representing plaintiffs in class actions and multidistrict litigations ("MDLs"). In most class actions and MDLs in which I am involved, I have been the primary plaintiff counsel responsible for handling privilege claims/logs on each side of the process – drafting/producing as well as receiving/analyzing. Some example cases where I have led privilege claim efforts for plaintiffs include:

- MDL 2804 - *National Prescription Opiate Litigation*
- MDL 2179 - *Oil spill by the Oil Rig "Deepwater Horizon"*
- MDL 2047 - *Chinese-Manufactured Drywall Products Liability Litigation*
- MDL 1657 - *Vioxx Products Liability Litigation*

My work over the years on these and other cases has involved hundreds of thousands of privilege claims. I have also presented continuing legal education classes on privilege, including the handling of privilege claims/logs.

I respect and appreciate the Discovery Subcommittee's consideration of potential rule changes, and I provide the below comments regarding the potential changes.

1. **"A revision to Rule 26(b)(5)(A) indicating that a document-by-document listing is not routinely required, perhaps referring in the rule to the possibility of describing categories of documents."**

This possible revision is a very bad idea. Document-by-document listing of privilege claims is necessary for proper and fair evaluation of the validity of the privilege claims being asserted. I have experienced first-hand what happens when a categorization process is attempted,

and it does not work well. Categorization of privilege claims is very prejudicial to the receiving party, and unfairly prevents any reasonable assessment the claims. Further, the categorization process itself is too subjective, often over-inclusive, and irreparably non-transparent. Additionally, categorization can actually result in more work and inefficiency for the parties and the Court. When categorization is attempted, the inevitable result is suspicion and probing by the receiving party, and unnecessary time is spent with the meet and confer process, motion practice, re-working of privilege logs, etc.

2. **A revision to Rule 26(f)(3)(D) directing the parties to discuss the method for complying with Rule 26(b)(5)(A) when preparing their discovery plan, and a revision to Rule 16 inviting the court to include provisions about that method in its scheduling order.**

This possible revision is a good idea. It is particularly helpful for parties to discuss early on in the litigation the method for complying with Rule 26(b)(5)(A).

3. **A revision to Rule 26(b)(5)(A) to specify that it only requires parties to identify "categories" of documents. Alternatively or additionally, a revision to the rule might enumerate "categories" of documents that need not be identified.**

This possible revision is a very bad idea for the same reasons outlined regarding proposed rule change no. 1 above. The alternative or additional revision (enumerating "categories" of documents that need not be identified) could potentially be beneficial for a very limited set of documents and with a modification. Specifically, communications between the designating party and its outside counsel after litigation has commenced are worthy of being logged with metadata fields only (e.g., author, recipient(s), date, subject line). However, I respectfully caution that even this narrow exception has pros and cons, and any potential revision should be very clear about its limited scope.

I would be happy to make myself available if any follow-up is desired by the Discovery Subcommittee. Thank you for your attention to this matter.

Sincerely,

/s/ Anthony Irpino

Anthony D. Irpino

ADI/bz

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August 1, 2021

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Re: ***Invitation for Comment Upon Contemplated Changes to Rule Rule 26of the Federal Rules of Civil Procedure and Discovery Disputes Arising Therefrom***

To the Distinguished Committee:

We write, at the Committee's invitation, to provide brief comment on changes the Committee may be considering, or may in the future consider, regarding discovery in federal courts under Rule 26 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."), and specifically regarding the nature of privilege logs, ESI and document review in large cases, and categorical privilege claims.

As the Committee's Invitation states, the "Committee on Civil Rules has received a suggestion that rule changes be adopted to address difficulties in complying with Rule 26(b)(5)(A) in some cases." The Committee also indicated that it:

> has not made any decision about whether any rule amendments should be seriously considered, much less what focus would be best if some amendments seem promising. The possibilities mentioned above are intended only to focus comment.

As members of the bar who typically represents plaintiffs in various large and complex actions, we believe it is vitally important to weigh in on the changes that the Committee may be considering. Particularly with regard to suggested changes to the process of developing, maintaining, and producing a privilege log, the decisions the Committee may make could have a dramatic impact on the discovery process in federal court, as well as our ability to represent our clients fully.

Who We Are

The undersigned are attorneys with the firm DiCello Levitt Gutzler LLC, a national firm practicing primarily in the areas of class action, mass tort, data breach and cybersecurity, privacy, catastrophic injury, medical malpractice, civil rights, and commercial litigation. Our firm routinely practices in federal courts around the country, and a large percentage of our cases involve what the Committee has referred to as "large document cases." We are experienced litigators, and frequently negotiate the scope, frequency, method, and form of ESI and document retention and production before, during, and after litigation. As the discussion regarding the discovery process has matured after the 2015 "proportionality" amendments to Rule 26, we have seen efforts by certain attorneys, particularly members of the defense bar, to further limit the scope of discovery in order to reduce the purported burdens on defendants.[1]

We understand that reviewing potential ESI productions for privilege can pose a real burden, even (and perhaps especially) to global billion-dollar companies, who are usually the target of class action and mass tort suits with thousands, if not millions, of putative class members and plaintiffs. However, we do not believe that amending Rule 26 to allow for categorical privilege classifications would bring the positive changes proposed by the proponents of these proffered changes. In fact, as discussed herein, allowing these amendments would only needlessly complicate the discovery process, cause more motion practice, and ultimately prolong and increase the expense of discovery on both sides of the civil bar. As a result, we urge the Committee to very seriously consider the long-term potential implications of allowing categorical privilege assertions.

Privilege Logs – A Multi-Part Process

The Federal Rules of Civil Procedure are the same, and apply the same, to both cases with few relevant documents, and "large document cases." No matter the size of the case, any attorney who receives a request for the production of documents under Rule 34 must work with their client to conduct a review of the documents under the client's possession, custody, and control. In conducting such a review, the attorney must determine if a given document is: (1) responsive to the request; (2) relevant to the claims and/or defenses in the case; and (3) protected

[1] We have noticed that arguments concerning the "proportionality" rule typically goes only one way; defendants frequently argue that *more* discovery is now required of individual litigants (even if burdensome and of limited relevance) due to the large number of documents that corporations produce in discovery.

by one of a few enumerated privileges. This multi-tiered review is necessary to allow the responding attorney to produce documents on behalf of their client, but also to make sure that any assertions of privilege are meaningfully reviewable by opposing parties and their counsel.

Particularly in cases involving large amounts of documents and/or ESI, this process typically takes place in waves, which makes logistical sense: the pool of documents that are responsive to a request is most often the broadest, narrower is the pool of documents that are both responsive and relevant to the case, and still narrower is the pool of documents which are responsive, relevant, and not subject to an enumerated privilege. In cases involving ESI, litigants and their counsel who are sufficiently technologically savvy have begun using software or cloud-based systems to quickly and efficiently identify responsive and relevant documents—often by hiring a vendor. These systems allow the parties on both sides to negotiate ESI protocols that allow the universe of documents to be confined to a mutually-agreed scope. These negotiations allow defendants to save time and money by limiting the review necessary to smaller universes of documents than they otherwise might be called to review. It also assists plaintiffs: as the document universe is negotiated, it is less likely that the defendants will simply "dump" every possible document on the plaintiffs and expect the plaintiffs to sort it out. Through a negotiated ESI protocol, the parties can work together (and when they cannot, they can resort to motion practice) to narrow the scope of documents that need review by counsel on either side of a given case.

How we respectfully submit the process should work.

While our experience with the defense bar on this issue has been varied, most defendants are willing to negotiate a discovery protocol that allows for certain categories of documents to be presumptively protected by a privilege categorization. For instance, our firm is presently representing a class of plaintiffs in a suit against a large technology company. The parties have been negotiating the ESI protocol, and opposing counsel have discussed (and envision) marking as presumptively privileged any email communications between their client and outside litigation counsel. While negotiation is ongoing regarding what members of the company's in-house litigation counsel may also have their communications presumptively privileged, the parties are steadily making headway without the intervention of the special master assigned to the case, or through motion practice. Defense counsel has been willing to identify certain in-house counsel for the company that they believe warrant presumptive privilege designations, and have been willing to provide the information on which they base that assertion. This provides plaintiffs' counsel with some assurances against gamesmanship, and information on which to challenge or further negotiate any assertions of privilege by the defendants. Because both sides are knowledgeable about how ESI protocols operate, we are able to *negotiate* this type of agreement, and ensure that we have sufficient information to mount challenges on defendant's privilege assertions. While such negotiation requires a good relationship between knowledgeable, reasonable opposing counsel to be effective, we are of the firm belief that this represents the vast majority of attorneys working in this space.

Even among reasonable counterparties with good working relationships, however, well-founded disputes can form during the meet-and-confer process. Two rule changes regarding clawed-back documents sought to help alleviate such disputes: the amendment of Rule 26(b)(5) in 2006, and the addition of Federal Rule of Evidence 502 in 2008.[2] Negotiation of an ESI protocol typically touches on this aspect as well, and we are currently negotiating those aspects in the case mentioned above. There is value in having this negotiation in the first place, even if it does not ultimately result in an agreed protocol, *i.e.*, the discussion helps to clarify the issues for a reviewing special master or Court. There is no need to make another rule change in this vein, especially when that change would exacerbate existing information disparities and perverse incentives.

Uniform adoption of categorical logs ensures that the process doesn't work.

Despite the broad willingness to negotiate the scope of privilege log categorization, some defendants consistently raise purported concerns related to the burden put on them by having to review large potential productions of documents for privilege. As a result, a minority of defendants tend to try to extend "categorical" claims of privilege to an extreme, and without meaningful negotiation. By way of example, one of our partners was appointed to serve as co-lead counsel in a data breach case involving over 300 million class members. In that case, we negotiated a limited categorical privilege log with defendants' counsel, under the condition that defendants agree to low-cost, common sense safeguards, including those recommended by the Facciola-Redgrave Framework.[3] We agreed to negotiate such a protocol with the defendants in that case despite the fact that categorical privilege logs can be prone to gamesmanship and over-designation,[4] a fact recognized by leading voices in the bar regarding privilege logs.[5]

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[2] *See* Fed. R. Civ. P. 26(b)(5), 2006 committee note ("The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery."); Fed. R. Evid. 502, 2007 committee note ("This new rule . . . responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive . . . .").

[3] *See* Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Cts. L. Rev. 19 (2009). Judge John Facciola (ret.) serves as the Special Master in that data breach case.

[4] *See e.g., In re Aenergy, S.A.,* No. 19-MC-542 (VEC), 2020 WL 1659834, at *4-6 (S.D.N.Y. Apr. 3, 2020) (finding defendant's categorical privilege log descriptions were "vague and repetitive" and improperly failed to reveal sufficient information to enable other parties to assess privilege claims); *Certain Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n*, No. 3:15-CV-01300-JMC, 2016 WL 6539344, at *3 (D.S.C. Nov. 3, 2016) (holding party's categorical privilege log was deficient because it did not allow opposing party or the court to test the applicability of privilege to each document sought to be withheld); *Franco-Gonzalez v. Holder*, No. CV 10-2211-DMG DTBX, 2013 WL 8116823, at *7 (C.D. Cal. May 3, 2013) (same); *Chevron Corp. v. Salazar*, No. 11 CIV. 3718 LAK JCF, 2011 WL 4388326, at *2 (S.D.N.Y. Sept. 20, 2011) (finding, after *in camera* review of withheld documents, that party's categorical privilege log "obscures rather than illuminates the nature of the materials withheld" and that some or all documents withheld were subject to disclosure).

Unfortunately, defendants' response was consistent with that experienced by other firms with whom we have worked extensively, in that they refused to: (1) agree what categories would be used; (2) include an attestation by an attorney to provide reasonable context as to the role of the person making the privilege assertion, the applicability of the privilege, and how the review was conducted; (3) include specific data points for categorical logs; and (4) provide distinct data points for document-by-document logs. Instead, defendants continued to propose category descriptions that were facially overbroad and inconsistent with the Federal Rules of Civil Procedure, despite producing millions of documents and indicating that they were withholding substantial additional documents.[6]

What became clear during negotiation, and then (inevitably) motion practice, was that the defendants intended to litigate the sufficiency of their privilege logs, which only further prolonged the discovery disputes present. After months passed with no movement beyond the naked placeholders offered at the outset, one of defendants' counsel advised that the "parties' proposals are too far apart for repeated redlines" and only then did they present us with two lists of proposed categories.

We eventually sought advice from the Special Master in that case, noting that we were frustrated with the way that the process was unfolding, and believed that months of delay with a looming discovery cut-off was preventing us from assessing *any* of defendants' privilege assertions. During a call with the Special Master, he told the parties that, if he had known that categorical logs would cause so many problems, he would not have suggested them. As a result, the parties negotiated a process that required defendants to produce document-by-document privilege logs, which allowed us to have sufficient information to mount several successful challenges to defendants' privilege assertions. Through this process, one of the defendants produced *thirteen thousand* relevant documents it had previously marked as "privileged." Had the parties used only categorical logs, these documents—many of which speak directly to defendants' liability—would have remained improperly shielded from discovery.

A Rule Change Is Unnecessary When Parties Are Able to Negotiate

The assertion of privilege must meaningfully provide any party the ability to test the assertions being made. If categorical privilege logs become the rule they would frustrate the information asymmetry that already exists in litigation: only the party withholding the document really knows what the document says, and the party seeking the document only knows what the withholding party says it says. Categorical privilege logs allow parties to withhold even more

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[5] *See* Facciola-Redgrave Framework, at 20.

[6] *See* Fed. R. Civ. P. 26(b)(5) (requiring a party withholding information based on privilege to "(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*.") (emphasis added).

information, thereby making challenges that much more difficult—requiring multiple rounds of revisions to the logs, supplementation, motions practice, and (finally) *in camera* review.[7]

Concerns regarding overly-broad categorization should militate against any amendments to Rule 26 that would provide parties the opportunity to categorically claim privilege over vast swaths of documents without first: (a) conducting some level of internal review, and (b) memorializing that review in a fashion that allows the opposing party to review and challenge assertions of privilege, if necessary. This is similarly important, of course, for a reviewing court. Any whole categorization of potentially privileged documents must have safeguards and protections in place that *cannot be spelled out by a uniform, one-size-fits-all rule change.* Rather, those safeguards and protections must be negotiated between the parties (or determined by a judge) given the specific circumstances of each respective case. Given the technology available to litigating parties today, such a rule change appears to be exceedingly unnecessary.

Categorical logs are likely to provide another tool for withholding parties to obscure the nature of their privilege designations, preventing open and efficient adjudication of these issues. We ask that the Committee not amend Rule 26(b)(5)(A) at this time.

Sincerely,

Adam J. Levitt, David A. Straite, Bruce Bernstein,
Amy E. Keller, and James Ulwick

For DiCello Levitt Gutzler, LLC

[7] *See, e.g., In re Blue Cross Blue Shield Antitrust Litigation*, MDL 2406 (N.D. Ala.) (Hon. R. David Proctor) and *In re: Disposable Contact Lens Antitrust Litigation*, 3:15-md-2626-J-20JRK (M.D. Fla.) (Hon. Harvey E. Schlesinger).

From: Eric Weisblatt
To: RulesCommittee Secretary
Subject: Privilege Law Practice
Date: Sunday, August 01, 2021 2:26:00 PM

To the Committee:

Thank you for providing the public with a chance to comment on potential changes to Rule 26(b)(5)(A). From my background, I am intimately familiar with the construction of privilege logs and the auxiliary litigation that accompanies challenges to those logs.

I was a member of teams that litigated patent infringement matters in many US district courts from 1982 until my retirement in 2018. (I represented both patentees and accused infringers in equal numbers at a small firm and two large firms.) These cases often involved the exchange of hundreds of thousands of pages if not several million pages. At the beginning of my career, my mentors at Burns,Doane, Swecker and Mathis assigned me to find and log every potentially privileged or work product immune document of our client. For every document, the log included the senders, recipients, date, original "re" line, attachments if any, and a final column that included my comments on the content of the document.. Documents of particular interest were flagged "red" and a detailed explanation went over why the document was thought to be important. When I was done, a partner would sit down with me and go over each document and decide if it was fairly privileged or work product immune. This log would be updated as our investigation into our client's documents continued. When the log was produced, the "my comments" column would of course be deleted.

My mentors explained to me that in patent cases if the district court did not require a privilege log, because we had a very good understanding of our privilege claims, we would move the court to order the parties to exchange logs. We wanted to force an exchange of logs because it was part of our litigation strategy to closely analyze our opponent's log and attack it through motion practice. We understood that such "parallel litigation" was costly, but in too many litigations we found that our opponent had misused the privilege and that the district courts would often agree and order the attacked documents produced. Further, since we already had a well-developed log, our opponent might not be so lucky and might have to rush construction of their log.

It is very important to the practice of Patent Law that privilege logs be exchanged in litigation. The controversial part of a log is almost always the required "general description of the subject matter of the document." Of course, this is the most difficult part to draft since you must reflect the "general subject matter" but not harm the invocation of the privilege in any way.

"Generic" or "boilerplate" descriptions were often necessary in our cases. For patentees, "Correspondence during the prosecution of US Patent No. X" often appeared in the log dozens of times. Accused infringers do not need any more information and after we had examined recipients and senders, we rarely challenged the privileged status of these documents.

Essential aspects of this work did not change when we passed from the "paper age" to the "digital document age." In fact, to be sure that we took out of production all copies of a privileged document, we invariably were forced to do a page-by-page review of every document.. You only have to produce a privileged document once that was buried in an email string to understand why the "digital age" changed very little here. The only thing that changed is that instead of wading through boxes of 2000 pages each, we could "click" through the document production.

It seems obvious that the general description in the log of each document must fairly describe the entire content of the document. If a rule change is deemed necessary, the Advisory Committee's Notes should mention that a failure to provide an adequate description that results in a waiver of the privilege for the particular document under *in camera* study also waives the privilege for all similarly described documents in the log. (A request for *in camera* inspection of selected logged documents under attack is always necessary to sort out these issues. That study is a burden on the district court but in 38 years I did not find a viable substitute. In our motion for such a study we would group similarly situated documents, e.g. documents where no attorney was involved, and would almost never ask the court to examine more than 7-10 individual documents.)

For your specific questions, for the first bullet point at page 2 of your invitation, if any such revision is made, perhaps cases brought under the Patent Laws could be exempted. Indeed, for cases brought under the Patent Laws, logs should be made mandatory in a form to be decided by the district court. Also, the use of "categories of documents" to replace a document-by-document log is ill-considered. The privileged status of each logged document must stand on its own content and individuals involved. I doubt that every document in most potential "categories" has identical senders, recipients, attachments, etc.

For the second bullet point at the top of page 3, the parties ought to discuss whether a log is necessary during the preparation of the discovery plan. For patent infringement litigation, however, logs should be mandatory and the discovery plan should specify when the logs will be exchanged and what information must be logged.

As I mentioned, the use of the identification of "categories" of documents is contrary to the spirit of attorney-client privilege law. Assertion of the privilege enables a litigant to withhold relevant documents from discovery. Each document needs to be separately logged so the privilege assertion for each document is able to be tested. One could not assume that every document in a category was "equally" privileged. This might be onerous but exceptions to discovery must be narrowly construed and forcefully proven.

Patent infringement cases are a miniscule part of federal district court litigation. But those are the very cases that require a detailed privilege log entry for each document withheld from production. During my career, the value of a requirement of a log of such entries was proven again and again.

Once more, thank you for asking for public comments on these thorny issues. Sincerely, Eric H. Weislbatt

WHITFIELD COLEMAN BULLOCK

John C. Whitfield
john@wcbfirm.com

August 1, 2021

The Discovery Subcommittee of the
Advisory Committee on Civil Rules

Re: *Invitation for Comment on Privilege Log Practice*

Dear Members of the Discovery Subcommittee:

It has come to my attention that the Discovery Subcommittee ("Subcommittee") of the Advisory Committee on Civil Rules has issued an invitation for comment on privilege log practice, regarding proposed changes to Rule 26 and the use of privilege logs. I respectfully wish to comment as to my experience with privilege logs during the course of over thirty-eight (38) years of practice, and to express my hope that no such changes to Rule 26 are made.

I am a trial attorney from the Commonwealth of Kentucky, representing primarily plaintiffs in all aspects of personal injury, wrongful death, products liability, and bad faith contexts. I have litigated and tried cases throughout the south, eastern seaboard, and Midwest. I have extensive experience dealing with the fundamental issues of privilege logs and the implementation of same and wish to provide a brief synopsis of my experience dealing with this part of my practice.

It appears the Subcommittee is considering the following changes:

1. Requiring categories of documents rather than a document-by-document description of each document;

2. Requiring the parties to discuss compliance with Rule 26(b)(5)(A) when preparing their discovery plan and potentially including a discussion in a Rule 16 conference;

3. A change to the rule that enumerates categories of documents that do not need to be identified.

My goal with this comment is to provide my real time experience with the three issues noted above.

To begin, privilege log issues typically arise in two situations in my practice: (1) Rule 30(b)(6) depositions and (2) parent company liability issues. In both instances, defendants I have encountered fully understand the requirements of FRCP 26(b)(5) to describe "*the nature of the documents, communications, or tangible things not produced or disclosed*", when claiming privilege, but within the last five years I have seen an increasing use of

category designations instead of document-by-document identification. I rarely encountered category designations before. Parties who try that tact now usually cite that FRCP 26(b)(5) does not mandate that a document-by-document privilege log is required, and then proceed to complain of the burdensome nature and expense of absolute document itemization in a privilege log. Of course, from a plaintiff's perspective of which I practice, categories do little to permit me to make an objective determination of whether the category of documents, much less the documents within these categories, are truly subject to privilege and not to be produced. I always object to this procedure, and always address this with defense counsel, outlining that FRCP 26(b)(5) requires sufficient information for me, or even the court, to "*enable other parties to assess the claim*". More often than not, I cannot "*assess the claim*" of privilege when numerous documents, emails, or other transmissions are broadly categorized. In the event I cannot obtain adequate cooperation from defense counsel as to my concerns (after complying with local meet and confer obligations), I have been pleased with how federal and state trial court judges have handled this situation.

I have been successful in the majority of my cases (when objecting to this category procedure) in obtaining additional information from defense counsel that assists me to "*assess the claim* " of privilege. For example, the category approach does not relieve the party of identifying all senders and recipients of communications, so that I can determine whether waiver exists. Nor does the category approach permit a party to identify broad general categories, as my experience with Courts dealing with this issue require a party at a minimum to break down categories into subcategories, such as date range, type of authors and recipients, and delineate the type of claimed protection (e.g. attorney-client privilege or work-product doctrine). Due to the fact that most discovery disputes of this nature in my cases resolve with mandated production of this type of information, I see no need to dilute FRCP 26(b)(5) even further, so as to provide ammunition for parties to broaden their categories or obtain protection from providing the subcategory information just noted. The rule and the spirit of its implementation achieves the goal of permitting a party to document and justify whether evidence is indeed privileged, and additionally provides a reasonable basis to decide whether to challenge the claim of privilege. It is for this reason alone that no change to Rule 26 in this regard is needed in my opinion.

My experience in both federal and state court cases has taught me that in some instances category use in a privilege log might be acceptable, and I have seen courts permit this procedure. Usually there are two situations in my practice where courts have permitted categories to be used:

1. Where a detailed disclosure would, in effect, reveal the putatively privileged information; and

2. Where a document-by document listing would be unduly burdensome and the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing the privilege claim.

Due to the fact that courts have carved out these two exceptions to the document-by-document privilege log, parties who wish to utilize categories can at present do so. However, those parties that I have confronted when claiming one of these exceptions have the burden to prove the validity of the exception, which I believe is necessary and right if evidence is truly privileged. In my practice, often claims of document-by-document itemization being burdensome falls on deaf ears due to the advent of technology in the modern litigator's arsenal which provides the ability to organize huge amounts of data (and metadata) efficiently and easily. In any event, at present parties wishing to use categories in privilege logs can certainly do so, as long as they can justify their use to the court in the limited situations I noted. This is another reason where no amendment to Rule 26 regarding privilege log productions is necessary.

I am supportive of dealing with compliance with Rule 26(b)(5)(A) relative to privilege log issues in discovery plans and including a discussion in a Rule 16 conference if necessary. In fact, I have made it a point to insist in any discovery plan that category of documents not be used, which in many instances are agreed to by the opposing side. In the event I do not receive this concession, courts have been very receptive to managing a plan to obtain the necessary information within the privilege log to permit me to assess the claim. Use of subcategories with additional information is a perfect example how a court can satisfy the alleged fears of parties who claim document-by-document itemization is either too burdensome or reveals putatively privileged information.

Finally, I strenuously object to suggestions to change the rule that enumerates categories of documents that do not need to be identified. I fear that with the advent of the use of categories more and more by parties and their counsel, the ability to classify a category as protected from disclosure outright (by rule) would invite abuse.

As noted, in my opinion Rule 26(b)(5) works adequately and fairly for all sides in litigation and should not be amended as outlined herein. I thank the Subcommittee for permitting me to tender this comment.

Sincerely,

John C. Whitfield

PRIV-0090

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August 1, 2021

VIA ELECTRONIC SUBMISSION TO:
RulesCommittee_Secretary@ao.uscourts.gov

RE: AAJ's Invitation for Comment on Privilege Log Practice

The Paul Byrd Law Firm is a plaintiff's firm representing individuals who have been injured in products' liability, premises liability, truck and car wrecks, medical malpractice events, work related injury, and other serious personal injury cases.

Our firm is encountering privilege log issues in nearly every category of case currently on our various dockets. Although these logs are jamming up primarily our larger cases, some of our smaller cases are plagued by them as well. We have had some modicum of success resolving some minor issues with privilege logs amongst counsel, but we often must seek court intervention, and this process can chew up valuable time, particularly in Federal Court cases where scheduling orders are often very tight.

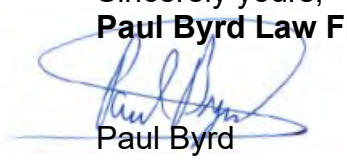
A change to the rule that would restrict and constrain the overuse and abuse of privilege logs would indeed prove most helpful in the swift administration of justice. On the contrary, any change to the rule that would make it easier for defendants to hide behind these privilege logs by using vague descriptions of materials withheld by category only, for example, would unbalance the playing field and skew the odds in favor of defendants attempting to hide their misconduct behind the cloak of attorney client privilege and attorney work product where none truly exists.

When large corporations slap "Privileged" on a document and must only describe it in categories, they can effectively disguise the document to the point that it may never be found, or it may require plaintiffs to engage in extensive and time-consuming discovery to unmask the privilege. We have a case now where the defendant has stated that a "root cause analysis" investigation into a serious and grossly negligent series of "production over safety" decisions and actions and inactions of what caused a serious injury is privileged as attorney client and work product even though company policies disclosed in discovery make it clear they require this analysis be conducted immediately. Moreover, nowhere in the hundreds of pages of company safety manuals and accident investigation policies and procedures manuals is a single mention of calling legal counsel in any form or fashion into this investigation. Indeed, the very purpose of these "root cause analysis" investigations is to allow the company to run better and safer and get to the bottom of each injury or unsafe action to avoid repetition of the offending conduct or event. Without a proper description of each document how can a firm distinguish what may be or may not be privileged?

Requiring the parties to discuss compliance with Rule 26(b)(5)(A) when preparing their discovery plan and potentially including a discussion in a Rule 16 conference would seem to encourage transparency and perhaps flush out and prevent some abusive uses of privilege logs.

Much like the proliferation of Protective Orders pushed to great and unfortunate success by the corporations and their counsel over the past two decades, privilege logs appear to be headed in the same onerous direction. Perhaps the rules should be amended to add the "teeth" of serious sanctions, such as awarding of attorney's fees and costs, or striking of pleadings when these obstructions to justice are abused.

Sincerely yours,
Paul Byrd Law Firm, PLLC



Paul Byrd
Attorney at Law

PRIV-0091

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August 1, 2021

To the Discovery Subcommittee of the Advisory Committee on Civil Rules:

Thank you for the opportunity to comment on proposed changes to Federal Rule of Civil Procedure 26(b)(5)(A). Romanucci & Blandin, LLC represents injured plaintiffs and individual victims of civil rights violations in Federal Courts.

The Federal Rules of Civil Procedure have the potential to affect the ability of our clients to obtain justice and just compensation. We would like to raise concerns regarding potential changes to the requirements regarding privilege logs. Under the current rule, privilege logs require information making it possible for parties to discern if additional discoverable materials exist. Currently, the privilege log requires an individual document description. This description often provides the basis for parties to specifically request or move for access to discoverable materials, inappropriately marked as "privileged".

Summarizing information into categories would not provide for the receiving party of a privilege log to identify specific documents or items that may require additional review or inspective before the Court before a determination of the potential privilege can be made.

For example, the case *First Midwest Bank v. City of Chicago* concerned an allegation that City of Chicago police officer Patrick Kelly, after years of overlooked misconduct and inappropriate force, shot a friend in the head after a night of drinking, permanently paralyzing him. Our firm argued on behalf of the Plaintiff that the City had maintained a practice for years of misrepresenting, under-reporting, and concealing officer misconduct. Despite requests for production we issued asking for all records of investigation into Kelly for prior alleged misconduct, we discovered the City had withheld such records in the course of the litigation. Nearly a year after we issued our requests, we discovered that Kelly had shot and killed a man on-duty during our litigation and that the City had investigated the propriety of this shooting. The information did not come from responses to our requests for production, but from a deposition of Kelly by an attorney in another matter. The City had omitted all reference and document production relevant to this shooting in its responses to our requests, later arguing that this investigation was a routine investigation, and did not concern any allegation of "misconduct." The production ultimately included more than 1,000 pages of relevant documents, which contemplated the propriety of Kelly's use of force under City of Chicago policy and relevant case law. This omission, and the mis-categorization of the requested documents, materially hindered our ability to investigate our claims against the City and our ability to thoroughly depose witnesses. The City was able to withhold this information from us only based upon an inaccurate categorization of documents with high relevance to the claims at issue.

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Privilege logs, even in their current form, provide an opportunity for parties to mislabel documents in an attempt to subvert potentially relevant information. Often plaintiffs in civil rights cases are required to fight for or compel even a basic privilege log after receiving vague objections to document production requests. Allowing for summarized descriptions for large portions of data only increases the potential that the logs will be used inappropriately.

Thank you for your consideration.

Sincerely,

Bhavani Raveendran

Nicolette Ward

Romanucci & Blandin, LLC

MotleyRice LLC
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www.motleyrice.com

"I will stand for my client's rights.
I am a trial lawyer."
–Ron Motley (1944–2013)

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August 1, 2021

Via Electronic Mail
Advisory Committee on Civil Rules
RulesCommittee_Secretary@ao.uscourts.gov

RE: **Invitation for Comment on Privilege Log Practice**

To whom it may concern:

My name is Jonathan Orent and I am a Member Attorney at the law firm of Motley Rice, LLC. My practice involves multiple areas of law, including serving as lead counsel of hernia mesh litigation in *In re Atrium Medical Corp. C-QUR Mesh Products Liability Litigation*, MDL #2753, and co-lead and co-liaison counsel in the largest consolidated hernia mesh litigation in the country, *In re Davol/C.R. Bard Hernia Mesh Multi-Case Management Coordination*. Additionally, I serve as co-chair of the AAJ Hernia Mesh Litigation Group. I write in response to the invitation for comment on privilege log practice, respectfully opposing any rule change.

A revision to Rule 26(b)(5)(A) that seeks to allow wholesale categorized privileged logging for documents- as opposed to providing a document-by-document privilege log- is an unnecessary modification that complicates a straight forward rule for parties engaged in discovery. First, categorical privilege logging would allow parties to claim privilege without reviewing the actual documents. Second, categorical privilege logging would preclude the necessary information the receiving party needs to evaluate whether a true privilege exists, and makes challenging such privilege almost impossible without court intervention. Finally, a modification of the rule is unnecessary in light of the technology currently available to litigants to ease the process of creating a privilege log.

In complex litigation, parties from both sides have the opportunity and generally engage in meet and confer sessions to determine the best way to conduct discovery within the confines of the rule and with minimal dispute. Indeed, under the rule the parties are afforded options on how they perceive the course of discovery should proceed. While the Rule provides some flexibility, it nonetheless makes clear that when a party withholding information otherwise discoverable by claiming privilege, it must expressly make the claim and "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**." F.R.C.P. 26(b)(5)(A). A categorical privilege invites foreseeable obstacles and the potential for litigation throughout the discovery process. Perhaps most importantly, a categorical privilege essentially eliminates the obligation of the withholding party in evaluating relevant documents for privilege. In support of this, I present events from the MDL 2753 litigation that involved a

categorization of documents asserting a privilege of an entire category of documents based solely upon certain broad categories.

During the course of discovery and in response to Plaintiff's request for production in MDL 2753, Defendants asserted categorically in a paragraph that all documents under a particular time period with respect to a particular subject were withheld as presumptively privileged pursuant to attorney/client privilege and work product privilege without providing any further information as to the substance or volume of said documents. The Parties lost significant time and resources engaging in subsequent meet and confers with respect to Defendants obligation to fully and properly responded to this discovery request prior to the issue ultimately being presented to the Court during a status conference. It was during this conference that it came to light that the volume of documents withheld was somewhere near 150,000 (it was ultimately found that this number was even higher), and perhaps more alarmingly that by asserting privilege under a particular category of documents, these documents had never been reviewed by the withholding party. As can be seen by this illustration, categorical logging functionally lowers the threshold requirement for claiming privilege and can result in significant negative impacts on the litigation. In this particular situation, the Court informally ordered the producing party to produce a privilege log with metadata recognizing the ease of the task. I am opposed to any rule change that functionally relieves the producing party of their obligation to show a privilege exists for relevant, withheld documents in relation to discovery requests.

Adopting changes to the current language of the rule may invite vague and repetitive categorical descriptions, thereby failing to provide the receiving party with adequate information sufficient to enable a determination on the validity of the asserted privileges. The onerous is on the person asserting the privilege to demonstrate the existence of this, a burden which is exceptionally low for that party. A majority of the information on the privilege log is metadata, and the task of generating this metadata is exceptionally low, sometimes involving just a click of the button. However, merely looking at this metadata is insufficient to determine privilege. A review of the actual document must be conducted to determine whether true privilege exists for that communication. Indeed, the party asserting privilege has this obligation to do so. With the asserting party already going through each document, the burden continues to be minimal to place the document and its information on a privilege log. A document cannot be presumed privileged without looking at the contents. This is especially true given one of the most litigated items is to determine whether a true privilege exists with respect to communication between in house counsel and employees. A categorical privilege asserted by the mere presence of an in-house counsel's email address invites the potential for improper withholding of documents. The distinction between legal advice and business advice must be evaluated to determine if true privilege exists, and this must be done through a document-by-document review. A blanket categorical privilege assertion would inevitably prompt the need for court intervention and delay the clear objections of Rule 1 the very purpose of Rule 26.

Federal district courts regularly address the obfuscation that results from categorical privilege logging. For example, the United States Southern District Court of New York granted a motion to compel General Electric to create a document-by-document log after the court determined that General Electric's submitted categorical log "did little to communicate the potential basis for its privilege assessments." *In re Aenergy*, S.A., 451 F. Supp. 3d 319, 326 (S.D.N.Y. 2020). Specifically, the majority of General Electric's categorical descriptions only generically stated that the documents-in-question were confidential communications between employees and in-house counsel. *Id*. In reaching its decision, the court cited a concern that overbroad or unwarranted privilege determinations were hiding behind General Electric's vague categorical groupings. The court reminded General Electric that "[a] privilege log is not a mere administrative exercise. Its purpose is to ensure that a withholding party can justify a privilege designation." *Id*. (quoting *BlackRock Balanced Capital Portfolio (FI) v. Deutsche Bank Nat'l Tr. Co.*, No. 14-CV-9367, 2018 WL 3584020, at *5 (S.D.N.Y. July 23, 2018)).

When vague categorical logs prompt confusion or vagueness, courts often rely the current document-by-document guidance provided by the current language in Rule 26(b)(5)(A). In *Norton v. Town of Islip*, a defendant's categorical log was deficient because of its vague categorical references to "notes," "memoranda," and "correspondences" of documents covering a three years period. *Norton v. Town of Islip*, No. CV043079PKCSIL, 2017 WL 943927, at *9 (E.D.N.Y. Mar. 9, 2017). Additionally, the defendant's amended privilege log, covering documents spanning over the course of nine years, prompted deficiencies that were "immediately glaring" to the court. *Id*. at *4. For example, the defendant's inadequate amended privilege log's description of "handwritten notes" failed to identify who wrote the note, when the note was written, and what the note was referencing. *Id*. Moreover, some of the defendant's entries in the amended privilege log were blank and incomplete. *Id*. As a result of the vague descriptions, the cataloged entries from both the amended privilege log, logging documents over the span of nine years, and the privilege log, logging documents over the span of three years, failed to adequately inform the plaintiffs of the basis for its privilege determinations. *Id*. at *9. As a result, the defendant was instructed to produce a document-by-document log. *Id*.

As demonstrated above, increasing the presence of categorical logging in litigation will naturally result in the expansion of deficient privilege logging. Consequentially, deficient privilege logging will create greater privilege log review inefficiencies between opposing parties. In *Neelon v. Krueger*, the plaintiff's choice to group his privilege log by relationship or transaction impeded the efficient review of the privileges. *Neelon v. Krueger*, No. 12-CV-11198-IT, 2015 WL 1037992, at *4 (D. Mass. Mar. 10, 2015). Specifically, the court noted that the log failed to indicate which of the withheld documents related to which of the defendants' document requests, causing more difficulty in understanding and testing the asserted privileges. *Id*. The court ultimately determined that the plaintiff would need to provide much more specific document-screening in order to meet

the obligations under Fed. R. Civ. P. 26(b)(5)(A) due to the difficulty created by the overly-broad categorical privilege log. *Id*.

The Western District of Tennessee also considered this issue when plaintiffs sought to categorically log all documents created before and after the filing of the complaint. *First Horizon Nat'l Corp. v. Houston Cas*. Co., No. 2:15-CV-2235-SHL-DKV, 2016 WL 5867268, at *6 (W.D. Tenn. Oct. 5, 2016). The documents--spanning over five years in age--were particularly relevant to the issues before the court. *Id*. The court determined that the categorical log provided by plaintiffs was minimal and vague. *Id*.; *See also McNamee v. Clemens*, No. 09 CV 1647 SJ, 2013 WL 6572899, at *3 (E.D.N.Y. Sept. 18, 2013) (stating that "broad classes of documents with exceedingly general and unhelpful descriptions" are impermissible in categorical logs). Further, the court reasoned that a categorical log of all of the relevant information may prevent the defendant from assessing the privileges and accessing non-privileged communications in fact. *Id*. at *7.

As evidenced by the cases above, federal courts in multiple jurisdictions regularly correct issues arising out of improper categorical logging. Revisions to the rule would increase the burden on courts and receiving parties to discern appropriate and sufficient privilege logging practices. Expanding the scope of approval for categorical privilege logging will only invite the escalation of the illusionary fog created by vague and overly-broad categorical privilege logs

For these reasons, I respectfully oppose any change to Rule 26(b)(5)(A). Thank you for your attention to this matter.

Very truly yours,

Jonathan D. Orent

August 1, 2021

Via Email (RulesCommittee_Secretary@ao.uscourts.gov)

Judicial Conference Advisory Committee on Civil Rules
Discovery Subcommittee

Re: Comment on Privilege Log Practice

Dear Advisory Committee and Discovery Subcommittee Members,

Berger Montague PC respectfully submits this comment in response to your invitation. Berger Montague is a full spectrum civil litigation firm with more than 60 attorneys practicing in Philadelphia, Minneapolis, Washington D.C., and California. The firm generally represents individual and corporate plaintiffs in complex litigation in federal and state courts around the country, including antitrust, class actions, consumer protection, employment, environmental, qui tam, and securities matters. Our firm has been in operation for more than 50 years. Based on our experience, we submit that the existing text of Rule 26(b)(5)(A) provides a workable standard and no changes to the rule are needed.

I. RELEVANT DOCUMENTS ARE OFTEN INAPPROPRIATELY DESIGNATED AS PRIVILEGED

Privileges, such as the work product and attorney-client privileges, are narrowly construed because they withhold relevant information from the judicial process.[1] In almost every case that our attorneys litigate privilege designations are challenged and relevant and/or highly relevant documents end up being dedesignated. Thus, disputes over whether a privilege applies are not mere "satellite litigation" but instead can go to the heart of the case.[2] The question of whether a privilege applies is fact-intensive so detailed privilege logs providing the information necessary to assess privilege are vital.[3]

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[1] *See, e.g.*, *In re Morning Song Bird Food Litig.*, 2018 WL 1948807, at *2 (S.D. Ind. Apr. 25, 2018); *Skyline Wesleyan Church v. California Dep't of Managed Health Care*, 322 F.R.D. 571, 583 (S.D. Cal. 2017); *S.E.C. v. Carrillo Huettel LLP*, 2015 WL 1610282, at *3 (S.D.N.Y. Apr. 8, 2015).

[2] Suggestion for Rulemaking to the Advisory Committee on Civil Rules from Lawyers for Civil Justice (Aug. 4, 2020), at 2.

[3] *See, e.g.*, *Skyline*, 322 F.R.D. at 583; *Sapia v. Bd. of Educ. of City of Chicago*, 351 F. Supp. 3d 1125, 1129 n.3 (N.D. Ill. 2019); *Ajose v. Interline Brands, Inc.*, 2016 WL 6893866, at *7 (M.D. Tenn. Nov. 23, 2016).

II. RULE 26(b)(5)(A) PROVIDES FOR THE FLEXIBILITY NECESSARY FOR THE PARTIES TO CONSTRUCT AN EFFICIENT APPROACH TO PRIVILEGE

The parties should meet and confer as early as practicable to reach agreement on how privilege assertions will be handled. The existing rule recognizes that there is no one-size-fits-all approach that works for every case. Determining whether a privilege applies often requires an analysis of each document necessitating a document-by-document log. However, our firm has utilized different combinations of techniques depending on the case to lessen the burden of privilege logging (e.g., categorical privilege logs for certain types of documents, no-logging of certain documents or certain time periods, a "quick peek" approach, staged privilege review).[4] Parties should be encouraged to work through these issues through meet and confers to come up with a tailored approach. If the parties engage in good faith early on, then less court involvement is typically needed. Additionally, to the extent privilege issues cannot be worked out amicably, the existing rule provides the possibility for a designating party to seek a protective order in unduly burdensome situations.

III. AMENDING RULE 26(b)(5)(A) TO PROVIDE LESS INFORMATION WILL JEOPARDIZE THE REQUESTING PARTY'S ABILITY TO EVALUATE PRIVILEGE ASSERTIONS, CONSUME RESOURCES, AND OBSCURE RELEVANT INFORMATION

In our experience, problems arise when designating parties do not comply with Rule 26(b)(5)(A) as it is currently drafted (*i.e.*, designating parties provide descriptions that are too general and do not allow the requesting party to test the privilege claim). When the information called for by Rule 26(b)(5)(A) is not provided, the requesting party ends up having to make broader privilege challenges because it lacks the ability to hone in on specific documents. Thus, amending the rule to provide less information, or to forgo a document-by-document analysis altogether in favor of a broad, categorical approach, will hinder a requesting party's ability to make targeted privilege challenges.

Amending Rule 26(b)(5)(A) to require less information would also make fights over privilege assertions less focused, requiring more judicial involvement to address vague categories of documents. Courts have already recognized that categorical privilege logs often do not "allow [the requesting party] or the court to test the applicability of the [] privilege."[5] For example, failing to identify the authors and recipients (and if any are attorneys) of emails may make it impossible to make a privilege determination.[6] Courts have also raised the concern that

[4] *See, e.g.*, The Sedona Conference Commentary on Protection of Privileged ESI, 17 Sedona Conf. J. 95, 164-67 (2016).

[5] *Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n*, 2016 WL 6539344, at *3 (D.S.C. Nov. 3, 2016); *Norton v. Town of Islip*, 2017 WL 943927, at *9 (E.D.N.Y. Mar. 9, 2017) ("the entries in the log fail to provide enough information to permit Norton to make an intelligent assessment of whether the documents were created for the purposes of obtaining legal advice, in anticipation of litigation, or, as part of a protected deliberative process").

[6] *See Williams v. Duke energy Corp.*, 2014 WL 3895227, at *18 (S.D. Ohio Aug. 8, 2014) (privilege log held insufficient when authors and recipients were not identified); *First Horizon Nat'l Corp. v. Houston Cas. Co.*, 2016 WL 5867268, at *4 (W.D. Tenn. Oct. 5, 2016) (categorical log deemed insufficient when the "communications include[d] dozens of authors and recipients and lump[ed] together documents concerning many matters into broad categories"); *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69 (S.D.N.Y. 2006) (defendants in this multidistrict patent

"overbroad or otherwise unwarranted privilege determinations are hiding behind" groupings in categorical privilege logs.[7]

The need for categorical privilege logs containing less information rather than traditional document-by-document logs is also lessened by modern litigation technology, which allows for much of the content of a privilege log to be extracted from metadata. As stated by one federal court, "given today's litigation technology, there is no good reason why privilege logs should not include . . . other readily accessible metadata for electronic documents, including, but not limited to: addressee(s), copyee(s), blind copyee(s), date, time, subject line, file name, file format, and a description of any attachments.[8] To the extent categorical privilege logs are appropriate for certain documents, the parties must agree on their contents to ensure that they provide substantive information.[9] For example, it is nonsensical to think about "categories" as being categories *of documents* because the nature of the document is rarely, if ever, relevant to determining if the document is privileged. Instead, what matters is the nature of the privilege and the basis for it. So perhaps any "categories" for logging purposes would have more to do with *who* is doing the communicating, *when* the communications are happening, and *why* they are happening than it would with particular types of documents.

* * *

Based on our experience, Berger Montague PC submits that the existing text of Rule 26(b)(5)(A) provides a workable standard and no changes to the rule are needed.

litigation moved to compel production of numerous communications that Plaintiffs claimed were protected by the attorney-client privilege. Court found the categorical log inadequate for, among others reasons: failure to identify specific legal professionals protected by the privilege under foreign law, i.e., patent attorneys as opposed to law firms generally, to which the privilege would apply. In response to the inadequacy of the log, the Court ordered that the underlying documents be produced in their entirety.).

[7] *See In re Aenergy, S.A.*, 451 F. Supp. 3d 319, 326 (S.D.N.Y. 2020); *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (categorical privilege logs do not obviate a party's obligation to provide "sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure"); *Auto. Club of N.Y., Inc. v. Port Auth. Of N.Y. & N.J.*, 297 F.R.D. 55, 59 (S.D.N.Y. 2013) (categorical privilege log is adequate if it provides information about the nature of the withheld documents sufficient to enable the receiving party to make an intelligent determination about the validity of the assertion of the privilege"); *FDIC v. Fid & Deposit Co. of Md.*, 2013 WL 2421770, at *6-8 (S.D. Ind. June 3, 2013).

[8] *See, e.g.*, *Favors v. Cuomo*, 285 F.R.D. 187, 223 (E.D.N.Y. 2012).

[9] For example, in a recent antitrust matter our firm received a categorical privilege log that was simply a three-page letter with vague and repetitive descriptions of certain categories of documents that had been withheld.

GIRARD SHARP

August 1, 2021

Via Email
Judicial Conference Advisory Committee on Civil Rules
Discovery Subcommittee
RulesCommittee_Secretary@ao.uscourts.gov

Re: Invitation to Comment on Privilege Log Practice

Dear Members of the Discovery Subcommittee:

I write in response to the Subcommittee's invitation to comment on privilege logging practices, and appreciate the opportunity to provide my perspective.

As a practitioner with a 20-lawyer plaintiff-side firm focusing on complex cases that often implicate substantial privilege and work product issues, I have first-hand experience with Rule 26(b)(5)(A) and the importance of document-by-document identification of material withheld on the basis of attorney client privilege and work product protection. I offer below an example from my practice, and recommendations for the committee's consideration.

The information exchanges that Rule 26(b)(5)(A) contemplates have, in many situations, made all the difference in my practice by giving us a fair opportunity to discover non-privileged liability evidence, where categorical logs would not have. The current rules give the parties and courts the tools they need to effectively address privilege issues in a range of cases.

To the extent the Subcommittee is inclined to consider rule amendments, the proposed revision to Rule 26(f)(3)(D), which would direct the parties to discuss the method for complying with Rule 26(b)(5)(A) when preparing their discovery plan, has the potential to effectively address burden arising from privilege issues, while balancing those considerations with the interests of transparency, fairness, and a tailored approach to the issues at hand.

In my experience, early and consistent engagement and collaboration on privilege issues is the best way to avoid costly and time-consuming privilege "do-overs" later in the litigation. Rules that require that discussion to occur during the parties' Rule 26(f) conference, and a companion revision to Rule 16 inviting the court to address in its scheduling order the parties' positions on compliance with Rule 26(b)(5)(A), would reduce burden in the long run by ensuring the parties get ahead of privilege issues early in the litigation, in a manner consistent with Rule 1.

1. **The current rules offer far more solutions than problems, and empower the parties and courts to tailor privilege processes to the case.**

The Subcommittee invites input on whether problems under the current rule principally occur in "large document" cases. In my view, the current rule offers the right balance of structure and flexibility, *particularly* for cases involving a large volume of documents and substantial privilege considerations.

The approach adopted by the parties in an antitrust matter alleging a drug company's attempts to extend its monopoly over a lucrative brand prescription drug provides a real-world example of the important role document-by-document logging plays. The defendant in *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation,* 18-MD-2819 (NG) (LB) (E.D.N.Y.) produced privilege logs with tens of thousands of entries, most of which fell into categories that included swaths of entries with descriptions that were identical or virtually identical to one another. Using the logs, we first focused challenges on categories of entries that reflected (1) insufficient information to assess the privilege claim, (2) communications involving no legal personnel at all, (3) communications on the boundary of legal and business matters, (4) facts and information regarding underlying regulatory proceedings, and (5) communications with certain third parties.

Based on those challenges, the plaintiffs negotiated production of categories of previously withheld documents that involved no legal personnel or legal advice, and also agreed to permit the defendant the opportunity to re-log some inadequately logged entries. The parties sought rulings on additional issues like third-party waiver and production of communications bearing on regulatory matters. With the benefit of rulings and guidance from the court on these threshold issues (*id. at* ECF No. 109), the iterative process concerning the 40,000+ privilege log entries continued, with the defendant withdrawing privilege assertions and producing thousands of previously withheld documents, and the parties continuing to narrow the issues in dispute.

The next question was how the defendant should conduct an efficient "re-review" of 18,000 privilege entries that the parties used search terms to identify as documents likely implicated by the rulings and party agreements to date. For the plaintiffs, as important as deciding on process was securing a process that would lead to a "best and final" set of privilege assertions, which in turn would lead to resolution without further delay. Again with the benefit of the court's guidance, the parties agreed to an expedited process that allowed the defendant to produce a "final privilege log" for re-reviewed documents, and allowed the plaintiffs to review and select a sample for *in camera* review. *Id.* at ECF No. 262.

The court approved a plan for the parties to fill out a "Redfern chart," which in this case identified each document and attendant privilege assertion, and included a field for each side's statement of 50 words or less concerning the privilege challenge. *Id.* The parties were able to reduce the number of documents in dispute on the Redfern, and ultimately submitted to the court a chart addressing approximately 150 log entries, along with copies of the documents. The court promptly reviewed the documents *in camera* and ruled on each entry (the order is sealed and thus not available for public review). *Id.,* 7/3/2019 text entry ("after carefully reviewing the parties' arguments and the documents, the court filed under seal… an updated version of the Redfern chart that sets forth its rulings").

The parties were then able to apply the court's rulings, in a largely self-executing process, to resolve additional privilege disputes, resulting in supplemental productions. It was

only after this process was complete that the parties resumed key depositions. The contours of the evidence in the case were defined by the documents produced through this process.

That the Redfern process worked in the *Restasis* litigation is not to suggest it should be adopted as a one-size-fits-all amendment to the rules. To the contrary, the *Restasis* Redfern was effective precisely *because* it was tailored to the issues and procedural posture of that case, and the multi-step, months-long process that led to the Redfern was necessary in large part because of the over-designations that resulted from the defendant's de-facto categorical logging in the first instance. The court's willingness to entertain early privilege motions and devote the time necessary to address the issues, and conduct a substantial *in camera* review, was also critical to the success of the process.

In any event, one thing is certain: if the defendant in *Restasis* had not been required to comply with Rule 26(b)(5)(A), the privilege challenge process and attendant delay of the litigation would have been far more extensive and burdensome for all involved or, more likely, the key documents that were produced as result of the process would have never seen the light of day, substantially prejudicing the plaintiffs, who were dependent on document discovery for the most important liability evidence.

Without Rule 26(b)(5)(A), in other words, the defendant would have succeeded in withholding critical evidence on issues of considerable public importance—alleged anticompetitive conduct in the market for generic pharmaceuticals. The process of testing the defendant's privilege assertions imposed considerable costs and delay on the plaintiffs and the court too. While a watered-down version of Rule 26(b)(5)(A) might have saved money, it would have been at the expense of the fairness and truth-finding values our courts have traditionally honored.

2. The proposed rule changes, if any, should focus the parties on frontloading cooperation and engagement.

The Subcommittee also invites input on possible changes to the rules.

Based on my experience in a range of complex cases including the one above, *In re JUUL Labs Inc., In re Lidoderm Antitrust Litigation, In re Xyrem Antitrust Litigation,* and *In re Generic Pharmaceutical Pricing Antitrust Litigation*, the proposal to revise Rule 26(f)(3)(D) to expressly require the parties to discuss their methods for complying with Rule 26(b)(5)(A) when preparing their discovery plan, and the companion proposal to revise Rule 16 to invite the court to address these issues in the scheduling order, may help alleviate privilege-associated burden.

The proposed revision would require the parties to get on the same page about logging early on, thus heading off the delay and expense associated with the multiple rounds of "do-overs" that occur when the parties fail to cooperate at the outset. Requiring as part of the Rule 26(f) conference a meaningful discussion about methods for complying with Rule 26(b)(5)(A) will also help ensure that practitioners across the full spectrum of cases engage on privilege issues early in the litigation.

Opportunities for early cooperation may include discussion about the scope of privilege issues likely to arise in the litigation, production of an initial sample privilege log, proposals about logging parameters for relevant time frames and key players, and negotiation of a robust privilege protocol addressing these and other issues. As part of that early discussion, the parties may also agree to production of privilege logs on a rolling basis, meaning that any substantial production would be accompanied within a reasonable time period by a corresponding privilege log. Courts and parties have recognized that tolling logs are another effective burden-reduction strategy for all involved, as the parties are able to address privilege issues in an iterative fashion as they come to light, rather than deferring those issues and later contending with "ballooning" privilege issues at the close of fact discovery.[1]

Categorical logging may also have a place in early privilege discussions, particularly where privilege issues will not feature prominently in the case or will not present close calls, and the parties share a consensus on the information required (or not required). Categorical logs are included as a potential option in a model order in the Northern District of California,[2] for example, and my firm has in some cases agreed to carve certain time periods or categories of non-controversial documents out of the default logging requirements. But the proposed revisions to Rule 26 adopting "categorical" logging more broadly would sacrifice too much transparency and information exchange, and for the reasons illustrated by the *Restasis* example above, are by no means guaranteed to reduce burden on the parties or the courts.

****

I would be pleased to address these issues further if it may be helpful, and again express my appreciation for the opportunity to comment on these important matters.

Respectfully submitted,

GIRARD SHARP LLP

/s/ Dena C. Sharp
Dena C. Sharp

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[1] *See, e.g.,* Civil Standing Order for Magistrate Judge Jacqueline Scott Corley, p. 5; https://cand.uscourts.gov/wp-content/uploads/judges/corley-jsc/JSC_Civil_Standing_Order_6-28-2021.pdf; *In re JUUL Labs, Inc.,* 19-md-02913-WHO, ECF No. 322, ¶ 13 (N.D. Cal. Dec. 17, 2019); *In re Generic Pharmaceutical Pricing Antitrust Litigation*, 16-md-02724-CMR, ECF No. 1045, § 11.7 (E.D. Pa. July 12, 2019).

[2] Model Stipulated Order Re: Discovery Of Electronically Stored Information For Standard Litigation, ¶8(c); https://cand.uscourts.gov/forms/e-discovery-esi-guidelines/

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Please reply to the Office

August 1, 2021

VIA EMAIL

Judicial Conference Advisory Committee on Civil Rules

Re: *Rule 26(b)(5)(A) - Privilege Log Practice*

Dear Members of the Advisory Committee on Civil Rules:

I serve as head of the Fiduciary, Consumer Protection and Antitrust practice groups at Kessler Topaz Meltzer & Check, LLP, a law firm with nearly 100 attorneys based in Radnor, Pennsylvania and San Francisco, California, and I have represented plaintiffs, including institutions, such as pension and health and welfare funds, businesses and individuals, in complex litigation for many years. I write this letter to strongly encourage the members of the Advisory Committee on Civil Rules to leave Fed. R. Civ. P. 26(b)(5)(A) unchanged.

In my experience, privilege logs are an important tool in preventing a party (especially one that has been accused of some wrongdoing) of improperly concealing evidence of liability. Rule 26(b)(5)(A), as currently written, provides litigants with a clear, workable standard. Because the Rule requires the producing party to share a baseline amount of information, it allows the parties to productively meet and confer concerning the withheld documents and effectively resolve most disputes. If the Rule were amended to require less information (*e.g.*, requiring only a categorical privilege log), the requesting party would be significantly hampered in its ability to critically assess and challenge an assertion of privilege. The baseline information currently required, *i.e.* authors, recipients, dates, subject matter, etc., is crucial to identifying specific documents for which privilege may be challenged.

Assertions of privilege that cover broader categories of documents would inevitably result in broader challenges to those assertions, and would likely require more judicial involvement with the court being asked to assess privilege as to an entire category as opposed to specific documents. My firm has, on a number of occasions, successfully challenged the withholding of documents on the basis of privilege, but if Rule 26(b)(5)(A) had not required the producing party to provide a document-by-document privilege log of such withheld documents, we would not have been able to assess and successfully challenge these privilege assertions.

I last note that Rule 26 already allows for a producing party to seek a protective order to modify the discovery requirements; a party thus currently has the ability to seek a modification to the privilege log requirement, where providing the baseline information, discussed above, would be unduly burdensome. As such, I believe that no change to Rule 26(b)(5)(A) is warranted.

Sincerely,

KESSLER TOPAZ
MELTZER & CHECK, LLP

/s/ Joseph H. Meltzer

Joseph H. Meltzer

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August 1, 2021

Judicial Conference Advisory Committee
Discovery Subcommittee
RulesCommittee_Secretary@ao.uscourtgs.gov

To whom it may concern:

On behalf of NELA-Illinois, I submit the following comment regarding privilege log practice.

The National Employment Lawyers Association, Illinois Chapter ("NELA-Illinois") is a bar association comprised of attorneys whose primary practice is the representation of employees in employment disputes and litigation. I submit this comment in an effort to collectively represent the experiences, concerns and recommendations of the organization's approximately 165 members.

Since most employment cases require the corporate and/or individual defendant(s) to provide a privilege log, I consider our membership experienced and well-suited to advise regarding this issue. The reasons for this are simple: a key factual and legal issue in most employment law matters of all sizes relates to the circumstances and timing of relevant employment decisions.

Consider a few examples: a plaintiff accusing his/her employer of harassment will seek discovery on the existence and timing of complaints and investigations, along with the identity of witnesses with knowledge of those actions. A discrimination plaintiff will serve discovery regarding the identity of decision-makers and the timing of relevant employment decisions. Privilege issues frequently arise in these contexts because many decision-makers are either attorneys or managers or human resources personnel who consult attorneys. From the perspective of our membership, obtaining this information is unnecessarily difficult in large part due to the rules and case law applying the rules relating to privilege logs.

Topic 1: What are the problems with the current Rule 26(b)(5)(A)

The collective experience of our membership reflects the following concerns regarding privilege logs: (1) they are frequently untimely (i.e. served weeks if not months after service of Rule 33 and 34 productions; (2) the logs themselves are vague, non-descriptive, and rarely complete; and (3) the mechanisms available to remedy these deficiencies are limited. Disputes are rarely able to be resolved among the parties, and court intervention rarely provides an appropriate remedy (i.e. a sufficient log and/or production of documents that are not subject to a recognized privilege). Because claims of privilege are frequently made relating documents that reference key decisions

and factual issues, privilege disputes frequently have important, if not case-determinative ramifications for our cases and clients.

We agree with the Lawyers For Civil Justice's August 4, 2020 Suggestion for Rulemaking to the Advisory Committee on Civil Rules (hereafter, "LCJ Suggestion") that privilege logs frequently fail to assist parties or courts to resolve privilege issues. *See* LCJ Suggestion § III(C) at 6-7. However, in our experience, this is the fault of the party that claims privilege but fails to describe the materials in a way that enables other parties to assess the claim.

The LCJ Suggestion claims some ESI are facially privileged and so the party seeking privilege should be allowed to broadly categorize them as privileged. *Id.* at 11. We disagree. Determining privilege cannot be so easily determined on the face of the ESI. Consider that many organizations employ in-house counsel who wear several hats. Some in-house counsel provide business advice as well as legal advice. While the earliest emails in a thread between counsel and management may pertain to legal advice, or are prepared in anticipation of litigation, many emails may contain no privileged information but only business advice which is not privileged communication.

Another example more specific to employment cases is the situation where the plaintiff-employee complains of discrimination. Some organizations delegate the task of investigating to HR representatives; some delegate it to attorneys. Regardless of the title of the investigator, many courts have determined that the materials produced by the investigation are neither legal advice nor are they prepared in anticipation of litigation, yet these investigatory materials are often improperly designated as privileged. Currently, at least the plaintiff has a fair opportunity to challenge this improper designation because the documents are individually identified and logged. With categories, the plaintiff might never learn of the existence of these types of documents, let alone have the opportunity to obtain them.

Topic 2: Possible Rule Changes to Solve Problems

We respond to the proposed changes as follows:

- *Requiring categories of documents rather than a document by document description of each document.*

From the perspective of an organization that already feels as though the information provided is insufficient, allowing less detail is a step in the wrong direction. Allowing parties to sweep allegedly-privileged materials into categories will only exacerbate this problem. Single

plaintiff employment cases often rise or fall on a plaintiff's ability to identify and dispute overbroad and improper claims of privilege. Allowing log authors to categorize documents rather than describe each document is a terrifying thought for our members. We cannot emphasize our objection to this proposal forcefully enough.

The proponents of privilege categories also claim document-by-document privilege logs are "rarely proportional to the needs of the case." LCJ Suggestion at 5-6. This is simply an argument that the cost of complying with the existing Rule 26 outweighs the benefits. To buttress their argument, the LCJ Suggestion cites to several outdated cases and law review articles that fail to recognize both the advances and cost savings recent improvements in e-discovery bring to the equation. The fact is that costs related to e-discovery are decreasing, and dramatically.

A recent law review article found that civil litigation and discovery costs will likely decline due to advances in legal technology. David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism,* 169 U. PA. L. REV. 1001, 1051-55 (2020). This article describes the cost arguments motivating an anti-litigation movement since the 1970s, and then examines advances in legal technology. The authors found that today, tools such as technology assisted review, predictive coding, and other forms of artificial intelligence will drive down costs, and conclude that:

> Short of substantial changes to current discovery rules, the near- to medium-term is likely to see a reduction in overall discovery costs. As a corollary, the proportionality concerns that have animated much recent litigation reform activity are likely to fade in importance, particularly in cases whose major costs are driven by large-corpus electronic document discovery.
>
> *Id.* at 1055.

To win a case, NELA-IL members must often prove the illegal intent behind an adverse employment action. We rely heavily on emails, texts, and even instant messages on platforms such as Microsoft Teams and Slack to reveal this crucial element of intent. Not only do we seek ESI from our opposing counsel, we produce it as well. E-discovery vendors are creating innovation and competition that has rendered comprehensive ESI-production cost effective for even our solo-practitioner members. Even Google has delved into the e-discovery game, promoting a program that is free. *See* Craig Ball, *Is Pinpoint the Future of eDiscovery?* BALL IN YOUR COURT (June 8, 2021), https://craigball.net/2021/06/08/is-pinpoint-the-future-of-ediscovery/. LCJ Suggestion's argument does not accurately reflect the state of ESI discovery costs or the tools available to address the proportionality concerns it raises.

Allowing categorization would significantly impair our ability to obtain relevant and key information in most of our cases. Further, allowing categorization further exacerbates the "vague and non-descriptive" concern identified above. We vociferously object to this proposal.

- *Requiring the parties to discuss compliance with Rule 26(b)(5)(A) when preparing their discovery plan and potentially including a discussion in a Rule 16 conference.*

We do not believe that requiring discussion does much to further underlying compliance in the absence of more concrete guidance as to the standards that must be met for compliance, but also recognize that discussion may be helpful. Said another way, discussion about the existing rule will do little to address the concerns of this organization, i.e. that the rule itself is too milquetoast to be of much value. If the relevant rule specifically described what information must be contained on the log, rather than simply stating the author must "describe the nature of the documents […] in a manner that]…] will enable other parties to assess the claim," requiring the parties to discuss compliance could have value. In the absence of a more robust Rule 26(b)(5)(A), requiring discussion may be of assistance, but less so than a substantive improvement to the Rule itself.

- *A change to the rule that enumerates categories of documents that do not need to be identified.*

NELA Illinois objects to this change for the same reason it objects to the use of categories: the existing rule already does not provide sufficient guidance or specificity and hinders, not helps, parties identify and discovery relevant and responsive information in employment matters. Authorizing categories of documents that do not require identification is, in our estimation, a step in the wrong direction.

Topic 3: Whether a rulemaking is necessary (or would create additional problems)

The proposed rulemaking appears intended to further weaken and dilute the rule at issue, and would, for the reasons described above, do more harm than good in the estimation of NELA-Illinois. Unless and until a rulemaking convened to consider modifications that would strengthen the rule and require compliance with that strengthened rule, NELA-Illinois believes that no rulemaking is necessary and that the rulemaking suggested causes more harm than good.

NELA-Illinois welcomes the opportunity to discuss our comments and concerns. Please contact me or our president, Catherine Simmons-Gill (cc'd below) if we can be of further assistance to you in this important regard.

Sincerely,

/s/ Lisa L. Clay

cc: Catherine Simmons-Gill
Board, NELA-IL

MANFRED, APC
Honest. Driven. Compassionate.

August 1, 2021

Re: Commentary To The Judicial Conference Advisory Committee On Civil Rules Concerning Privilege Log Practice ("Committee") Applicable To Federal Rule of Civil Procedure 26(b)(5) ("FRCP 26(b)(5)(A)")

To Whom it May Concern:

I have practiced complex consumer class action litigation for over 17 years and recently opened my own practice devoted to plaintiff's consumer, employment, investor, and policyholder advocacy. Over the years, I have had participated with several litigation teams that have had to contest asserted privileged documents that we generally contended to thwart plaintiffs from being unable to have produced non-privileged documents critical to the prosecution of plaintiff-side claims.

The current language and structure of FRCP 26(b)(5)(A) is paramount to enabling plaintiff-side attorneys to evaluate stated privileges which otherwise may be near impossible to undertake if FRCP 26(b)(5)(A) were to be recast in a way where wholesale claims of privilege can be made on a categorical basis. Indeed, wide-ranging categorized claims of privilege are already being asserted by way of artificial intelligence discovery software and younger defense associates who are often tasked with having to oversee this process. While often arduous, the ability to evaluate privilege and contest it where necessary is crucial to the pursuit of potentially case-making discovery that otherwise might be withheld. Courts and caselaw have developed over the years in the electronic discovery era to enable an equitable manner by which contested claims of privilege may be evaluated while

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still equipping parties to assert privilege as necessary. In short, FRCP 26(b)(5)(A) functions to benefit the parties as it does not empower one party over the other. Though a document-by-document evaluation of privilege may be needed at times, courts are more than sufficiently keen to determine what kind of detail is required in the context of the case before the court and establish an appropriate governing discovery order. The current version of FRCP 26(b)(5)(A) generally incentivizes the parties to resolve differences and to narrow the universe of asserted privilege that is in dispute before presenting such dispute before a court.

The ability to ascertain and ultimately challenge the privilege hinges on the information set forth in privilege logs under FRCP 26(b)(5)(A). If the current required content of privilege logs were to be undermined by allowing high-level categorizations to stand as sufficient descriptions of privilege, it is not hard to envision a substantial increase in discovery disputes where entire bodies of documents are categorically withheld rendering counsel to challenge this assertion by an in-camera inspection of the documents which is a task that most judicial officers are loathe to undertake. Moreover, such a change would not serve to benefit the interest of justice which is ultimately predicated on robust fact-finding.

As such, I respectfully urge the Committee to strongly consider maintaining the current language of FRCP 26(b)(5)(A) as it currently stands. Thank you for any attention given to this commentary.

Sincerely,

Manfred Muecke

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August 1, 2021

Discovery Subcommittee of the Advisory Committee on Civil Rules
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Washington, DC 20544

Re: Comments on proposal to amend Federal Rule 26(b)(5)(A) regarding Privilege Logs

Members of the Committee:

I am a trial lawyer with more than 40 years' experience litigating complex scientific, medical, engineering and environmental cases in both state and federal courts.

I am admitted in six United States District Courts, seven Courts of Appeal and the Supreme Court of the United States. I have also been admitted *pro hac vice* in numerous state and federal courts around the country and particularly in the West.

I have been a member of the Board of Governors of the American Association for Justice and the Boards of Directors of the Montana Trial Lawyers Association and Public Justice for more than 30 years, and now the Board of Advisors of Institute for the Advancement of the American Legal System for the past six years. I have also been nominated and elected by my peers to membership in the American Board of Trial Advocates.

I begin any analysis of proposed changes to the Federal Rules of Civil Procedure by viewing the proposals through the lens of Rule 1. How will the proposed changes affect the mandate of Rule One

to secure the "just, speedy, and inexpensive determination" of matters in disputes? As I describe below, although there is much in the real world practice of privilege logs that needs improvement, the changes suggested in the Subcommittee's invitation will largely reduce, not improve, the just, speedy and inexpensive determination of matters in dispute.

In principle, there should be little need to change or amend the requirements of FRCP 26(b)(5)(A)(ii). As written, the explicit standard should be sufficient to provide protection to the party claiming privilege and, if the information disclosed in the log is provided in good faith, enough to "enable other parties to assess the claim." Those words state exactly what the standard for disclosure should be. Unfortunately, in practice, and in the experience of a number of my colleagues who have shared their experiences with me, in complex, large document cases, opposing counsel often fail to abide by that standard and the overall requirements of candor and good faith in the Rules. Instead, they delay providing a log and fail to provide sufficient information upon which to assess the privilege claim.

The standard spelled out in Rule 26(b)(5)(A)(ii), while well-meaning, in practice is too vague and subjective and requires good faith in the drafting and disclosure of information. The vagueness of the standard means that counsel may have to contest many privilege claims that might well be valid and requires courts to spend unjustified judicial time on these disputes that could be avoided with good faith on the part of counsel claiming the privilege. Too many of us have been served blanket, boilerplate privilege claims with little more information than the date of the document and descriptions no more revealing than "work product," "trade secret" or "client privileged communication," with no effort to provide information why or how such documents are entitled to protection.

By delaying their responses and providing insufficient or vague information, counsel claiming the privilege force counsel to put in

motion the steps that would lead to a motion to compel, beginning with sometimes a series of meet and confers, knowing full well how long that process takes and how courts dislike such motions. This gamesmanship is time consuming and with discovery deadlines and expert requirements looming, counsel often have no choice but to agree to unjustified, burdensome and improper protective orders. The alternative of filing motions to compel is never one that counsel take lightly.

On one hand, I would like to say that there is really no need to amend the privilege log rule, if it were followed in good faith and enforced. However, if the Committee decides to begin the process then I would have three proposals for improvement of the rule.

First, would be to provide some greater specificity in the 26(b)(5)(A)(ii) disclosure standard that would be easier and more straight forward for counsel and courts to evaluate for compliance.

Second, the rule should impose time requirements on when a privilege log must be provided.

Third, as the invitation suggests, it could be helpful to require the parties to discuss compliance with Rule 26(b)(5)(A) when preparing their discovery plan and potentially including a discussion in a Rule 16 conference. However, more is needed to improve compliance.

While discovery responses require certification by counsel, privilege logs should also require confirmation that counsel has reviewed the documents in good faith and that the documents described in the log warrant protection from disclosure. One of my colleagues described a case where over 100,000 documents were withheld as privileged. Yet, opposing counsel admitted at oral argument that they never actually reviewed the documents.

Lastly, for the record, I would strongly object to changing the standard in 26(b)(5)(A)(ii) to allow counsel to withhold "categories

of documents." This proposal will undermine the purpose of a privilege log. In effect it would give license to create the haystack in which to hide the needles.

Thank you for giving me the opportunity to comment on your invitation.

Sincerely,

William A. Rossbach

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PRIV-0099

August 1, 2021

VIA E-MAIL
Chair John D. Bates
Committee on Rules of Practice & Procedure
Judicial Conference of the United States
Washington, D.C.
RulesCommittee_Secretary@ao.uscourts.gov.

RE: *Invitation for Common on Privilege Log Practice*

Dear Counsel:

I am a partner at Nichols Kaster, PLLP and a co-chair of the Firm's eDiscovery committee. Together with members of this committee, I write this letter to comment on the current state of the privilege log requirements under the Federal Rules of Civil Procedure, as well as comment on proposed changes to the same.

Nichols Kaster is a premier plaintiff-side litigation firm with offices in Minneapolis and San Francisco. The Firm focuses on employment, consumer, civil rights, and qui tam litigation, representing real people in both individual, group, and class actions. Our cases are filed in federal and state courts, as well as arbitrations across the country. Nichols Kaster is comprised of thirty-eight experienced and talented attorneys dedicated to justice, who have been recognized locally and nationally for their achievements.

Throughout its forty-seven years of practice, the Firm has developed a sterling reputation as a top employment and consumer plaintiffs' firm. In 2020, the National Trial Lawyers and ALM named Nichols Kaster the Employment Rights Law Firm of the Year. The U.S. News & World Report has named the Firm as a Best Law Firm consecutively since 2012. Law360 has listed Nichols Kaster as a top plaintiffs' employment law firm, and Minnesota Lawyer has declared it one of Minnesota's top 100 firms. The Firm has a 5 out of 5 rating on Martindale Hubbell. Super Lawyers, Best Lawyers, and Law Dragon all regularly recognize the Firm's individual lawyers.

We provide the following feedback on the state of privilege logging in federal practice as drawn from our experience reviewing and drafting privilege logs in our everyday practice. It is from this experience that we recommend to the Committee that it decline to amend the Rules, particularly that it reject the three amendments presented.

1. The State of the Current Rule

Under the current Rule 26 of the Federal Rules of Civil Procedure, information and documents are discoverable if they are relevant and proportionate to the needs of the case. Fed. R. Civ. P. 26(b)(1). A party wishing to withhold otherwise discoverable information on the basis of attorney-client privilege, the work product doctrine, or another legally recognized privilege (collectively "privilege"), must (i) expressly invoke the privilege, 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. Fed. R. Civ. P. 26(b)(5)(A). Though not stated explicitly, Rule 26(b)(5)(A) has been interpreted largely by the courts to require a document-by-document log. The burden to prove the existence of a privilege rests with the producing party. *See, e.g.*, *Khoday v. Symantec Corp.*, No. CV 11-180 (JRT/TNL), 2013 WL 12140484, at *2 (D. Minn. Sept. 24, 2013).

While is true that the proliferation of electronically stored information ("ESI") in modern times has expanded the sheer quantity of discoverable ESI (and with it the number of documents being designated as privilege), it is also true that document management tools and analytics have also greatly improved to meet this challenge. Gone are the days when parties manually enter details about all potentially privileged documents onto a table. Now, parties most often extract meta data from document review platforms into Excel (.xls) or .csv files to be further populated with a privilege review.

This meta data provides the reader with crucial information necessary to assess the sufficiency of a privilege designation, and is the basis on which a party will decide whether or not to challenge it. For example, email meta data logs often include the to, from, cc, subject, and date sent fields. Reviewers then add an additional field where they populate the privilege designation associated with the document. Each document is numbered so it can be easily referenced by the parties in subsequent meet and confers. To the extent that logging is time consuming or expensive for producing parties, it is the privilege review itself that causes these challenges, not the act of populating a privilege log. Regardless, a review must be done in order to determine whether a particular document can be properly withheld under applicable standards. This is true regardless of the type of log produced. A categorical log (as proposed), therefore, will not alleviate this burden.

The Committee requests "[s]pecific examples of problems encountered (**or not encountered**) in litigation under the rule." Document-by-document privilege logs are highly valuable in litigating our cases, and in our experience, their exchange results in less disputes before the courts, not more. For example, in a case we are actively litigating (and for that reason we do not wish to disclose the case name), plaintiff's counsel requested a meet and confer with defendant to inquire about entries on its privilege log. At that conferral, the defendant acknowledged it improperly withheld many of the documents,

and then it proceeded to produce hundreds of documents identified. Without a log, we would not have been able to identify the issues that lead to this conferral and ultimately this production. We did not involve the court in this process.

2. The Importance of Privilege Logs in the Firm's Practice

Obtaining improperly withheld documents is vital to our client's success of litigation. It is not a fishing expedition as some defense counsel may imply. To illustrate precisely how we use privilege logs to obtain documents directly relevant to the claims and defenses in our cases in various practice areas, we provide the following information:

ERISA 401(k) Class Action Litigation

Privilege logs are essential to obtaining highly relevant discovery in cases challenging whether fiduciaries of retirement plans have complied with the fiduciary duties imposed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1104(a) (imposing fiduciary duties of loyalty and prudence on retirement plan fiduciaries). The attorney-client privilege is subject to a fiduciary exception, which applies to "any communications with an attorney that are intended to assist in the administration of the [retirement] plan." *Asuncion v. Metro. Life Ins. Co.*, 493 F. Supp. 2d 716, 720 (S.D.N.Y. 2007).[1] Under this exception, a fiduciary of an ERISA plan "must make available to the beneficiary, upon request, any [such] communications with an attorney . . . ." *In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997). Determining whether a particular communication concerns a fiduciary or non-fiduciary matter requires a "fact-specific inquiry" that focuses on "both the content and context of the specific communication." *Asuncion*, 493 F. Supp. 2d at 720. As a result, sufficiently detailed privilege logs are essential to assessing whether a party has properly withheld documents potentially subject to the fiduciary exception.

Our firm's financial services group regularly brings motions to compel where privilege logs appear to identify documents that fall within the fiduciary exception and which are improperly withheld. *See Plfs' Mem. Supp. Mot. to Compel,* ECF No. 106-1 (Nov. 19, 2020), *Reetz v. Lowe's Companies, Inc.*, No. 18-cv-75 (W.D.N.C.) (noting that dozens of documents previously withheld as privileged had already been produced following prior negotiations between the parties);[2] *Plfs' Mem. Supp. Mot. to Compel,* ECF No. 143 (Sept. 13, 2019), *In re M&T Bank Corp. ERISA Litigation*, No. 16-cv-375 (W.D.N.Y.) (compelling production of documents in possession of plan's counsel and

[1] "The exception is premised on the theory that the attorney-client privilege should not be used as a shield to prevent disclosure of information relevant to an alleged breach of fiduciary duty." *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 787 (7th Cir. 2005); *see also Leber v. Citigroup 401(K) Plan Inv. Comm.*, 2015 WL 6437475, at *1 (S.D.N.Y. Oct. 16, 2015) ("This exception arises from an ERISA fiduciary's duty to provide full and accurate information to plan beneficiaries regarding the administration of the plan."); *Cavanaugh v. Saul*, 2007 WL 1601743, at *3 (D.D.C. June 4, 2007) (the "rationale for the fiduciary exception" is that "the attorney's work was done on behalf of, and with payment from, the fiduciary on behalf of the beneficiaries").

[2] The order resulting from plaintiffs' motion is sealed.

disclosed in privilege logs).[3] Moreover, the exchange of sufficiently detailed privilege logs has permitted our Firm to resolve multiple other disputes with opposing parties regarding the scope of the fiduciary exception without the need for court intervention.

FLSA Wage & Hour Collective Actions

Privilege logs have an important role in wage and hour litigation. The federal Fair Labor Standards Act ("FLSA") establishes minimum wage, overtime pay, and recordkeeping requirements for employers. The FLSA provides that an employer who fails to pay minimum wages or overtime compensation as required is automatically liable for "liquidated damages," which is an amount equal to the unpaid minimum wages or overtime compensation. 26 U.S.C. § 216(b). An employer may avoid an award of liquidated damages by showing that the violation was in "good faith" and that it had "reasonable grounds" to believe its actions were not a violation of the statute. *See, e.g.*, *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 376 (4th Cir. 2011).

Often, this "good faith" defense is premised on advice of counsel. When this happens, the defendant puts communications with counsel about FLSA compliance at issue. *See Brown v. Barnes and Noble, Inc.*, 474 F. Supp. 3d 637, 653 (S.D.N.Y. 2019) (finding waiver of privilege related to communications about classification decision where employer asserted good faith defense). Plaintiffs must review these communications to confirm the attorney advice, determine whether the defendant provided its counsel with accurate and complete information, and to determine whether defendant acted consistently with (or contrary to) that legal advice. *See, e.g.*, *Mumby v. Pure Energy Serv. (USA), Inc.*, 636 F.3d 1266, 1270 (10th Cir. 2011) (stating that to rely on advice of counsel to demonstrate the good faith defense in an FLSA action, defendant must show "full disclosure of the relevant facts to counsel" as part of its burden).

In theory, these communications can be categorically identified on a log. In reality, however, such a log would pose significant problems, particularly where the attorney who provided the pre-suit advice (or their firm) also represents the party in other matters or subsequently represents the party in litigation. Without document-by-document information as to the time of communications, the parties involved, and the subject of the communications, we could not be sure that crucial discoverable information is not being withheld as wrongly classified (even if inadvertently).

To illustrate, the employer in *Brown v. Barnes and Noble, Inc.* had produced a privilege log of approximately 320 documents subject to attorney client privilege or work product. 474 F. Supp. 3d 637, 653 (S.D.N.Y. 2019). However, after *in camera* review of a sample of 50 documents, the court found that the "vast majority" of the documents in the sample were not properly withheld because they did not seek or convey legal advice to be subject to attorney client privilege, and even among the documents that were properly

[3] This case settled shortly after the motion to compel was filed, so no decision was made by the court with respect to plaintiffs' motion. *See In re M&T Bank Corp. ERISA Litigation*, No. 16-cv-375, ECF No. 179 (W.D.N.Y. July 29, 2020) (denying motion as moot given preliminary approval of settlement).

designated as attorney client privilege, that the employer waived this privilege when it relied on attorney advice in asserting the good faith defense. Therefore, the court ordered production of those documents that the employer previously had withheld from plaintiffs. In other words, without the benefit of reviewing the employer's privilege log, plaintiffs would not have received discovery related to the factual basis of the employer's good-faith defense.

FCA Qui Tam Litigation

The False Claims Act ("FCA") broadly protects the funds and property of the Government from fraudulent claims. *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968). The FCA permits whistleblowers (known as relators) to file claims of fraud on behalf of the Government under seal in federal court. 29 U.S.C. § 3730(b)(2). The Government then investigates the complaint,[4] and either seeks to intervene in the action, or allows the relator to proceed on its behalf. § 3730(b)(4).

At the heart of every FCA claim is an allegation of fraud or deceit. For example, section 3729(a)(1)(A) requires a showing that a person or entity "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," to the government. 31 U.S.C. § (presentment claim). This requires a relator to establish scienter.

Fraud is rarely committed in the open. It often involves secret meetings and communication, and commonly the inclusion of an attorney in an effort to invoke the attorney-client privilege. Of course, not every communication with an attorney is privileged. And merely adding an attorney to a discussion does not make it so. *See, e.g. Expert Choice, Inc. v. Gartner, Inc.*, No. 3:03-cv-2234, 2007 WL 951662 at *5-7 (D. Conn. March 27, 2007) (emails cc'd to attorney are not privileged); *Fru-Con Const. Corp. v. Sacramento Mun. Util. Dist.*, No. S-05-0583, 2006 WL 2255538 at *2 (E.D. Cal. Aug. 7, 2006) ("[T]he dissemination of information to the lawyer must indicate that the lawyer is being addressed so that advice can be formulated or action taken, not simply for FYI reasons—or worse yet, simply because the lawyer must be added in order to make a non-privileged document assertedly privileged."); *In Re Gabapentin Patent Litig.*, 214 F.R.D. 178, 186 (D.N.J. 2003) ("Including an attorney on the distribution list of an interoffice memo, Cc'ing numerous people who are ancillary to the discussion, one of whom happens to be an attorney, or forwarding an e-mail several times until it reaches an attorney does

[4] During the investigation phase, communications between relator and the Government may (or may not) be protected under the common interest privilege. Once litigation begins, defendant often demands a privilege log of these communications from us so to scrutinize any privilege designations. Logs are not only used by Plaintiffs. In fact, even outside FCA work, our Firm has compiled and produced extensive logs representing plaintiffs, particularly where we engage in joint representation (co-plaintiff privilege) and/or when we represent attorneys as clients. We may not represent large corporations, but we do have insight into the process.

not amount to 'attorney client communication.'"). But such deliberate tactics can also evade conscious defense counsel if the privilege review is not robust enough.

In FCA litigation, our Firm must conduct thorough analyses of privilege logs to weed out key documents directly related to the claims in the matter cloaked in a privilege designation. This can be a difficult task using document-by-document privilege logs (depending on the information provided). It would be nearly impossible to challenge such designations if categorical logs were used.

Individual Employment Disputes

Nichols Kaster represents individuals in an array of employment matters, including advancing claims involving anti-discrimination laws, breaches of contract, as well as minority-shareholder litigation. These actions often involve an imbalance of information, and privilege logs provide our clients with crucial access to details about key-materials sometimes improperly withheld on privilege grounds.

Investigations: We regularly challenge privilege designations wrongfully associated with investigation materials. In retaliation cases, a former employer will often conduct an internal investigation after terminating an employee who complained about discrimination. Likewise, in reduction-in-workforce discrimination cases, former employers often speak internally about the reasons for the reduction and/or the reasons particular employees will be laid off. In these, and other types of employment investigations, defendants often seek to withhold the reports, notes, and corresponding communications on privilege or work product grounds. Many times, these investigations do not involve attorneys at all. Or alternatively, the defendant will assign the investigation to legal counsel in an attempt to improperly implicate the attorney/client privilege despite the fact that such an investigation is an ordinary business obligation. Materials prepared in the ordinary course of business or containing raw fact-intensive information, of course, are not entitled to work product protection as they do not reveal or disclose attorney mental impressions or opinions. *See Hervey v. Nelson*, 2006 WL 8443651, at *4 (D. Minn. Jan. 5, 2006); *Onwuka v. Fed Express Corp.*, 178 F.R.D. 508, 512–14 (D. Minn. 1977).

When such investigative reports, supportive materials, and corresponding communications are withheld, a privilege log provides critical insight upon which we base our conferrals with opposing counsel and our motions to compel when necessary. Upon first blush, a categorical log of "investigation communications and documents" may appear to cover all of the above materials. In practice, however, discoverable factual statements are often intertwined with proper work product. For example, an initial communication may contain a recitation of facts, and this should be produced. The follow-up responsive communication, however, may contain work product and be properly withheld. Because of this, a document-by-document log is essential to weed out the discoverable investigatory documents and communications from the privileged materials.

Actively involved in-house counsel. Privilege disputes also arise in litigation where in-house counsel is also an active member of the company's business operations

team. Privilege does not attach to communications or documents where counsel is working on business matters, particularly because they can become a party or material fact witness in such cases. *See United States v. Spencer*, 700 F.3d 317, 320 (8th Cir. 2012) ("[W]hen an attorney acts in other capacities, such as a conduit for a client's funds, as a scrivener, or as a business advisor, the privilege does not apply."); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, No. 08-CV-1958(ADM/RLE), 2009 WL 1178588, at *1-2 (D. Minn. May 1, 2009) (finding privilege did not attach to certain communications with in-house counsel).

This is common in cases involving an executive-level employee, breaches of contract, or minority-shareholder claims against a closely held company. In these cases, producing parties often attempt to take a broad view of the attorney-client privilege and work-product doctrine. When this happens, our attorneys need a document-by-document log with the appropriate information so that they may identify documents potentially withheld using an erroneously expansive interpretation of the privilege.

3. Proposed Changes to the Current Rule

The Committee invited comment on three possible changes. We address all three in two parts.

Categorical logs

The first proposed change would amend Rule 26(b)(5)(A) to suggest a document-by-document log is not "routinely required," potentially giving way to an increase in categorical logs.

The third proposed change would amend Rule 26(b)(5)(A) to specify it only requires the parties to identify "categories" of documents that are being withheld and/or to specify that there are categories of documents that need not be identified.

We do not support either change and address them together.

First, the suggestion that document-by-document logs are not "routinely required" and/or an amendment that condones categorical logs would, in practice, make document-by-document logs (the most common today) the exception and not the rule. This will lead courts and withholding parties to require requesting parties to justify why a document-by-document log is needed in a particular case. But, these documents are theoretically discoverable under Rule 26(b)(1), and it is the withholding party's burden to establish application of a privilege. Forcing a requesting party to justify why they need basic information to assess the claim of privilege essentially shifts the well-established burden onto them. This is not appropriate.

Second, either change would in practice lead requesting parties to recover fewer erroneously withheld documents. With document-by-document logs no longer "routinely required," categorical logs would become the norm. As detailed in the above practice group discussions, this would make it virtually impossible for requesting parties like our

clients to properly challenge an over designation based on blanket categories (whatever those may be). This is because the documents found in a particular category are likely not all privileged by association. Instead, some are appropriately withheld while others are not. Therefore, the identification of a category of withheld documents would do nothing to help requesting parties assess which particular documents are erroneously withheld. In practice, requesting parties would be denied more otherwise discoverable information.

Third, an increase in categorical logs would lead to an increase in disputes over privilege. A decrease in useful information naturally leads to distrust. Requesting parties will be forced to confer more often about categories of withheld documents since they will not be able to confirm rationales from their own review of the logs themself. Producing parties will likewise have to re-review documents in particular categories to ensure that nothing was inappropriately grouped, or else refuse. In that case, this process is more than likely to lead to increased motion practice and in camera reviews by courts.

Categorical logs are, and should remain, the exception not the Rule. Categorical logs should not be normalized by including mention of them directly in the language of the Rule itself. After all, the present Rule does not identify document-by-document logs either. Rather, the parties and the courts should assess the particular needs of a given case to determine how documents should be logged for privilege purposes. This is already happening and does not require a change to the Federal Rules.

Last, the Rule should absolutely not be amended to identify categories of documents that need not be logged because, as discussed more thoroughly below, these categories (if any) will vary from case to case, making any such amendment unworkable as a general rule applicable to all civil litigation.

Discovery Conference and Rule 16 Discussions

The second proposed change is to revise Rule 26(f)(3)(D) to direct the parties to discuss Rule 26(b)(5)(A) at the discovery conference, as well as to revise Rule 16 to reflect the same. But, Rule 26(f)(3)(D) already provides for discussion of issues associated with privilege (which includes privilege logs). And, particular district courts already expand on this to encourage the parties to discuss the scope and particular features of the log. *See, e.g.*, Minnesota eDiscovery Guide, at 12—13 (updated Jan. 2021). For this reason, we oppose any change as unnecessary.

The parties are already on notice that they should confer about the scope and the particulars of logging early on. In fact, the Firm often does in litigation as soon as we are prepared to do so. For example, we confer with opposing counsel on the use of meta data logs, including agreeing on what meta will/will not be included. If a conferral cannot timely be reached, we include an instruction in our written discovery requests about the information we seek from a privilege log.

In litigation, our Firm also commonly agrees on behalf of our clients with our opposing parties that certain documents need not be logged at all, or alternatively may made be presented as a category when the circumstances call for it. For example, in cases

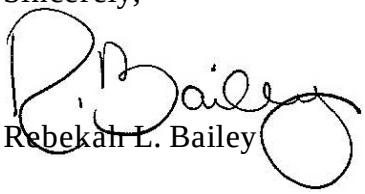
where litigation counsel is not otherwise implicated (like in the FLSA example above), and where the wrongdoing has ceased prior to litigation, we may agree that the parties need not log communications with litigation counsel after the initiation of the lawsuit. Both parties usually benefit from agreements like this, so neither needs to be incentivized to do so with any additional amendments to the Rules.

Also, there have been instances where we substantively have disagreed on behalf of our clients with an opposing party about the applicability of a particular privilege to *any* communication or document. In those instances, we have conferred and agreed to brief the question of whether the privilege applies with the court without first wasting time on logging. This makes sense in these circumstances since the dispute is all or nothing. In such instances, should the court rule that the privilege is not implicated, then all documents in the category would be produced. Conversely, if the court finds merit in the invocation of the privilege, only then would a log be exchanged.

These types of cooperative approaches must be reached on a case-by-case basis in consideration of the unique facts and circumstances applicable to the litigation at hand. As stated above, they should be the exception, not the rule. To be sure, we do not oppose the concept of conferral relating to privilege logging. It is our position, however, that an amendment is not necessary as the parties should already be cooperating under the existing Rules.

If it ain't broke, don't fix it. For all of the above reasons, we request that the Committee reject invitations to disturb Rule 26. Thank you very much for your time and consideration.

Sincerely,



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Joined by

/s/Jacob Schultz

/s/Laura Farley

/s/Caroline Bressman

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August 1, 2021

Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Dear Honorable Members:

I write to provide comments to the privilege log rule embodied in Federal Rule of Civil Procedure 26(b)(5)(A). My practice involves the representation of plaintiffs in personal injury, wrongful death, and medical malpractice cases, and primarily plaintiffs in business and commercial litigations.

I have extensive experience in my 27 years of practice working with privilege logs, particularly in large complex cases. While there has been a movement to default to categorical logs, such approach hampers a party's ability to discern whether a proper basis exists to assert privilege. A categorical approach usually benefits large corporate defendants. I have personally experienced many parties using a categorial approach to bury and hide non-privileged materials under broad subject matter categories. When documents are listed out separately, however, a challenging party can review dates, senders, recipients, and subject-matter in the context of each document so as to mount a challenge to inappropriate assertions of privilege. I have found this virtually impossible to do under a categorical approach.

There is also a movement to impose the attorney fees incurred in listing out documents separately against the party asserting the challenge. Such an imposition of fees severely prejudices smaller parties, mainly plaintiffs, in being able to achieve justice and litigate on an even playing field. Any such rule must be the absolute exception.

In conclusion, the presumption should be to list out documents separately to ensure full and fair disclosure. A party seeking to use a categorical log should justify its request on a clear and convincing basis and show that the costs are wholly prohibitive (based on the litigant's financial ability) and the proportionality clearly favors such party.

Respectfully,

/s/ Robert A. O'Hare Jr.

Robert A. O'Hare Jr.

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August 2, 2021

VIA E-MAIL: RulesCommittee_Secretary@ao.uscourts.gov
MEMBERS OF THE JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON CIVIL RULES

Re: Fed. R. Civ. P. 26(b)(5)(A) – Privilege Logs

To the Members of the Advisory Committee on Civil Rules:

I am the senior partner of HensonFuerst, PA, a Raleigh NC based plaintiff's law firm representing victims of personal injury, medical malpractice, and nursing home abuse and neglect. I have been a plaintiff's lawyer for 33 years, and in that time have encountered countless obstructionist tactics by defendant companies, health care providers, nursing home corporations, and insurance companies.

One of the most important tools I have in my arsenal to combat those tactics lies in the power of Rule 26(b)(5)(A) and the specific language used therein. Rule 26(b)(5) of the North Carolina Rules of Civil Procedure is in essence the same as the federal counterpart. Any changes to the federal rule would in all probability impact and trickle down to the NC rule as well.

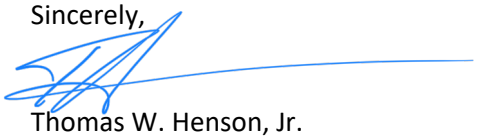
In my experience, the typical discovery situation unfolds as follows. I as counsel for plaintiff send discovery requests to the defendant. Responses are served which are replete with baseless objections and assertions of privilege. A privilege log is not provided. I must then request such a log multiple times, in writing, with threats of motions to compel or the actual filing of a motion to compel often needed to have any effect. When I finally get a purported privilege log, the vast majority of those do not provide enough detailed information for me to assess the validity of the privilege, and we often end up in a motion to compel hearing anyway, often many months after the serving of my initial discovery requests. Typically, the day before the hearing, the defense will produce a more detailed privilege log. Once plaintiffs scrutinize the privilege log, and challenge improper privilege assertions, scores of documents that were improperly withheld get produced. Invariably, the documents that were attempted to be hidden are the ones most important for a jury to see.

Oversight by the court is critical, and the production of a detailed privilege log is indispensable to that oversight process. Most importantly, the current language of the rule forces defendants to play fairly, and the gamesmanship that sometimes dominates the discovery process can be brought to a halt. I cannot overstate how important current Rule 26(b)(5) is. Any change that allows designation of "categories" of documents would strike a fatal blow to fair play, to the rights of parties in our nation's courts, and to the very essence of our judicial system, which is the discovery of the truth.

For these reasons, I strongly and sincerely urge the Advisory Committee to leave the Rule unchanged, and not allow the categorical logging of documents. Indeed, a more helpful change would be to include specific requirements as to what information must be included on a privilege log, so that the parties are allowed to assess the claims of privilege fully, fairly, and efficiently, without wasting counsel's time and the Court's time in assessing whether their privilege logs are sufficient.

Thank you for the opportunity to submit this Comment, and for your consideration in this important issue.

Sincerely,



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August 2, 2021

Via email only: Secretary@ao.courts.gov

To the Members of the Discovery Subcommittee of the Advisory Committee on Civil Rules regarding the invitation for Comment on Privilege Log Practice:

This Comment is respectfully submitted to the Subcommittee of the Advisory Committee on Civil Rules regarding considerations for amendment to Rule 26(b)(5)(A): Privilege log. I write to express my serious concerns with any attempt to limit the basic requirement, nee necessity, of providing the underlying basis for any assertion of privilege related to individual documents in a privilege log.

I have practiced as a plaintiff's attorney for more than 10 years after 10 years of practice as a defense attorney for large medical malpractice and catastrophic injury cases. Thus, I have been on both sides of the courtroom during my legal career. I learned during my 10 years as a defense attorney that it was easy to cover-up harmful documents by laying down blanket assertions of "privilege" for various categories of documents. In fact, both I and most of my peers were instructed to use blanket privilege objections for all discovery responses. If a plaintiff's attorney objected to the blanket objections, then we would provide piecemeal responses including the bases for the objections; however, the hope was that plaintiff's attorneys would be too busy or too trusting to look beyond the blanket assertions. Rarely, if ever, did the defense attorneys produce a useful privilege log. Instead, the log contained more of the same blanket assertions.

Both in my practice as a defense attorney and in my current practice as a plaintiff's attorney, I would estimate that more than 65% of all contested documents listed on a privilege log presented for judicial review are found to not be privileged. Frequent hearings over assertions of privileges before judges has led me to believe that attorneys are not able to be unbiased with regard to damaging documents that might contain privilege. When the impartial judge examines the same documents, more often than not, the judge finds that the documents simply do not meet the asserted privilege.

Allowing parties to simply broadly label documents as privileged will likely result in more improperly withheld documents and more motions and hearings practice to determine the veracity and basis for such claims. Our already overburdened federal courts will have to shoulder the burden of more and more privilege hearings. The focus should be on requiring the attorneys to be more specific versus less specific. Specificity will lead to better communication between and among counsel prior to any court intervention.

As such, I recommend against any further limitation in the duty to identify basis for claims of privilege and work product regarding individual documents.

Respectfully submitted,

Rachel A. Fuerst

COMMENT
to the
DISCOVERY SUBCOMMITTEE
of the
ADVISORY COMMITTEE ON CIVIL RULES

August 1, 2021

AN UPDATED PROPOSAL FOR IMPROVING PRIVILEGE LOG PROCESS

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Discovery Subcommittee of the Advisory Committee on Civil Rules ("Subcommittee") in response to its Invitation for Comment[2] on privilege log practice.

INTRODUCTION

Today's *de facto* requirement for document-by-document logging is a "one-size-fits-all" regime that induces overlogging and imposes significant burdens on parties, non-parties, and courts. The Subcommittee has read LCJ's August 2020 suggestion[3] to replace the document-by-document default with a rule-based presumption favoring categorical logging and excluding certain categories of material from privilege logs, but noted that our specific rule proposal seemed more limited than that.[4] LCJ now updates its submission with the attached revised proposal ("LCJ's Revised Proposal"). LCJ's Revised Proposal will curtail overlogging while protecting the ability of parties to obtain more specific information as warranted, achieving a much-needed balance while focusing parties and courts on the substantive issues in dispute.

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[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Available at https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment/invitation-comment-privilege-log.

[3] Lawyers for Civil Justice, *Privilege And Burden: The Need To Amend Rules 26(B)(5)(A) And 45(E)(2) To Replace "Document-By-Document" Privilege Logs With More Effective And Proportional Alternatives* (August 4, 2020), available at https://www.uscourts.gov/sites/default/files/20-cv-r_suggestion_from_lawyers_for_civil_justice_-_rules_26_and_45_privilege_logs_0.pdf (hereinafter, "LCJ Suggestion").

[4] Report by the Advisory Committee on Civil Rules to the Standing Committee (May 21, 2021), available at https://www.uscourts.gov/sites/default/files/2021-06_standing_agenda_book_final_6-23_0.pdf.

I. LCJ's Revised Proposal Establishes a Presumption in Favor of Categorical Logging—While Protecting More Particularized Logging When Needed

Rules 26(b)(5)(A) and 45(e)(2)[5] should establish the presumption of categorical logging while allowing more comprehensive logging when justified by the needs of the case and the materiality of the information. The default to document-by-document logging for all materials is based on a flawed premise that each document (or redacted portion) should be treated with equal detail. Because documents and privilege claims differ greatly, so should their treatment, and subdivisions (A), (B) and (C) of LCJ's Revised Proposal make this clear. Of course, certain materials may require detailed description, and LCJ's Revised Proposal provides simple procedural guidance for achieving that in subdivisions (B) and (C). These provisions would help parties, non-parties, and courts to make appropriate decisions about logging, recognizing that resources devoted to identifying, logging and resolving disputes about privileged documents are often out of proportion to the needs of the case, particularly when the parties do not have or anticipate disputes over withheld documents. For non-parties facing the prospect of producing a privilege log pursuant to Rule 45, such transparency may be even more important. Although Rule 45 makes clear that non-parties should be entitled to greater protection against undue burdens, it fails to provide it expressly with respect to privilege logging. Rule 45 has no mechanism to facilitate categorical privilege logging by non-parties.

II. LCJ's Revised Proposal Would "Codify" the Presumption that No Logging Is Required for Privileged and Trial-Preparation Materials Created After the Complaint is Filed

One of the most important functions of the FRCP is to provide clear guidance on issues that generate frequent, and largely pointless, satellite litigation despite being largely settled questions. In the realm of privilege logging, the issue that squarely fits that description is whether parties are required to provide logs of trial-preparation documents created after the commencement of litigation. Communications between counsel and client regarding the litigation after service of the complaint are privileged absent highly extraordinary circumstances. Similarly, communications exclusively between a party's in-house counsel and outside counsel during litigation are also clearly within the privilege and almost never will be admissible in the substantive case. Unfortunately, because of the current lack of clarity in the rules and disparate case law in the circuits (as noted in LCJ's original submission), parties frequently wrangle over whether documents in these categories must be logged. Rule 26(b)(5)(A) should reflect the reality that this category of materials is so unlikely to contain non-privileged information that any sort of logging should be the exception rather than the rule. Such a presumption, which is incorporated in Section (D) of the Revised Proposal, would improve the efficiency of litigation while reducing the acrimony that can develop when gray areas exist. It would also preserve everyone's ability to obtain for more detail when a need is demonstrated. This clarity would reduce disputes regarding the scope of logging that arise under today's *de facto* rule that all documents must be specifically described.

[5] LCJ's Revised Proposal expressly address Rule 26, but we suggest a parallel amendment to Rule 45.

III. LCJ's Revised Proposal Sets Forth Clear Procedures for Motions to Compel Production of Withheld Information—and Recognizes that Logs are Discovery Tools Rather than the Basis for Judicial Determinations of Privilege

It is well understood that privilege logs are discovery tools (and too often, strategic weapons in discovery battles) rather than the mechanism for providing courts a sufficient basis for determining privilege disputes. "Indeed, many judges will acknowledge that resolving privilege challenges almost always requires the *in camera* examination of the documents, and the logs are of little value when trying to determine the accuracy of either the factual or legal basis upon which documents are being withheld from production."[6] The rules governing logging should recognize this reality while setting forth clear procedural standards for resolving privilege disputes. To address motions to compel based upon categorical logs, Section (F) of LCJ's Revised Proposal provides that: (a) the responding party shall provide a description of a reasonable sample of the disputed items that is sufficient to permit the court to assess the privilege claim; (b) the court may order a document-by-document log; and (c) production orders cannot be based upon categorical descriptions, but rather must reflect a determination that each item to be produced is not privileged. And for the benefit of courts and parties alike, LCJ's Revised Proposal permits parties to submit items for *in camera* review only when the court has determined that it cannot assess the basis for withholding by the description provided. Such provisions will provide procedural transparency to the parties (and non-parties) while, importantly, protecting judicial resources by limiting *in camera* review to instances when it is necessary.

CONCLUSION

LCJ's Revised Proposal seeks to focus disputes regarding privilege withholding on an efficient and balanced process that minimizes court involvement. It is consistent with the 1993 Committee Note to Rule 26(b)(5), which contemplates that detailed logging such as document-by-document privilege logs may be suitable when only a few items are being logged, but identification by category is more appropriate in other circumstances. Unfortunately, the Committee's 1993 insight has been misunderstood or ignored, and now Rule 26(b)(5)(A) and its case law progeny have institutionalized a "one-size-fits-all" rule in the form of a *de facto* default to "document-by-document" overlogging. It is time for the Committee to rework the rule and include clear guidance in the Rule text itself while providing flexibility that permits the parties or

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[6] *The Sedona Conference, Commentary on Protection of Privileged ESI*, *supra* note 4, at 103 (internal citation omitted). Judge Paul Grimm previously recognized the current incentive for collateral disputes:

> Requesting parties also know of the limited utility of privilege logs (for they likely have served similar privilege logs in response to their adversary's discovery requests), and thus, when they receive the typical privilege log, they are wont to challenge its sufficiency, demanding more factual information to justify the privilege/protection claimed. This, in turn, is often met with a refusal from the producing party, and it does not take long before a motion is pending, and the court is called upon to rule on the appropriateness of the assertion of privilege/protection, often with the producing party's "magnanimous" offer to produce the documents withheld for *in camera* review. *In camera* review, however, can be an enormous burden to the court, about which the parties and their attorneys often seem to be blissfully unconcerned.

Victor Stanley, Inc., 250 F.R.D. at 265.

the court to employ the logging procedure that best meets the needs of the case. An amendment along the lines of LCJ's Revised Proposal is strongly needed because it would motivate and enable parties, non-parties, and courts to customize logging procedures (and develop new and emergent technologies) to the needs of each case. By prioritizing the most important issues, such an amendment would also serve to reduce the number of privilege claims at issue between the parties.

LCJ's REVISED PROPOSAL

Proposed Amended Rule 26(b)(5)

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must identify and describe the information not produced and the basis for withholding the information, except as the parties agree or the court orders that the identification and description of that information is not required or the information is excluded from this requirement by subdivision (D) of this rule.

(B) *Identification and Description of Information Withheld by Category.* A party withholding items shall identify and describe the items withheld by category, as the categories are defined by agreement of the parties or court order, that:

(i) describes the type or subject matter of the documents, communications, or tangible things not produced and the basis for withholding based on categories such as types of communications and/or subject matter of the items–and do so in a manner that will enable other parties to assess the claim; and

(ii) may include the identification, by number or otherwise, of each item withheld.

(C) *Identification of Information Withheld by Item.* The parties may agree, or a party may move the court, to require individual item identification of withheld information on the grounds of substantial need, undue hardship, or prejudice. If a motion is brought, the court shall consider whether an identification by item is proportional to the needs of the case as set forth in subdivision 26(b)(1) of this Rule and, if the motion is granted, may order that the additional costs of describing each item be shared by the parties or allocated in full to the moving party.

(D) *Information Withheld Excluded from [Not Subject to] Identification.* Absent a showing of substantial need, undue hardship, or prejudice, a party withholding privileged or trial-preparation materials is not required to identify categories of items or each item withheld that are created or dated after the filing of the first complaint in the action. If the court orders identification of such items, the court may order that the additional costs of describing each item be shared by the parties or allocated in full to the moving party.

(E) *Use of Technology for Identification of Withheld Materials*. A party may use search terms or other technologies to identify potentially privileged and trial-preparation materials and rely upon those search terms or technologies for withholding as privileged or protected as trial-preparation materials. Upon a showing of substantial need, undue hardship, or prejudice by any other party, the court may order that search terms or technologies be modified or another procedure for identification such materials be employed. If the court orders a modification or other procedure, the court may order that the additional costs of describing each item be shared by the parties or allocated in full to the moving party.

(F) *Motions to Compel Production of Withheld Items.* If a party moves under Rule 37(a) to compel the production of items withheld on the grounds privilege or protected as trial-preparation material, the procedures shall require:

(i) if the motion is to compel production of a category or categories of items:

(a) the responding party shall provide a description of a reasonable sample of the items setting forth the basis of the claim and sufficient to permit the court to assess the claim;

(b) the court may order the responding party to provide a description of each item in the category as set forth in subdivision (C) of this rule; and

(c) the court shall order the production of items only upon determining that each item to be produced is not subject to withholding on the basis of privilege or as trial-preparation materials.

(ii) items shall not be submitted to the court for *in camera* review except where the court has determined that the basis for withholding cannot be assessed by the description provided by the responding party and that such review is necessary for the court to adjudicate the issue; and

(iii) a party may move for an order to compel another party to provide descriptions of categories or items which comply with subdivisions (B) or (C) of this rule. An order to compel descriptions of categories or items shall require only the withholding party provide descriptions in compliance with this rule and, where good cause is shown, award reasonable fees and costs to the moving party.

(G) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; shall take reasonable steps to retrieve the information if the party disclosed it before being notified and provide the identity of the person(s) or entity(ies) to whom the information was disclosed; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved. If the parties have entered an agreement regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.

CLEF
Educating, Empowering,
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VIA ELECTRONIC MAIL
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Dear Ms. Womeldorf:

The Complex Litigation eDiscovery Forum (CLEF) appreciates this opportunity to respond to the questions posed by the Judicial Conference Advisory Committee on Civil Rules ("Committee").

CLEF is a non-profit educational and advocacy organization dedicated to advancing knowledge of, and best practices in, eDiscovery among practitioners and the courts. CLEF addresses the unique educational needs and perspectives of plaintiffs'-side practitioners, whose interests are frequently underrepresented and underrecognized by other national eDiscovery organizations. The members of CLEF's Board of Directors are nationally recognized for their expertise in complex litigation and eDiscovery:

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CLEF participants include some of the most prominent plaintiffs'-side law firms and lawyers litigating many of the nation's largest, most complex matters, including class actions and mass tort litigation across all practice areas. They have extensive experience in negotiating privilege log protocols early in litigation, preparing

privilege logs, evaluating logs produced by opposing and third-parties, and challenging improper claims of privilege and work-product protection.[1] That expertise informs our comments today.

I. Summary

Amendments to Federal Rule of Civil Procedure 26(b)(5)(A) would be premature and pose a serious risk of undermining the purpose of the Rule itself. While amendment of Rules 26(f)(D) and 16(f) may be helpful, we believe that practitioners in large document/ESI cases already address and negotiate privilege issues at early stages of the litigation.

Although the Committee recognizes that "the nature of a rule change to solve a problem" depends upon what that problem is, several of the possible amendments the Committee offers for discussion purposes presume the nature of the problem is, in fact, that document-by-document privilege logs are unduly burdensome. But proponents of that view have demonstrated neither that traditional logs are the source of any privilege log burden nor that any substitutes to traditional logs would reduce the burden (if it exists) while advancing the objectives of the Rule. As we discuss below, problems complying with Federal Rules lie not with parties' ability to comply with the demands of Rule 26(b)(5) but rather with their discovery obligations to withhold only relevant documents protected by privilege or the work-product doctrine. To the extent there is a burden of document-by-document logging, we suggest it is more likely attributable to over-inclusive privilege screens and extensive over-designation of documents for which there is no colorable claim of privilege, resulting in unnecessary costs to the producing party. If interest in amending Rule 26(b)(5) concerns "compliance," the Committee's attention may be better focused on tools available to the judiciary to disincentivize over-designation to reduce costs imposed on both receiving parties and the courts from over-designation.

More importantly, two proposals contemplated by the Committee—one normalizing and sanctioning categorical logs and the other limiting the disclosure obligation to *only* categories of documents withheld—pose serious problems.

First, these proposals would permit disclosure by "category" (and thus categorical or summary logs) without any parameters on what disclosure by category actually means or any basis to believe categorical disclosures reduce the burdens of logging. Parties must still conduct a document-by-document review to satisfy their Rule 26(g) obligations to determine whether the documents placed in that category are, in fact, privileged. And there is no common understanding, much less agreement, among the courts or the bar about what categorical logs are, what categories should consist of and how broad or narrow they can be, how they should be constructed, whether and

[1] For convenience, references to "privilege" herein encompass both attorney-client privileged communications and documents protected by the work-product doctrine.

how they reduce logging burdens, or whether they permit parties to assess the claim of privilege. Any amendment that seeks to avoid undermining the goals of the Rule requires careful advance examination of, and answers to, these questions. We suggest that investment in such a massive undertaking is unwarranted when the purported burden of traditional logs has not been substantiated (particularly in light of modern technology) nor the case made that categorical logs lessen that burden.

Second, the possible amendments would subvert the very purpose of Rule 26(b)(5)(A) by encouraging non-compliance with discovery obligations and undermining the goal of the Rule's disclosure obligations. Both amendments presume that disclosure by category—whatever that may mean—permits courts and parties to assess a claim of privilege. But our collective experience is that categorical disclosures frustrate rather than facilitate that assessment.

"Categorical" logs, as used today:

- are unproven and unhelpful in assessing claims of privilege;
- result in more, not fewer, disputes among parties;
- increase, rather than lessen, the burden on the judiciary; and
- obstruct, rather than advance, the goals of the Rule.

This is because the "categories" in categorical logs are nearly always common descriptions explaining the basis for the withholding as to all documents, without any information about the individual documents within those categories that would allow the receiving party to test the validity of the descriptions for any particular document. Advocates of categorical logs beg the question: They presume that the description of the category accurately characterizes each document in that category, obviating the need for information about each document to substantiate the claim, when the accuracy of the description is the very thing a log is intended to test.

Moreover, categorical logs exclude document-by-document information that is readily available through modern, nearly universally embraced eDiscovery tools. Modern privilege logs are ordinarily assembled from document-by-document exportable metadata that identifies senders, recipients, dates, etc., for each document. Some categorical logs are produced by collecting and merging all of this individual metadata for each document in a category to conceal pertinent information for each document, requiring *extra* steps to create the categorical log. And regardless of how categorical logs are assembled, all exclude this readily available document-by-document information and instead combine all senders, recipients, authors, and document types for all documents in the category. This practice makes it impossible to determine whether an attorney was even involved in a given communication, the information was disclosed to third parties, or an attachment to a privileged communication was independently privileged. Permitting categorical logs allows the

producer to obscure electronically generated information, which poses no burden to assemble, from production without any valid purpose.

And because it is impossible to assess the privilege based on categories, in practice, categorical logs result in more motions challenging the sufficiency of the logs themselves and more *in camera* review. Since the claim as to individual documents cannot be challenged informally among the parties on the basis of the log itself without need for court intervention, challenges to the sufficiency of entire log or as to all documents within a category must be brought to the court for resolution.

And as unhelpful and error ridden as critics claim they are, document-by-document logs are indisputably the only means (outside of *in camera* review) of identifying invalid privilege claims. It is only through disclosure of the "who, what, where, when, and why" of each document that receiving parties can distinguish legitimate claims from invalid ones. Indeed, after receipt of document-by-document logs and informal challenges to specific documents, it is commonplace for parties to voluntarily withdraw privilege claims for large numbers of documents. This often happens without need for court intervention.

This is not to say that a "categorical" approach to disclosure can never permit an assessment of a claim. But there is no basis for building a presumption into the Rule that categorical logs necessarily do. Whether a categorical approach to disclosure can be designed in a manner that permits assessment will depend upon on a number of factors including: the nature of the claims in the case, the parties' agreement regarding the nature of any categories of documents to be logged, the nature of the parties and the role of key players whose documents might be logged categorically, and the technology and review mechanisms employed to assemble the log. But the Federal Rules cannot supply the answers to these case-by-case questions.

A third suggested amendment would enumerate in the Rule itself categories of documents that need not be identified. But whether, when, and what, if any, categories are properly excluded, will always be case-specific. For example, in certain cases it may be reasonable to presume that communications with outside litigation counsel relating to the subject matter of the litigation after the filing of a complaint are so likely to be privileged that communications occurring or documents created by or on behalf of attorneys after litigation commences need not be logged. And, as discussed below, parties frequently agree to exclude such communications from the logging obligation. But where outside litigation counsel wear multiple hats or when the conduct in question is ongoing beyond commencement of the litigation, that presumption will not hold. Appropriate exclusions cannot be identified by a general rule.

A fourth proposed revision would amend Rule 26(f)(3)(D) and Rule 16 to provide that the parties discuss the means of complying with Rule 26(b)(5)(A) as part of their

discovery plans and that courts include provisions regarding the same in their scheduling orders. While such an amendment may be helpful in encouraging early discussions that may avoid later disputes, Rule 26(f)(3)(D) already provides for discussion of issues associated with privilege (which includes privilege logs) and, as discussed below, particularly in large ESI cases and complex matters, the parties commonly agree to privilege log "protocols" early in the litigation and prior to production. It may not always be the case, however, that the parties will have sufficient information early in the litigation, before documents are collected (or searched and reviewed for responsiveness and privilege) to know what type of privilege logs are appropriate and when they should be produced. Presupposing that informed determinations of appropriate compliance mechanisms for Rule 26(b)(5) can always be made at inception of the litigation may introduce inefficiencies and disputes where none might otherwise arise.

Finally, we urge the Committee to reject suggestions to import Rule 26(b)(1)'s proportionality standard into Rule 26(b)(5)(A). Proportionality requires assessing (among other factors) the burden of discovery when balanced against the parties' relative access to relevant information, the importance of the discovery in resolving the issues, and the benefit of the discovery sought. Although a proportionality analysis may assist courts in assessing the proper scope of discovery when specific *requests* for discovery are at issue, it is ill-suited to analyzing the value of *disclosure* over non-disclosure (or limited disclosure) under Rule 26(b)(5)(A). And it is not clear why such an analysis is appropriate in the first place: documents to be logged are, *by definition*, responsive to requests that have already been deemed proportionate to the needs of the case.

Any inquiry into the value of disclosure that focuses on the value of the documents withheld would be non-sensical when the very nature of the withheld documents and their contents is unknown and unknowable to the requesting party and the court. The result would be a singular focus on the cost of disclosing without any informed basis on which to balance the cost against the benefits of disclosure. It is the producing party's burden to demonstrate that protection applies. A proportionality analysis would effectively flip that burden to the requesting party to explain the value of the disclosure required by the Rule without any basis to do so. This is so though the Rule itself already presumes the value of disclosure; it is unclear why a requesting party should need to demonstrate it in a given case. One would hardly expect courts to entertain a proportionality analysis for other types of disclosures of unknown information (for example, initial disclosures) on grounds that the reasonable inquiry required to make such disclosures was just too burdensome. If a producing party finds privilege logging too burdensome, it may seek a Rule 502(d) order to scale back its review and reduce the burden of producing a log, or forego a privilege review, relying instead on a clawback agreement.

II. Over-Designation and the Value of Traditional Logs in Detecting It.

As the Discovery Subcommittee noted in its recent report, Rule 26(b)(5) was adopted because receiving parties cannot determine what responsive documents are withheld when privilege objections are asserted and "suspicions that sometimes parties were overly aggressive in their privilege claims." Advisory Committee on Civil Rules, Apr. 23, 2021 Agenda Packet at 174. That suspicion has proven well-founded.

A. Significant Over-Designation is Commonplace.

In our experience, dramatic over-designation of documents is all too common. Whatever its cause, the practice of over-withholding not only results in unnecessary logging burdens on the producing party, but also effectively shifts the burdens to receiving parties, at enormous cost in attorney hours and other direct costs, who must review excessive logs to challenge improperly withheld documents that are, in many cases, subsequently voluntarily withdrawn. Legal databases and court dockets do not reflect the extent of over-designation because, when document-by-document logs are provided, receiving parties launch informal challenges and producing parties voluntarily withdraw claims for many documents without need for involvement of the courts.

Below are just a few recent examples of over-designation from matters in which CLEF members were directly involved and that illustrates how important document-level logs are in exposing over-designation.

1. *In re Domestic Airline Travel Antitrust Litig.*, No. 15-mc-1404 (D.D.C.)

A recent decision in *In re Domestic Airline Travel Antitrust Litigation* provides a useful case study in over-designation and the value of document-by-document logs in assessing the claims of privilege.

There, a defendant provided a traditional privilege log with 41,259 entries.[2] Following review of each log entry over the course of six weeks, involving dozens of attorneys and nearly 2,000 hours in attorney time, Plaintiffs informally challenged more than 22,000 claims of privilege, providing reasons for each challenge based on the participants in the communication, the description and nature of the document, dates, and other information in the log. Their challenges included that the communications and documents appeared to involve business or public relations (not legal) advice; were disclosed to third parties; did not involve any attorneys; were prepared for the purpose of release to others, not legal advice or litigation, and so forth.

[2] Much of the history presented here is recounted in briefing submitted to the Special Master but not filed on the docket.

Following the challenge, the producing party undertook to "re-review" its log, revising it three times (requiring re-review by the receiving party), and withdrawing more than 17,000 of the 22,000 challenged documents—some 3,000 because they were determined to be nonresponsive and some 14,000 because they were logged in error. That is, the producing party unnecessarily logged, and the plaintiffs unnecessarily reviewed, over 75% of the challenged entries. The producing party did not re-review entries that the plaintiffs did not challenge, leaving unknown how many of those were improperly withheld. Of the remaining 5,000 documents originally challenged, Plaintiffs moved to compel nearly 2,100 of them.

Following months of *in camera* review by the Special Master at a cost to the parties approaching $300,000 (split between the producing party and plaintiffs), the Report and Recommendation found that of the documents challenged by the motion, nearly 80% were not privileged either in whole or in part.[3]

The Master compared the log with the documents produced *in camera* and identified patent over-designation as well as errors in the log that, if correctly presented, would have made the improper claim even more apparent (e.g., inaccurate sender and recipient information, omission of third parties as recipients or authors, erroneous inclusion of attorneys as participants in communications).[4]

The R&R also highlighted "questionable claims of privilege" for email threads that even the volume of documents could not justify, observing that "'Respondent's [] privilege claims with respect to these particular documents—each of which were logged and withheld as separate communications—cast[] doubt upon Respondent's claims as a whole.'" [5] Notably, there is no specific recourse or sanction in the Federal Rules which addresses the problem of persistent over-designation.

Plaintiffs challenged a host of documents for which log data suggested no legal advice was at issue despite the claim in the description. The R&R noted the producing party's practice of including attorneys on ordinary business communications, finding:

> [B]usiness personnel infrequently raised legal questions or concerns, and [the] internal review process infrequently resulted in counsel providing legal advice or engaging in discussions that tended to reveal the substance of a client confidence. Instead, this review process tended to result in in-house counsel providing stylistic, editorial, and other non-legal feedback.[6]

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[3] *In re Domestic Airline Travel Antitrust Litig.*, No. 15-mc-1404, 2020 WL 3496748 (D.D.C. Feb. 25, 2020), *adopted,* 2020 WL 3496448 (D.D.C. May 11, 2020).

[4] *E.g.*, *id.*, Ex. 1 at 52, 63, 96,106, 140, 240, 302, 431, 720.

[5] Id. at *12 (quoting *In re Veiga*, 746 F. Supp. 2d 27, 43-44 (D.D.C. 2010)).

[6] *Id.* at *13.

In our experience as practitioners, this type of over-designation of communications that reflect merely ordinary business matters in which an attorney may have been included is commonplace.

The detailed 800+ page exhibit to the R&R revealed a range of serious errors in the characterization of the documents and the privilege—errors that only the document-by-document log could have flagged by permitting an assessment of the description against the log detail.[7] The R&R used the following terms and phrases in reference to the assertions in the log and the opposition briefing more than 160 times: "cannot reasonably support," "not supported," "unsupported," "does not support," "no support," "inaccurate(ly)," "not accurate(ly)," "not true," "not so," "no basis," "misleading," "in error," "incorrect," "inconsistent" (with respect to claims, descriptions, arguments, and assertions in the Log and opposition), and "fail[ure] to identify" (with respect to information such as senders, recipients, attorneys, authors, emails, and so forth). It noted repeatedly where documents could not reasonably be construed as legal advice or work-product.[8]

2. *In re Blue Cross Blue Shield Antitrust Litig.*, No. 13-cv-20000-(N.D. Ala.)

Over-designation and burden shifting was equally pervasive in *In re Blue Cross Blue Shield Antitrust Litigation*. There, the parties agreed that, to reduce defendants' claimed burden in producing privilege logs, any party withholding documents need only provide a metadata privilege log for withheld documents. That is, objective metadata for each document was provided in lieu of manually created entries.

At the end of discovery, defendants produced their metadata privilege logs containing more than 700,000 documents. The court appointed a Privilege Master and outlined a process for challenging log entries.[9] First, defendants were required to certify that all documents on the privilege log had been reviewed by an attorney and were actually privileged. Second, plaintiffs reviewed all 700,000+ entries to select a sample of 1,974 documents for *in camera* review by the Master. Third, the Master reviewed the samples and issued rolling Reports & Recommendations on whether or not the documents were actually privileged. Fourth, plaintiffs were then required to re-evaluate Defendants' metadata logs to try to identify whether other documents were similar to those deemed non-privileged by the Master and ask defendants to de-designate those documents. And finally, to the extent documents remained, plaintiffs could move to compel their production.

This process took more than a year, and resulted in the de-designation, in whole or in part, of 66.33% of defendants' privilege logs—an astounding 465,291 documents

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[7] In many cases the description was simply inaccurate. *See, e.g., id*. Ex. 1 at 99, 169, 241, 302, 389, 403, 552, etc.

[8] *Id.* at 64, 108 173, 207,230 313, 327, 366, 305, 406-407, 413, 455, 581, 582, 615.

[9] ECF No. 1667.

removed from the logs, even after defendants had certified that every document on their logs was privileged.[10] Thirty of the thirty-six defendants de-designated more than 60% of their logs. The defendant with the largest privilege log, at 127,151 entries, ended the sampling process with just 21,482 entries—de-designating 83% of documents it had initially withheld as privileged. The nearly $90,000 in Master fees was split equally between plaintiffs and defendants, with the more than 30 defendants splitting their half among themselves, at *de minimis* cost to them but significant cost to plaintiffs.

The late production of previously withheld documents after close of discovery deprived plaintiffs of the opportunity to use relevant documents in depositions and at summary judgment on key issues in the case.

B. Traditional Privilege Logs Advance the Goals of the Rule.

These case studies are, unfortunately, merely examples of the over-designation that commonly occurs in both complex and standard litigation and bloats the cost of preparing privilege logs. Legal databases are replete with opinions analyzing privilege challenges that could only have been brought after review of document-level logs.[11] And, as noted, because many improperly withheld documents are voluntarily produced after informal challenges, the databases understate the degree of over-designation.

Despite common shortcomings of document-by-document privilege logs (e.g., inadequate information or vague descriptions), the foregoing demonstrates that such logs further the goals of the Rule. In neither of these cases would the receiving party have been able to unearth the improperly withheld documents had the log not provided information at the document level. Indeed, information at a document level is the only means of testing whether a document description or claim of privilege or work-product is valid. For example, if work product is claimed, is there any indication in the log that an attorney prepared or directed preparation of the document and, if

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[10] ECF No. 2377.

[11] For example, in *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, No. 12-cv-526, 2017 WL 3535293 (D.N.M. Aug. 16, 2017), the plaintiff objected to 2,831 documents on a 4,143-entry log. Following a re-review, the defendant voluntarily produced nearly 2,000 documents. No. 12-cv-526, 2017 WL 3535293, at *9-10 (D.N.M. Aug. 16, 2017). Following that dramatic de-designation of nearly 70 percent of the documents challenged, Plaintiffs challenged the remaining entries. That challenge resulted in a re-review and the voluntary production of nearly 900 additional documents, and ultimately an order to produce another nearly 200 documents. *Id.*

Similarly, in *Dolby Laboratories Licensing Corp. v. Adobe Inc.*, a defendant withheld more than 4,000 documents that included no lawyers in the communication. 402 F. Supp. 3d 855 (N.D. Cal. 2019). The court ordered the defendant to review the non-attorney communication to remove inappropriate assertions, after which, the plaintiff selected a sample of 15 documents from the revised log for *in camera* review. The defendant then withdrew its claims for 2 of the 15 and of the remaining 13, the court found six to be unprotected in whole or part. That is, of the 15 sample documents *more than half* were improperly withheld. The court ordered the defendant to conduct a further re-review of its log consistent with the ruling.

not, that it was ever sent to or from an attorney? If there is a claim that legal advice was sought, was any attorney a recipient, and if so, was that attorney merely cc'd or one among many recipients? These types of red flags are only apparent when the receiving party has information at the document, not category, level—on subject matter, dates, senders, recipients, copyees, and authors, among other information. It is unsurprising, then, that many courts presumptively require standard logs.

As one court observed:

> [E]xaggerated and improper claims of attorney-client privilege continue to impermissibly affect discovery specifically and the adversarial process generally. Unfortunately, such claims are too often indiscriminately applied to documents that do not truly qualify for protection. Often, the excessive and improper claims are later abandoned when a party is challenged and is required to properly support the claims. But that is too little too late, when viewed from the deterrent purposes of sanctions.
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> . . . .
>
> Both [attorney-client privilege and the work product doctrine] operate in derogation of the search for the truth and run counter to the public's right to every person's evidence. Accordingly, courts have always construed the privilege narrowly, unless to do so will serve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. The party hoping to withhold evidence from the proceedings - and, to degrees that vary from case to case, thwart the fact-finders' efforts at uncovering the truth - necessarily has the burden of establishing the applicability of the privilege it asserts on a document-by-document basis.[12]

Despite protections against waiver from "under-withholding" via Federal Rule of Evidence 502(d), over-designation and excessively broad privilege screens remain the norm. Rule 502(d) was designed to lessen the burden of review and logging by permitting courts to find privilege or work-product protection is not waived by disclosure in *any* proceeding. It reduces the risk of subject matter waiver from an appropriately narrowly tailored privilege screen and review, and the lessens the need to over-withhold documents on the borderline, reducing logging burdens. Yet sadly, even where the parties agree to 502(d) provisions and clawback agreements, vast

[12] *Urb. 8 Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC*, 334 F.R.D. 149, 154, 156 (N.D. Ill. 2020) (cleaned up).

over-designation occurs. Indeed, in the case studies above, Rule 502(d) orders had been agreed to by the parties and entered by the court.

We urge the Committee to consider whether the burden of privilege logs is not the result of the logging process itself, but instead a consequence of parties stretching attorney-client privilege and the work-product doctrine far beyond their bounds.

III. Categorical Logs Do Not Permit Parties or Courts to Assess the Claim and Result in More, Not Fewer, Privilege Disputes.

Categorical logs, by their very nature, fail to provide sufficient information to assess claims of privilege. Before considering any Rule amendment that would suggest, encourage, or limit the disclosure to categories of withheld documents, we urge the Committee to consider (A) what it means to disclose by "category," (B) whether and, if so, *how if at all*, disclosure by category lessens the logging burden given how categorical logs are typically assembled (using available document-by-document information); (C) how logs that *consolidate* information about individual documents into generic categories would solve the problem of purportedly "generic" or "boilerplate" descriptions that amendment-proponents assert render traditional logs useless; and (D) whether, and, if so, how they allow parties to assess the claims.

A. Categorical Logs Remain Undefined.

There is no common understanding about (1) what categorical logs are; (2) how they should be constructed; (3) what appropriate "categories" are (e.g., by description, by type of communication, by document type, by the participants in the communication, etc. ?); (4) how narrow or broad the categories should be; (5) the appropriate time-span for a category (a week, a month, a year, 10 years?); (6) how many documents may fall into a category before the validity of the category itself becomes questionable (dozens, hundreds, thousands?); or (7) what information they must contain to permit assessment of the claim, among many other questions.

Before the Committee considers permitting disclosure by category or limiting disclosure to *only* categories, these questions must be answered. Yet there is little agreement among the bar, not to mention courts, about those answers much less that categorical logs are sufficient and, if so, what constitutes an adequate one.[13]

[13] To the extent some point to inconsistency among jurisdictions as justification for an amendment permitting categorical logs to create uniformity, only the most prescriptive Rule amendment could do so. Courts would remain free to determine what sufficient categorical disclosure consists of just as they now interpret what Rule 26(b)(5)(A) requires. And different approaches by jurisdiction are no more problematic here than with other local rules of procedure. Litigants are accustomed to and accommodate different approaches to the Rules of Civil Procedure.

B. Categorical Logs Group Large Numbers of Documents Under Broad Descriptions.

Where parties produce categorical logs, they nearly universally "categorize" by a description of the documents, often by broad subject matter, encompassing dozens, hundreds, or sometimes thousands of documents in a single category.

Consider the following excerpted entry from the New York City Bar Association's "model categorical log":[14]

Model Categorical Privilege Log

Category No.	Date Range[1]	Document Type	Sender(s)/Recipient(s)/Copyee(s)	Category Description	Privilege Justification	Documents Withheld (Total Documents: 454)[2]	Documents Withheld, Including Families[3]
1	3/11/2012 - 6/30/2012	Email, PDF	**Attorneys:** K. Currie, Esq.; S. Salem, Esq.; E. Mendola, Esq.; F. Fernandez, Esq.; J. Driscoll, Esq.; T. Duxbury, Esq (Smith and Kline LLP).; K. Currie, Esq. **Client:** M. Salem; K. O'Shea; J. Martin; C. Dew; F. Zegler; M. Moore; E. Andrews; A. Skar; A. Chen; J. Ginter; F. Treglia;B. Parks; R. Thomas; V. Anderson; H. Dickey; C. Vega; M. McIntosh; B. Carrol; E. Schmidt; B. Newburn; S. Turner; J. Rose; C. Whalen; C. Acton; D. Holmes; K. Stewart; J. Ginter; F. Treglia **Qualified Third-Parties:** H. Smith (Accountants LLP); D. Jones (Consultant)	Communications with outside counsel providing, requesting or reflecting legal advice regarding easement and operating agreement negotiations with Heights Building Ltd.	Attorney-Client Privilege; Attorney Work Product	325	415

In this model entry, over the course of more than three months, 325 emails and pdfs were exchanged among some or all of seven attorneys, some or all of two third parties, and some or all of twenty-eight employees. All are purported to be: "communications with outside counsel providing, requesting, or reflecting legal advice regarding easement and operating agreement negotiations." How is the receiving party to assess whether that description is accurate? All senders, recipients, and copyees, are logged together in a single cell, making it impossible to determine whether each of the 325 documents either requested, provided, or reflected legal advice. Even if all senders and all recipients were separately identified for all documents in that category, and assuming the subject matter is accurate, the receiving party still could not know:

- How many documents are emails, attachments, or loose documents;
- Whether attachments are independently privileged even if the email is;

[14] NYCBA, Model Categorical Privilege Log, https://www2.nycbar.org/pdf/report/uploads/20072891-GuidanceandaModelforCategoricalPrivilegeLogs.pdf. Documents Withheld represents the number of documents to which privilege applies in each category; Documents Withheld, Including Families includes these documents with families, which may not be privileged.

- How many of the documents purportedly "reflect" legal advice (as opposed to seeking it or containing legal advice),[15] who authored them, to whom were they sent, and the type of document (e.g., presentation, memo, speech, press release, etc.);
- Of the unprivileged family members to documents withheld, which were produced and how to identify them to assess the withheld family member; or
- Of the emails:
    - how many emails included attorneys as senders or recipients;
    - how many attorneys were merely cc'd on emails to non-attorneys;
    - how many attorneys were included in none of the communications; and
    - how many are threads that include attorneys in fewer than all emails.

Unfortunately, the "model log" is not atypical of categorical logs produced today, which combine documents under such broad descriptions with nothing to test the accuracy of the description for documents in that category. Some provide far less information or far broader categories spanning hundreds or thousands of documents.

Categorization by description is plainly insufficient. Invalid claims are most often revealed not by a description alone (because attorneys do not ordinarily provide descriptions that make clear no privilege attaches), but instead by the accompanying information about senders, recipients, dates, and attachments that call that description into question. For example, emails described as seeking, rendering, or reflecting legal advice (a) between non-attorneys, (b) merely cc'ing an attorney, (c) involving many individuals, or (d) involving third parties all raise questions about the validity of the claim. Categorical logs obscure this information and thus make it impossible to assess the claims.

Additionally, categorical logs make it impossible to determine into which categories documents that are redacted but produced fall. In a document-level log, redacted documents are identified by their Bates numbers so the receiving party can match the log entry with the document produced to evaluate the document against the privilege log information. In a categorical log, redacted documents are combined with documents that are wholly withheld and, like all documents in categorical logs, cannot be individually identified, preventing the receiving party from assessing the redacted document against the log information.

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[15] Parties frequently and erroneously claim privilege over documents that have incorporated revisions following legal review as "reflecting" legal advice though the document itself contains no advice and any advice resulting in revision is not discernable. *See, e.g.*, Discovery Order, *Epic Games v. Apple*, No. 20-cv-05640 (N.D. Cal. Apr. 28, 2021) ("Lots of documents are reviewed and revised by attorneys and therefore reflect legal advice they provided to business . . . . The attorney-client privilege protects the communications between attorney and client involved in the drafting of those documents, such as emails with redlined documents reflecting legal advice or oral conversations giving legal advice. But that's it. Apple does not contend that [the document] is itself a communication between attorney and client (it obviously is not), or even that the reader could glean from this document what the legal advice or edits were (you can't), so it is not privileged.").

To the extent the justification for discarding the time-tested approach to logging in favor of an untested one is that traditional logs frequently provide insufficient information to assess the privilege,[16] CLEF is hard pressed to see how that problem is ameliorated by encouraging logs that provide *even less* information and encourage even more "robotic" descriptions (e.g., "documents providing, requesting, or reflecting, legal advice regarding" on a particular subject matter). And given that producing parties are already prone to over-designate, it is hard to see how permitting them to withhold information that could be used to challenge their claims will do anything other than encourage more, not less, improper withholding.

C. Categorical Logs Are Often Constructed from Available Document-by-Document Information that is Obscured to Create Categorical Logs.

Based on our understanding and experience, prior to construction of many (if not most) categorical logs for ESI, detailed information is available on a document-by-document basis and could be produced to the receiving party but is obscured when the categorical log is constructed, often requiring more, not fewer, steps in the logging process.

Privilege reviews of ESI are conducted on electronic review platforms and production of privilege logs has become substantially automated, reducing the burden of logging. Documents identified as potentially privileged by privilege screens (usually using broad search terms or sometimes analytics) are reviewed by "coders." The electronic coding pane provides tags for coders to mark documents as attorney-client privileged, work-product, redacted, or withheld, and generally provides for an "attorney notes" field that can be used to indicate the basis for the claim, provide a description, or make other notes. In some cases, privilege descriptions are *pre-determined* before documents are reviewed for privilege[17] and electronic coding tags are provided to coders to select a pre-set description for each document. Email addresses for senders, recipients, cc, bcc, are often normalized (i.e., jdoe@abcco.com, Jane Doe, J. Doe, Jane A. Doe, jdoe@gmail.com become "Jane Doe").[18]

Following review, most document-by-document privilege logs are initially constructed by exporting from the review platform an Excel spreadsheet or .csv file containing

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[16] E.g., Oct. 15, 2020 Letter from Jonathan Redgrave to the Rules Committee at 2 ("The challenge to create extensive document-by-document logs while protecting privilege often yields robotic and insufficient log entries that fail to elucidate enough information to assess the claims.").

[17] *See, e.g.,* Digital WarRoom, 8 Crucial Tips to Improve Your Privilege Log Workflow ("When selecting an e-discovery review tool, look for the ability to create a list or library of privilege text annotations. These can be crafted by Counsel at the outset of the matter, and should be available to reviewers for selection and association to a document, during the document review phase, and to Privilege and QC Reviewers on subsequent tiers of review."), https://www.digitalwarroom.com/blog/privilege-log-workflow-8-tips.

[18] Many electronic review platforms allow for automated name normalization in constructing privilege logs. *See, e.g.*, Privilege Logs using Relativity Name Normalization, https://www.relativity.com/ediscovery-training/self-paced/privilege-logs-using-name-normalization/.

certain metadata fields (sender, recipient, cc, bcc, author, date, subject line, or "filename," description, etc.) for each individual document that has been tagged for withholding or redaction.[19] That provides the foundation for a document-level log. Most traditional logs are assembled using electronic tools that perform these functions.[20] The days of manual production of privilege logs are long gone. In some appropriate cases, as discussed below, the receiving party will agree to accept the objective metadata, streamlining the log production.

When a "categorical" approach is used, in many cases, the field for the pre-set categorical descriptions of withheld documents are included in the Excel or .csv metadata export for each document. The rows for each document are then sorted by description, and the individual metadata (senders, recipients, etc.) for each document tagged for the same category *are merged* into a single cell, obscuring all of the information previously available on a document-by-document basis. That is, if 100 documents share a category, the 100 rows containing metadata identifying senders of each document separately are merged into a single "senders" cell for all 100 documents combined. Thus, there is one field for *all* senders of all 100 documents, one field for *all* recipients of all 100 documents, and so forth, with no means of distinguishing who sent what to whom. Worse, as with the NYCBA model log, some categorical logs may further merge all the already-consolidated sender, recipient, cc, and bcc information into a single cell for the category. That is, the categorical log production in this manner involves *additional* steps. Available document-by-document information that could be provided to the receiving party to test whether the description is accurate is withheld and replaced with consolidated information that makes doing so impossible.

To the extent categorical logs are constructed in any other manner, we have difficulty understanding how their construction would not *increase* the logging burden, assuming the documents are actually reviewed for privilege (as they must be), the categories are thoughtfully and narrowly constructed, and the descriptions provide sufficient detail and accurately describe the document.

D. Categorical Logs Increase, Rather than Decrease, Disputes.

Where categorical logs are used, they increase rather than lessen disputes and increase reliance, and thus burden, on the courts for resolution. This is because the logs make it impossible to challenge, at a document level, whether the privilege claim

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[19] *See, e.g.*, Relativity – Privilege Logs, Relativity - Privilege Logs.pdf (epiqsystems.com); Ricoh, eDiscovery On Demand, Creating a Privilege Log, eDiscovery On Demand Creating a Privilege Log - Bing video; Disco, How to create a Privilege log with CS Disco E discovery software | ediscovery training - Bing video; KLDiscovery, LDiscovery's PrivLog Builder, https://investors.kldiscovery.com/news/news-details/2014/LDiscoverys-PrivLog-Builder-Now-Compatible-With-Relativity/default.aspx.

[20] *See, e.g.*, Consider it a Privilege? H5 Announces New Privilege Log Design Module (announcing analytics for privilege review), https://complexdiscovery.com/consider-it-a-privilege-h5-announces-new-privilege-log-design-module/.

is valid, necessitating challenges to the sufficiency of the log or to entire categories of documents and reliance on *in camera* review to assess the privilege since little can be gleaned from the log. Moreover, categorical logs frequently result in "do-overs" after the insufficiency of the log becomes apparent to the court.

This will also increase the burden on both parties. As requesting parties challenge whole categories, producing parties must often re-review every document in that category to determine which if any of the included documents are appropriately categorized. This will take longer than if the producing party was just re-reviewing carefully selected entries challenged by the requesting party. To the extent revised logs are then produced, the receiving party must re-review them. The categorical approach thus only lengthens the conferral process before disputes are brought to the courts for resolution.

Below are just a few examples that illustrate these problems from matters in which CLEF members were directly involved and of which they have personal knowledge. In addition to demonstrating how dispute-prone categorical logs are, these cases make clear that categorical logs do not result in logs prepared with greater assiduity. Descriptions are more, not less, vague and boilerplate. And over-designation still occurs; it is simply harder to detect. And that outcome creates perverse incentives that undermine the purposes of the Rule.

1. *In re Disposable Contact Lens Antitrust Litig.*, No. 15-md-2626 (D. Fla.).

In *Contact Lenses* the court ordered, over the objection of the receiving party, categorical logs that provided the dates, authors, recipients, category description, privilege justification, and number of documents withheld in each category. The result was four rounds of motion practice over the sufficiency of the logs and improper withholding spanning more than three years.

In the first motion, plaintiffs challenged categorial logs they asserted made it impossible to assess the claims of privilege. The logs lumped more than 16,000 documents into 116 categories, with some categories covering thousands of documents with little more than a conclusory assertion of privilege.[21] Many categories contained communications with a dozen or more third parties, with no factual description of the communications. For example, ten categories had more than 500 documents each, three had more than 1,000 documents each; 67 of the categories had thirty or more individuals listed, twenty-six categories had more than 100 individuals listed, and one category had more than 350 individuals listed. Six categories spanned a date range of three or more years.

Plaintiffs moved to compel production of all documents in entire categories where, for example, third parties were present, breaking the privilege for that category or the communications appeared to include hundreds of individuals, negating an intent to

[21] ECF No. 420.

maintain confidentiality.[22] Plaintiffs ultimately challenged more than 15,000 documents on several grounds but acknowledged that the "number of documents at issue may well be much lower than Plaintiffs estimate, as not every document in each category necessarily fits into one of the areas of challenge." That is, because of the categorical approach, Plaintiffs could challenge *only* entire categories of documents because they could not tell which among the documents in the category were not privileged, such as where third parties were identified as among the participants.

The producing party conceded this problem—that a producing party cannot identify which documents in a category are subject to challenge—is "inherent in a categorical approach."[23] They nonetheless faulted the plaintiffs for challenging all documents in a category though it was impossible to discern which documents in a category were not privileged. For example, the defendant complained that the receiving party challenged entire categories of documents because of the presence of some third parties in a category's senders or recipients, noting that "within a given category, any individual that is listed as a sender or recipient on any document is listed within that category; that does not indicate that different individuals appeared on the same underlying document as opposed to separate documents." And the producing defendant admitted that the plaintiffs could "not know how many documents on [the] privilege logs have any third parties copied." Where the plaintiffs challenged claims of work-product protection for a category because a portion of the date range for the category pre-dated the litigation, the defendant opposed the motion because "the fact that some documents included in a [work-product] category may predate the filing of litigation does not mean that all documents in a category began on that date." Of course, the Plaintiffs could not tell which did and which didn't.

Following *in camera* review of a sample of the withheld documents across categories, the court ordered the defendant to produce a new log with more specific descriptions, a greater number of categories spanning fewer documents and participants in each, and ordered the party to describe the steps taken to identify the documents, including whether each document was reviewed or merely sampling was conducted. After the order, the defendant subsequently revised its log twice, providing document level information and voluntarily producing more than 9,000 documents previously withheld—or nearly 60% of those initially logged.[24]

The revised log narrowed the categories and increased their number (to more than 380) and provided document-level metadata. With this information, Plaintiffs moved a second time to compel production of more than 3,000 of the documents remaining on the log. The court reviewed a sample of the documents, finding that many did not

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[22] *Id.* Sections of briefing from *In re Contacts* quoted herein have not been sealed.

[23] ECF No. 425.

[24] ECF No. 587.

Following the court's resolution of the first motion and order for more detail, a different party conducted a "re-review" of its categorical logs and withdrew its claims regarding some 2,500 of 11,000 withheld documents, or nearly 25% of the documents on its categorical logs. *See* ECF No 759.

appear to contain legal advice and involved no lawyers, ordering the party to again re-evaluate its privilege claims.[25]

Yet another motion challenged a categorical log, which had been subject to multiple meet and confers and subsequent revisions, for failure to include redacted documents in its log. The court ordered the log be further revised and to identify by Bates number, the redacted documents being withheld for each category.[26]

2. *Chen-Oster, et al. v. Goldman, Sachs & Co.*, No. 10-cv-6950 (S.D.N.Y)

In *Chen Oster*, Plaintiffs complained that the defendant's categorical logs provided insufficient information to assess the claim.[27] They lacked basic information necessary to assess the claim of privilege, including: document type; author; addressees; other recipients; the relationship of author, addressees, and recipients to each other; and sufficiently detailed descriptions. The categorical logs also lumped together many years of documents (in some cases up to eight years' worth of documents) covering multiple categories, without identifying who created them, who sent and/or received which documents, the number of documents being logged, or anything beyond generic descriptions. Additionally, plaintiffs complained the withholdings were facially overbroad; for example, many entries withheld e-mail attachments, while only purporting to justify privilege for the e-mail and not the underlying attachment.

The Court ordered Goldman Sachs to review and revise its privilege logs to "comply with their obligation to adequately provide the information necessary to evaluate claims of privilege."[28] It ordered the Defendants to provide additional information supporting its privilege claims and verify that all documents within the category or group are in fact subject to a good faith claim of privilege and to describe in more detail the nature, type and subject matter of the documents contained in the group or category.

In the months that followed, Goldman Sachs produced revised logs with continued deficiencies. This resulted in further briefing, and a second order: (1) requiring Goldman Sachs to provide information about listservs and email subject lines for selected documents on the logs; and (2) permitting Plaintiffs to identify 50 documents for *in camera* review, to assess the claim of privilege.[29] Following Plaintiffs' document selection, Goldman Sachs withdrew the privilege designations for approximately 25%

[25] ECF No. 992.

[26] ECF. No. 825.

[27] ECF Nos. 771 & 781.

[28] ECF No. 796.

[29] ECF No. 888.

of the sample documents.[30] The Court agreed that this was "a substantial percentage - from a relatively small sample," and concluded that there was "good reason to believe that there are additional documents among the thousands remaining on Goldman's privilege logs that should have been produced in whole or in part."[31] The Court therefore ordered a second re-review of the logs, and ordered Goldman to identify all other improperly or errantly withheld documents from its privilege logs and to certify the efforts it undertook, as well as the results.

Goldman's review of just a sample of its logs resulted in de-designation of more than 33% of the documents withheld in that sample.[32] In light of this high error rate, the Court ordered another re-review of Goldman Sachs' logs, in their entirety and production of revised logs. In the end, thousands of documents previously withheld and categorically logged were ultimately produced.

E. The Case Law Reflects Abuse of Categorical Logs.

Though some courts have permitted categorical logs, the case law reflects that they are ripe for abuse and frequently result in production of document-level logs when their insufficiency becomes apparent. The following examples illustrate precisely why categorical logs pose such a threat to the purposes of Rule 26(b)(5)(A), how differently categorical logs are constructed, and why sanctioning their use is ill-advised.

- In *Chevron Corp. v. Salazar*, No. 11 Civ. 3718, 2011 WL 4388326, (S.D.N.Y. Sept. 20, 2011), the court found, after *in camera* review of a sample of documents logged categorically, that the plaintiff's categorization process "obscures rather than illuminates the nature of the materials withheld" and ordered a new log identifying each document. It observed that a category of documents described as "documents assembled, obtained, gathered, or compiled as part of a fact investigation at the direction of counsel and in anticipation of litigation or in preparation for trial, the assembling, obtaining, gathering, or compiling of which reflect the thoughts, impressions, legal theories, or litigation strategies of counsel regarding discovery proceedings" would have been more accurately described as "press releases and news stories." This type of description is all too common in categorical logs.

- In *Franco-Gonzalez v. Holder*, No. 10-cv-2211, 2013 WL 8116823 (C.D. Cal. May 3, 2013), the court found that the defendants' categorical privilege logs were deficient because the plaintiff could not determine whether the documents on the log were widely shared (vitiating the privilege) or whether legal advice was being requested or obtained for some of the documents. The court ordered the

[30] ECF No. 909.

[31] ECF No. 912.

[32] ECF No. 937.

defendants to, among other things, "supplement their categorical privilege logs to include an identification of the time periods encompassed by the withheld documents, an identification by name of the author and recipient(s) of the withheld documents, and for each privilege log, . . . specific and detailed declarations supporting the claim of privilege.

- In *Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n*, No. 15-CV-01300, 2016 WL 6539344 (D.S.C. Nov. 3, 2016), one of the categories in the log contained 646 documents spanning three years involving no fewer than 72 different people (including third parties). The court ordered the plaintiff to, among other things, produce a metadata log for all withheld and redacted documents and affidavit(s) from the person(s) with knowledge regarding the basis for withholding documents shared with third parties.

- In *In re Aenergy, S.A.*, No. 19-MC-542, 2020 WL 1659834 (S.D.N.Y. Apr. 3, 2020), the court found that the categorical privilege logs had "significant shortcomings," including (1) "vague and repetitive" descriptions such as "internal documents between . . .employees and in-house counsel 'seeking or conveying legal advice' about the 'on-sale contracts . . . .'"; and (2) large categories containing hundreds of document families involving "numerous authors and recipients." To remedy these issues, the court ordered the violating party to re-review the withheld documents and produce a document-by-document log.

- In *Norton v. Town of Islip*, No. CV043079, 2017 WL 943927, at *8 (E.D.N.Y. Mar. 9, 2017), the court found the defendant's three-page categorical privilege log deficient because the descriptions were vague and ordered the defendant to produce an individualized log.

- In *First Horizon Nat'l Corp. v. Houston Cas. Co.*, No. 2:15-CV-2235, 2016 WL 5867268, *4-6 (W.D. Tenn. Oct. 5, 2016), the court granted a motion for a document-by-document log after plaintiff's categorical privilege log "grouped thousands of documents created over the course of five years" into nine categories and "include[d] dozens of authors and recipients and lump[ed] together documents concerning many matters into broad categories." It concluded that "in the absence of a document-by-document log, the court or the Defendants cannot assess whether the privilege claim is well grounded." It observed that the documents listed in the categories may not involve lawyers or may involve lawyers but not privileged communications, or may have been related to business not legal matters.

IV. Parties Can and Are Cooperatively Addressing Privilege Issues and Burdens Specific to the Needs of the Case.

The Committee posits potential amendments to Rules 16 and 26(f) directing the parties to discuss the method for complying with Rule 26(b)(5). While this may be helpful in some cases, in the complex cases CLEF participants prosecute (which are typically those with extensive privilege logs), it is already standard operating procedure to engage in such a discussion early in the litigation. Rule 26(f)(3)(D) which requires that the discovery plan address "any issues about claims of privilege or of protection as trial-preparation materials" provides the directive for these discussions.

Early in our cases, generally before discovery commences, the parties generally cooperate and negotiate "privilege protocols" for both the format, timing, and manner of production of privilege logs and procedures for raising privilege challenges. These protocols forestall disputes down the road on format, content, and timing issues and work to balance the need for information to assess the claim and the burden of compliance with Rule 26(b)(5).

Whether or not these agreements can be reached early in the case may, however, be highly case dependent and not susceptible to application in all cases. A Rule amendment specifying universal application of any of these procedures would not advance the goals of the Rule: the appropriateness and need for their application is case specific.

- *Rule 502(d) Agreements:* It is standard in the large complex matters that CLEF participants prosecute, which involve large ESI productions, for the parties to propose to the court a stipulated order entering a 502(d) agreement, with procedures for clawback of privileged documents and challenges to those clawbacks.

- *Exclusions for Logging Obligations*: In many complex cases, the parties will agree to exclude from the privilege logging obligation documents so likely to be privileged that a log is unnecessary. This generally results in agreements to exclude work-product by (or directed by), and communications with, outside litigation counsel regarding the litigation after commencement of the action. This type of exclusion can be appropriate where (1) the parties have an informed understanding of the role of outside litigation counsel; and (2) the commencement of the action can be expected to terminate ordinary communications about the underlying subject matter of the litigation (for example, when unlawful conduct is alleged and one expects that communications evidencing unlawful conduct likely ceased, such as RICO, antitrust, fraud, and discrimination cases). Sometimes these exclusions may apply to in-house counsel where the in-house counsel's role is limited exclusively to litigation rather than business matters. Sometimes these exclusions will apply prior to inception of the litigation, for example, when there

has been a federal or state enforcement action prior to the civil litigation. And sometimes, depending on the facts of the case, may agree to exclude all privileged material created after a certain date.

Such exclusions, however, are not appropriate in every case and should only be made on an informed basis. For example, the presumption that communications with outside counsel are excludable may not hold when outside counsel (or their firms) wears multiple hats (business advisor, lobbyist or government relations advisor, public relations advisor, and so forth) or is representing the client on matters related to the litigation but which are not necessarily privileged (for example, contract negotiations with third parties). The parties may not have sufficient information early in the case—such as the role of in-house or outside counsel—to assess whether an exclusion is appropriate.

Whether and what information is appropriately excluded from a privilege log is often fact-dependent and case-specific. A rule amendment directing exclusion of these or similar categories across all cases is thus inappropriate and would subvert the purposes of Rule 26(b)(5)(A).

- *Timing of Privilege Log Productions:* The parties will frequently negotiate the time frame for producing privilege logs, such as whether they will occur after production is complete or on a rolling basis. The timing of privilege log production, however, can sometimes depend on information that is not known early in the case before discovery commences and may depend heavily on the discovery schedule, and the parties may defer, until later in the case, discussions on deadlines for logs.

- *Content and Format of Privilege Logs:* We frequently negotiate the specific fields of information that privilege logs must contain, their format, whether alternative approaches are appropriate, and other provisions to address privilege log burdens.

  For example, protocols increasingly permit a producing party to produce a metadata log in lieu of a traditional log for all ESI withheld. These logs export objective metadata from the review platform for each document (dates sent/received, email addresses for senders, recipients, copyees, author, subject line, file name, custodian, document type (e.g., .msg, .pdf, .doc, etc.) redacted, family document ids, etc.) and present it in Excel format. Often the parties will agree that a key will be provided to identify attorneys and individuals associated with email addresses. In some cases, the parties will agree that a description will be provided; in others, the parties may agree to forego the description. These metadata logs substantially alleviate any burdens associated with constructing privilege logs.

  But metadata logs are not necessarily appropriate for all document types or in all cases. They increase the burden on the receiving party to discern the identity of

those in the log from email addresses (unless the parties agree that names will be normalized). They also provide little information for non-email document types which frequently have limited or inaccurate metadata. In some cases, the parties may agree to a metadata log only for emails and their attachments, rather than all documents. Further, because metadata exists only for the last email in the thread, they do not provide any information to determine if all, or just some, emails in a wholly withheld thread are privileged. Parties have negotiated "work arounds" for these problems in their privilege protocols. For example, to eliminate the burden of logging all emails in the thread, the parties may agree that wholly withheld threads will be logged only with metadata, but the entire thread will be produced in a manner that redacts all content but reveals the senders, recipients, and dates. The solutions the parties agree upon to reduce logging burdens while still ensuring sufficient information to assess the claim will depend upon the particular case and the needs and interests of the parties.

Some protocols will even set forth categories of documents that the parties agree may be logged together. Whether this is appropriate depends upon the needs of the case, the categories at issue, and whether categories can be designed on a transparent, informed basis. Others will provide that a party may apply the same description to multiple documents that are individually logged such that the party may export their log from their review platform with metadata for pre-set privilege designations.

- *Challenge Procedures*: Most privilege protocols set forth a procedure for privilege challenges, both informal, prior to court involvement, and formal when court resolution is necessary. Although some parties may agree to sampling procedures for formal challenges, whether such procedures are appropriate, and if so, what they are, may be unknowable until the logs are produced.

In sum, the Rules provide flexibility to parties in cases where there may be voluminous privilege claims to design procedures that are appropriate for their specific matters.

CLEF appreciates this opportunity to provide our input and are available should the Committee have questions.

Respectfully,

/s/ Dana Smith

Dana Smith
Executive Director, Complex Litigation eDiscovery Forum
danas@complexlitigatione-discovery.com

cc: Rebekah Bailey, Nichols Kaster, PLLP

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Jeannine Kenney, Hausfeld LLP
Annika Martin, Lieff Cabraser Heimann & Bernstein
Zachary Wool, Barrios Kingsdorf & Casteix LLP

From: Joseph Neal, Jr.
To: RulesCommittee Secretary
Subject: Opposition to FRCP 26 (b) (5) Privilege Log Rule Change
Date: Tuesday, August 03, 2021 4:19:45 PM

Committee on Rules of Practice and Procedure

Judicial Conference Advisory Committee on Civil Rules
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Invitation for Comment on Privilege Log Practice

To Whom It May Concern,

I am a Champion Member of the Georgia Trial Lawyers Association ("GTLA") and here for provide comments about the Discovery Subcommittee's consideration of possible changes to Federal Rule 26(b)(5). GTLA is a voluntary organization of around2000 trial lawyers throughout Georgia whose practices mainlyfocus on representing individuals injured by the wrongdoing of others. GTLA's mission is to protect the constitutional promise of justice for all by guaranteeing the right to trial by jury, preserving an independent judiciary, and providing access to the courts for all Georgians. I am a practicing trial lawyer in Augusta and Atlanta Georgia licensed to practice in all state trial and appellate courts and the NDGA and SDGA federal district courts in Georgia and a former Vice President of GTLA.

It is my fervent position that the current rules about privilege logs are appropriate and should not be modified. The attempt to change this rule will only emboldened corporate and other well heeled, sophisticated civil defendants to basically hide evidence.

As the United States Supreme Court has long recognized, "privileges against forced disclosures … [are] exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974). It is similarly clear that thae party seeking to avoid disclosure of otherwise discoverable documents based on a privilege has the burden of proving that the privilege applies and has not been waived. *See, e.g.*, *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16,

22, 62 Fed. R. Evid. Serv. 1032 (1st Cir. 2003) ("But the party who invokes the privilege bears the burden of establishing that it applies to the communications at issue and that it has not been waived."); *In re VISX, Inc.*, 18 Fed. Appx. 821, 823 (Fed. Cir. 2001) ("The privilege holder … has the burden of convincing the district court that it has not waived the privilege."); *United States v. Jones*, 696 F.2d 1069, 1072, 11 Fed. R. Evid. Serv. 1890 (4th Cir. 1982) ("The proponent must establish not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived."); *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 25, 8 Fed. R. Evid. Serv. 475, 31 Fed. R. Serv. 2d 1196 (9th Cir. 1981) ("As with all evidentiary privileges, the burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it. One of the elements that the asserting party must prove is that it has not waived the privilege.").

The practical problem confronted by litigants with respect to privileges is that the party challenging a privilege assertioncannot review the withheld evidence to determine whether the evidence is properly withheld. With no mechanism for reviewing documents withheld based on a claimed privilege, parties would have to take their opponent's word that withheld documents are properly protected from disclosure or seek in camera review of every document withheld from production. Neither of those options makes any practical sense in the context of litigation in front of busy federal courts.

That is why the Advisory Committee added Federal Rule 26(b)(5) in 1993 and required that parties seeking to withhold documents based on a privilege "expressly make the claim" and "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." Fed. R. Civ. P. 26(b)(5). As the Advisory Committee noted then, by requiring a party to provide sufficient information to allow opposing parties to assess the claim of privilege, the "need for in camera inspection of documents" should be reduced. Fed. R. Civ. P. 26(b)(5) adv. comm. notes to 1993 amendments. In its current form, Federal Rule 26(b)(5) provides clarity and certainty to privilege assertions and challenges.

And the Rule works. There are many reported decisions in Georgia and nationwide where courts have compelled production of documents that were withheld based on a claimed privilege, but were ultimately found not to be privileged. *See, e.g.*, *Cap. Sec. Sys., Inc. v. NCR Corp.*, No. 1:14-CV-1516-WSD, 2016 WL 4191028, at *3 (N.D. Ga. May 26, 2016) (ordering production of documents listed on privilege log because the documents related to business affairs instead of legal advice); *United States ex rel. Bibby v. Wells Fargo Bank, N.A.*, 165

F. Supp. 3d 1319, 1329 (N.D. Ga. 2015) (rejecting and accepting privilege challenges based on targeted motion to compel); *In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig*.,No. 4:08-MD-2004(CDL), 2010 WL 11519568, at *5 (M.D. Ga. Jan. 22, 2010) (granting in part and denying in part motion to compel documents identified on privilege log). Those decisions were the express result of the current Rules in place for privilege logs.

A detailed privilege log that identifies each document withheld is the best way for parties and Courts to assess claims of privilege and to make targeted challenges to privilege assertions. For example, there are types of documents that are privileged or that constitute work product when sent or created after notice of a potential claim, but that otherwise would not be protected as routine business documents. Similarly, there are documents that are protected by the attorney-client privilege because they originate from a lawyer and contain legal advice, but that lose the protection when shared with persons outside the privilege relationship. Without a detailed privilege log identifying the date of the communication, the nature and purpose of the communication, and the recipients, parties and courts cannot reasonably assess claims of privilege.

Furthermore, claims of intense burden and widespread problems with compliance with Rule 26(b)(5) appear to be overblown. It is the experience of GTLA's members that in most cases privilege logs include only a few entries, if a log is produced at all. As a result, in most cases the burden imposed in creating a detailed privilege log is slight. It is also the experience of GTLA's members that they rarely confrontarguments from defendants that simply producing a detailed privilege log would be too burdensome. In most cases, logs are produced with no objection.

But in those relatively rare instances in which a party contends that simply logging allegedly privileged materials is unduly burdensome, the Federal Rules already provide greatflexibility. Rule 26(f) requires the parties to engage in a discovery conference at the beginning of the case and to attempt to reach agreement on "any issues about claims of privilege or of protection as trial-preparation materials." Fed. R. Civ. P. 26(f)(3)(D). If any party contends creating a privilege log that separately lists each document withheld will be unduly burdensome, that issue should be discussed at the initial conference and can be heard by the court in its consideration of the parties' discovery plan if no agreement is reached. *Id.*

Failing an agreement, or upon a later discovery that producing a privilege log would be burdensome, a party also can seek a protective order under Rule 26(c). Fed. R. Civ. P. 26(b)(5) adv. comm. notes to 1993 amendments. Finally, any party seeking an order compelling production of materials withheld based on a claim of privilege is required by Rule 37 to meet and confer in good faith in an attempt to

resolve the dispute without a Court Order. Fed. R. Civ. P. 37(a). In short, parties confronted with an allegedly burdensome task of separately logging privileged documents can seek relief from the court and the court itself has much discretion in resolving any alleged burden issues. It is the experience of our members that judges take claims of undue burden seriously when supported by evidence and try to craft solutions that are fair and make sense based on the needs of each case.

The suggestion put forth by the "Lawyers for Civil Justice"("LCJ") that has prompted this comment procedure seeks to do away with the rule imposed by most courts that privilege logs separately list each document withheld based on a claim of privilege. LSJ proposes instead that documents be listed by category at the producing party's discretion. But as the advisory committee notes to Rule 26(b)(5) already make clear and as LCJ acknowledges in its suggestion, the Rule does not specify exactly how a party must comply with the requirement that parties describe documents withheld based on a claimed privilege. Fed. R. Civ. P. 26(b)(5) adv. comm. notes to 1993 amendments.

The LCJ Suggestion also ignores or greatly downplays the protections available to parties who contend that providing a document by document privilege log is burdensome. For example, the LCJ suggestion claims that "The 2006 Committee Notes to Rule 26(f) recommend that parties address issues concerning privilege during the Rule 26(f) conference. Unfortunately, the suggestion has been largely ignored, and the current practice appears to have been largely parties proceeding in silence at their own peril." LCJ Suggestion at 11. That parties ignore portions of the Rules is no reason to amend the Rules. Instead, parties who believe that complying with the Rules is unduly burdensome should raise that issue with their opposing party and if necessary the court.

Indeed, entering a blanket rule that parties need only list categories of documents will not make litigation more efficient or decrease the burden on our already busy courts. Instead, it likely will increase the number of disputes. An attorney receiving a privilege log simply identifying categories of documents is far more likely to seek in camera review of ***all***documents withheld, than an attorney receiving a detailed log that allows the attorney to challenge specific documents that arguably are not protected by any privilege.

As for the suggestion that the Committee should exemptcategories of documents from the logging requirements of Rule 26(b)(5), it is not the experience of our members that parties often dispute the application of the privilege to documents that are clearly protected. One category of documents identified by LCJ that could be problematic is "communications between counsel and client regarding the litigation after the date the complaint is served." LCJ Suggestion at 11. It is not the experience of our members that parties dispute the application ofthe privilege to

such documents or even insist that such documents be included on a privilege log. Courts are also not inclined to grant challenges to outside counsel communications or work-product absent extraordinary circumstances, such as the crime-fraud exception. Trying to reach an agreement to exclude outside counsel communications or work-product from the logging requirement is something that should be discussed by the parties at the initial conference and decided by the court if no agreement is reached. In other words, excluding express categories of documents from logging is already something that can easily be accomplished under the existing rules.

In short, it appears to us that changes to Rule 26(b)(5) would be a solution in search of a problem. There already is a significant power imbalance in the cases handled by our members. Our clients are individuals seeking relief from corporations or individuals backed by large insurance companies. By making it harder for parties to challenge privilege claims or to even assess whether such a challenge should be made, the Committee would increase that power imbalance in favor of corporate defendants.

I respectfully submit that the Rules as currently written provide for a flexible and appropriate procedure for handling claims of privilege that minimizes disputes, streamlines the procedure, and reduces the burden on the parties and the courts. Every change to the Rules runs the risk of substantial disruption. Given the current Rules' flexibility, and the tools already available to the parties in federal court, there is no reason to amend Rule 26(b)(5).

Joseph R Neal Jr

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Please excuse typos

Sent from my iPhone

From: Michael L. Neff
To: RulesCommittee Secretary
Subject: Please protect Privilege Logs
Date: Tuesday, August 03, 2021 5:27:30 PM

To Whom It May Concern,

I am a member of the Georgia Trial Lawyers Association ("GTLA"). I understand that GTLA has already sent feedback re: the Discovery Subcommittee's consideration of possible changes to Federal Rule 26(b)(5). GTLA is a voluntary organization of around 2000 trial lawyers throughout Georgia whose practices mainly focus on representing individuals injured by the wrongdoing of others. GTLA's mission is to protect the constitutional promise of justice for all by guaranteeing the right to trial by jury, preserving an independent judiciary, and providing access to the courts for all Georgians. I am a practicing trial lawyer in Atlanta, Georgia though I handle cases in other states (currently including Colorado, Arizona, and California). I have been practicing law for 27 years. I have litigated hundreds of civil cases and tried approximately 30 civil trials.

More than half of all cases filed in federal court in fiscal year 2020 were personal injury actions. As an organization dedicated to serving attorneys representing plaintiffs mostly in personal injury actions, GTLA has a keen interest in ensuring that our members and their clients are given a full and fair opportunity to present their cases to a jury. Providing for efficient and fair procedures for parties to claim privilege over evidence, and to challenge those claims when necessary, is an important part of our member's practice. It is GTLA's position that the current rules about privilege logs are appropriate and should not be modified.

As the United States Supreme Court has long recognized, "privileges against forced disclosures … [are] exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974). It is similarly clear that thae party seeking to avoid disclosure of otherwise discoverable documents based on a privilege has the burden of proving that the privilege applies and has not been waived. See, e.g., In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 22, 62 Fed. R. Evid. Serv. 1032 (1st Cir. 2003) ("But the party who invokes the privilege bears the burden of establishing that it applies to the communications at issue and that it has not been waived."); In re VISX, Inc., 18 Fed. Appx. 821, 823 (Fed. Cir. 2001) ("The privilege holder … has the burden of convincing the district court that it has not waived the privilege."); United States v. Jones, 696 F.2d 1069, 1072, 11 Fed. R. Evid. Serv. 1890 (4th Cir. 1982) ("The proponent must establish not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived."); Weil v. Investment/Indicators, Research and Management, Inc., 647 F.2d 18, 25, 8 Fed. R. Evid. Serv. 475, 31 Fed. R. Serv. 2d 1196 (9th Cir. 1981) ("As with all evidentiary privileges, the burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it. One of the elements that the asserting party

must prove is that it has not waived the privilege.").

The practical problem confronted by litigants with respect to privileges is that the party challenging a privilege assertion cannot review the withheld evidence to determine whether the evidence is properly withheld. With no mechanism for reviewing documents withheld based on a claimed privilege, parties would have to take their opponent's word that withheld documents are properly protected from disclosure or seek in camera review of every document withheld from production. Neither of those options makes any practical sense in the context of litigation in front of busy federal courts.

That is why the Advisory Committee added Federal Rule 26(b)(5) in 1993 and required that parties seeking to withhold documents based on a privilege "expressly make the claim" and "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." Fed. R. Civ. P. 26(b)(5). As the Advisory Committee noted then, by requiring a party to provide sufficient information to allow opposing parties to assess the claim of privilege, the "need for in camera inspection of documents" should be reduced. Fed. R. Civ. P. 26(b)(5) adv. comm. notes to 1993 amendments. In its current form, Federal Rule 26(b)(5) provides clarity and certainty to privilege assertions and challenges.

And the Rule works. There are many reported decisions in Georgia and nationwide where courts have compelled production of documents that were withheld based on a claimed privilege, but were ultimately found not to be privileged. See, e.g., Cap. Sec. Sys., Inc. v. NCR Corp., No. 1:14-CV-1516-WSD, 2016 WL 4191028, at *3 (N.D. Ga. May 26, 2016) (ordering production of documents listed on privilege log because the documents related to business affairs instead of legal advice); United States ex rel. Bibby v. Wells Fargo Bank, N.A., 165 F. Supp. 3d 1319, 1329 (N.D. Ga. 2015) (rejecting and accepting privilege challenges based on targeted motion to compel); In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig., No. 4:08-MD-2004(CDL), 2010 WL 11519568, at *5 (M.D. Ga. Jan. 22, 2010) (granting in part and denying in part motion to compel documents identified on privilege log). Those decisions were the express result of the current Rules in place for privilege logs.

A detailed privilege log that identifies each document withheld is the best way for parties and Courts to assess claims of privilege and to make targeted challenges to privilege assertions. For example, there are types of documents that are privileged or that constitute work product when sent or created after notice of a potential claim, but that otherwise would not be protected as routine business documents. Similarly, there are documents that are protected by the attorney-client privilege because they originate from a lawyer and contain legal advice, but that lose the protection when shared with persons outside the privilege relationship. Without a detailed privilege log identifying the date of the communication, the nature and purpose of the communication, and the recipients, parties and courts cannot reasonably assess claims of privilege.

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burden imposed in creating a detailed privilege log is slight. It is also the experience of GTLA's members that they rarely confront arguments from defendants that simply producing a detailed privilege log would be too burdensome. In most cases, logs are produced with no objection.

But in those relatively rare instances in which a party contends that simply logging allegedly privileged materials is unduly burdensome, the Federal Rules already provide great flexibility. Rule 26(f) requires the parties to engage in a discovery conference at the beginning of the case and to attempt to reach agreement on "any issues about claims of privilege or of protection as trial-preparation materials." Fed. R. Civ. P. 26(f)(3)(D). If any party contends creating a privilege log that separately lists each document withheld will be unduly burdensome, that issue should be discussed at the initial conference and can be heard by the court in its consideration of the parties' discovery plan if no agreement is reached. Id.

The suggestion put forth by the "Lawyers for Civil Justice" ("LCJ") that has prompted this comment procedure seeks to do away with the rule imposed by most courts that privilege logs separately list each document withheld based on a claim of privilege. LSJ proposes instead that documents be listed by category at the producing party's discretion. But as the advisory committee notes to Rule 26(b)(5) already make clear and as LCJ acknowledges in its suggestion, the Rule does not specify exactly how a party must comply with the requirement that parties describe documents withheld based on a claimed privilege. Fed. R. Civ. P. 26(b)(5) adv. comm. notes to 1993 amendments.

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In short, it appears to us that changes to Rule 26(b)(5) would be a solution in search of a problem. There already is a significant power imbalance in the cases handled by our members. Our clients are individuals seeking relief from corporations or individuals backed by large insurance companies. By making it harder for parties to challenge privilege claims or to even assess whether such a challenge should be made, the Committee would increase that power imbalance in favor of corporate defendants.

I respectfully submit that the Rules as currently written provide for a flexible and appropriate procedure for handling claims of privilege that minimizes disputes, streamlines the procedure, and reduces the burden on the parties and the courts. Every change to the Rules runs the risk of substantial disruption. Given the current Rules' flexibility, and the tools already available to the parties in federal court, there is no reason to amend Rule 26(b)(5).

Very truly yours,

Michael L. Neff, Esq.

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August 6, 2021

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

Via U.S. Mail
& E-Mail

Re: ***Invitation to Comment on Privilege Log Practice***

Dear Ms. Womeldorf:

I appreciate this opportunity respond to the Judicial Conference Advisory Committee on Civil Rules' invitation to comment on privilege logs and Rule 26(b)(5)(a).

Among the areas of inquiry in the invitation is amendment of the Rule to permit categorical privilege logs as a means of complying with disclosure obligations under the Rule. The experience of my firm in a recent class action counsels against any such amendment. I write to briefly recount that experience. The relevant order from the matter is attached for your review.

In *Begley v. Windsor Surry Co.,* No. 17-cv-317 (D.N.H.), a products-defect case, the plaintiffs received a categorical privilege log. Because the log did not permit us to assess the claims of privilege we sought waiver of the claims for documents so logged. The defendant claimed that creating entries for each document would be unduly burdensome without any corresponding benefit. The Court declined to find waiver and instead conducted an *in camera* review of three boxes of hard copy documents. The Court complained that because it was forced to conduct an *in camera* review, it was required to "undertake[] the task that Windsor did not—inspecting each document, one-by-one, to determine whether it was privileged." Order at 7. We expect this burden on the judiciary would become commonplace if categorical logs were sanctioned as a means of compliance with the Rule because there are few alternatives to resolve challenges when withheld documents are logged by group rather than individually.

Among a key issue in the dispute was the relationship between counsel and a third party, purported to have been integral to the provision of legal advice. Windsor produced affidavits to support this claim. The Court rejected this "blanket claim" of privilege, noting that:

> Blanket claims of privilege are 'extremely disfavored,' and instead a party asserting privilege must establish its elements as to each disputed question. Indeed, [d]etermining whether documents are privileged demands a highly fact-specific analysis—one that most often requires the party seeking to validate a claim of privilege to do so document by document. Here, however, Windsor has painted with a broad brush and left the document by document privilege analysis to the court.

Order at 11 (internal citations and quotations omitted) (alteration in original). It was "it was only through a review of each of the 114 files that the court was able to properly categorize which [were] privileged and which [were] not." *Id.*

Despite claims that there was a "triangular relationship" between the party, its counsel, and the third party, the Court found that such a relationship was not supported by the documents, the vast majority of which *did not involve counsel for the party at all*, and that the third party's involvement was "*rarely for the purpose of helping attorneys provide legal advice.*" Order at 11. I'm aware that some observers claim that it is unreasonable to describe the complex relationships between counsel, parties, and third parties on a document-by-document basis.[1] But this case demonstrates why it is critical that support be provided on just such a basis to avoid over-generalization about such relationships and over-withholding in contravention of the Federal Rules. It is neither "impossible" or "unreasonable" to require such justification, and this case well-illustrates the dangers of permitting disclosure by category. Permitting disclosure by category will encourage blanket claims and discourage the analysis required to properly assess the privilege.

---

[1] Oct. 15, 2020 Letter from J. Redgrave to Committee on Rules of Practice and Procedure, at 2 n.4 ("Identifying and supporting privilege claims, particularly (but not exclusively) for corporations and other entities, involve analyzing complex privileged relationships between in-house and outside counsel, executives, managers, employees, advisors, consultants, agents, and experts. Describing such relationships for each withheld document (or for each message in a thread of emails) is unreasonable, if not impossible as a practical matter in even modest-sized matters.").

The Court also assessed categorical claims of work-product protection. The Defendant supported its blanket claims of protection by submitted an affidavit asserting that it communicated with counsel about product complaints for which it anticipates a legal claim. Yet the court found that the affidavit was unsupported by the documents themselves. Thus, attorney affidavits do not resolve the problems inherent in categorical logs—that the claims cannot be assessed for individual documents as they must be.

In the end, of the 114 files on the categorical log and reviewed by the Court, only 24 were found to be protected in whole or in part; 90 were ordered to be produced. Without the protections of Rule 26(b)(5) and the Court's *in camera* review, these files would not have been produced.

I urge that the Committee reject calls to permit categorical logs as an acceptable means of disclosure under the Rule. This single example should help demonstrate why.

Thank you for this opportunity to comment,

Shawn J. Wanta

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Brian Begley

v. Case No. 17-cv-317-LM

Windsor Surry Company et al.

O R D E R

In this putative class action, the named plaintiff, Brian Begley, brings claims of breach of express warranty, negligence, and declaratory and injunctive relief[1] arising from allegedly defective wood products that defendants Windsor Surry Company and Windsor Willits Company (collectively "Windsor") manufacture and sell. Doc. no. 17. The court bifurcated discovery into a class certification stage and a liability stage. Doc. no. 56. Throughout class certification discovery, there have been frequent disputes between the parties. One of the major areas of disagreement centers on Windsor's invocation of attorney-client privilege and the work product doctrine to prevent production of certain documents requested by Begley. It is those issues that are currently before the court.

[1] Begley initially alleged a violation of the New Hampshire Consumer Protection Act, which he later withdrew. See Doc. no. 27-1. He also alleged a breach of the implied warranty of merchantability and requested punitive damages. These were dismissed on Windsor's motion. See Doc. no. 41.

Background

On November 6, 2019, Begley moved to compel interrogatory responses and document production. Doc. no. 71. On November 21, 2019, Windsor objected. Doc. no. 76. On December 2, 2019, Begley filed a reply. Doc. no. 79. One of the disputes litigated by the parties in this briefing was whether the attorney-client privilege and work product doctrine applied to a subset of documents requested by Begley. In the court's December 23, 2019 order (doc. no. 85), the court ordered Windsor to produce the documents it claimed were protected to the court for *in camera* review. Windsor submitted the documents, along with an accompanying memorandum of law (doc. no. 91), on January 21, 2020. Windsor's submission was housed in three boxes for a total of 114 files. Each file was divided into a manila folder and a red folder – the manila folder containing unredacted documents that were also produced to Begley[2] and the red folder containing documents as to which Windsor was claiming attorney-client privilege and work product protection.[3] Begley filed a

[2] Windsor's notice indicated that certain documents would be produced to Begley in redacted form. However, at the April 22, 2020 telephone conference, it was clarified that all documents in the manila folders had been produced to Begley in unredacted form. See court order of April 28, 2020.

[3] Windsor filed a notice of clarification (doc. no. 95) regarding five documents that were inadvertently placed in

response on January 27, 2020. Doc. no. 92. The court has reviewed Windsor's submission, as well as the parties' briefing, and finds that while certain documents are protected, many others do not fall under either the attorney-client privilege or work product doctrine and must be produced.

Applicable Law

Litigants "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." Fed. R. Civ. P. 26(b)(1). Thus, the language of the rule indicates that privileged materials need not be produced, even if they are relevant and proportional.

Generally, federal common law governs privilege in federal court. See Fed. R. Evid. 501. However, when state law supplies the rule of decision, state privilege law applies. Id. Here, the remaining claims arise under New Hampshire law, so New Hampshire privilege law governs.[4] Under New Hampshire law,

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manila folders but should have been placed in red folders. The court has transferred those documents and considered them as part of its *in camera* review.

[4] Windsor discusses choice of law principles, as they relate to the attorney-client privilege, at length in its brief. However, as the parties do not dispute that New Hampshire privilege law applies, the court need not undertake a choice of law analysis here. See Doe v. Phillips Exeter Acad., No. 16-cv-

> [w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives.

Prof'l Fire Fighters of N.H. v. N.H. Local Gov't Ctr., 163 N.H. 613, 615 (2012) (quoting Riddle Spring Realty Co. v. State, 107 N.H. 271, 273 (1966)); see also Jenks v. Textron, Inc., No. 09-cv-205-JD, 2012 WL 2679495, at *7 (D.N.H. July 6, 2012). "A party claiming the attorney-client privilege bears the burden 'to establish that the privilege exists and covers the statements at issue.'" Jenks, 2012 WL 2679495, at *8 (quoting Kraft v. Mayer, No. 10–cv–164–PB, 2011 WL 1884769, at *1 (D.N.H. May 18, 2011)).

Federal courts apply the federal work product doctrine, "even in diversity cases." Galvin v. Pepe, No. 09-cv-104-PB, 2010 WL 2720608, at *2 (D.N.H. July 8, 2010). The work product doctrine, first recognized in Hickman v. Taylor, 329 U.S. 495 (1947) and codified as Federal Rule of Civil Procedure 26(b)(3),

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396-JL, 2016 WL 5947263, at *2 n.3 (D.N.H. Oct. 13, 2016) (citing Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 23 (1st Cir. 2011) ("When the parties agree on the substantive law that should govern, 'we may hold the parties to their plausible choice of law, whether or not that choice is correct.'") (citation omitted)).

"protects work done by an attorney in anticipation of, or during, litigation from disclosure to the opposing party." Maine v. U.S. Dep't of Interior, 298 F.3d 60, 66 (1st Cir. 2002). "As with the attorney-client privilege, the party asserting work-product immunity bears the burden of showing that the doctrine applies." Walker v. N.H. Admin. Office of the Courts, No. 11-cv-421-PB, 2013 WL 672584, at *4 (D.N.H. Feb. 22, 2013) (citing Vicor Corp. v. Vigilant Ins. Co., 674 F.3d 1, 17 (1st Cir. 2012)).

Discussion

Before turning to its analysis of specific documents, the court addresses a preliminary matter. One particularly fertile source of disagreement during certification discovery has been the nature of Norcon's relationship with Windsor and its counsel.[5] The affidavit testimony offered by Windsor, along with the court's review of the documents, is enough to conclude that

[5] In its memorandum of law (doc. no. 91), Windsor frequently refers to Norcon as its counsel's "expert." In its response (doc. no. 92), Begley challenges this usage. This dispute appears to rest on a difference in preferred nomenclature. Whether Norcon is labeled a third-party consultant or a non-testifying expert, the analysis is the same for the purposes of the attorney-client privilege and work product.

Norcon[6] was indeed retained by Windsor's counsel[7] and not directly by Windsor.[8] However, Windsor still has the burden of demonstrating that the communications and documents created by or sent to Norcon are protected by the attorney-client privilege or the work product doctrine.

Privilege Log

In claiming privilege, Windsor's first burden was to provide a privilege log that "describe[s] 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." Fed. R. Civ. P. 26(b)(5). Begley initially argued that Windsor waived its attorney-client privilege and work product objections by providing a deficient

[6] Norcon Consulting Group, Ltd. currently provides expert consulting services to Windsor's counsel. A separate entity, Norcon Forestry, Ltd. previously provided similar services to Windsor's previous counsel. See Doc. no. 91 at 3. As the two entities functioned in a similar way for privilege and work product purposes, the court will use "Norcon" to refer to both entities.

[7] Windsor changed outside counsel at least once during the period at issue in this case. See Doc. no. 91-1 at 2. As this change does not affect the court's analysis, the court will simply refer to "counsel."

[8] This conclusion is also supported by Norcon's offer letters to homeowners and builders, which specify that Norcon is "acting on behalf of counsel for Windsor Mill."

log. Windsor responded that its categorical approach was appropriate in this case to avoid voluminous entries and because creating entries for each document "would be grossly burdensome and provide absolutely no benefit to the case." Doc. no. 76 at 11. As this court has found, "[p]lacing a label of 'attorney-client privilege' on a privilege log, without more, does not meet [a party's] burden." Walker, 2013 WL 672584, at *8. However, Begley's general claim that Windsor's privilege log is defective does not merit a finding of waiver. See Goss Int'l Americas, Inc. v. MAN Roland, Inc., No. 03-cv-513-SM, 2006 WL 1575546, at *3 (D.N.H. June 2, 2006) (finding that a party's "blanket argument" regarding a defective privilege log was "not persuasive"). The court recognizes that Windsor failed to make its claims of attorney-client privilege and work product protection with specificity in the privilege log. The court has therefore undertaken the task that Windsor did not – inspecting each document, one by one, to determine whether it is privileged. In doing so, it focused on two main issues: 1) whether the communications were made for the purpose of legal advice and therefore protected by the attorney-client privilege and 2) whether the communications were in anticipation of litigation and therefore protected by the work product doctrine.

Purpose of legal advice

First, the application of the attorney-client privilege, in this case, turns on whether the communication was for the purpose of legal advice. In making that determination, there are several relevant principles to consider. Importantly, "privileged communications to . . . an attorney include communications to those assisting or working under the supervision of the . . . attorney." State v. Melvin, 132 N.H. 308, 310 (1989) (citing N.H.R. Evid. 502); see also Lluberes, 663 F.3d at 24 (citing United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)) (finding, in the context of federal privilege law, that "[t]here is a possible extension of the privilege when a third party helps the lawyer give legal advice."). The Lluberes court went on to provide useful guidance on how to analyze the privilege in the context of third-party agents retained by an attorney:

> The key, it seems to us, involves considering the source and nature of the information contained in the documents. If the communication contains only client confidences made in pursuit of legal advice—or legal advice based on such client confidences—that communication, if intended to remain confidential, should be covered by the privilege, regardless of whether it came from the client, his attorney, or an agent of either one. If, however, the transmitted information consists largely of facts acquired from non-client sources, those facts are not privileged.

Id. at 24–25 (footnotes and citation omitted).[9] "[A] number of courts have determined that the attorney-client privilege does not protect client communications that relate only to business or technical data. However, client communications intended to keep the attorney apprised of business matters may be privileged if they embody an implied request for legal advice based thereon." Pacamor Bearings, Inc. v. Minebea Co., 918 F. Supp. 491, 510–11 (D.N.H. 1996) (internal quotation marks, brackets, and citations omitted) (discussing federal attorney-client privilege). Additionally, "documents which merely communicate information obtained from independent sources are not protected by the attorney-client privilege" and "documents prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged since they are not communications made primarily for legal advice." Id. at 511 (internal quotation marks, brackets, and citations omitted).

Windsor claims that the communications between Windsor and counsel, counsel and Norcon, and Windsor and Norcon were confidential and "were made relating to and in furtherance of

[9] "As to matters about which the [state Supreme Court] has not spoken, [this court] take[s] a predictive approach and seek[s] guidance from other persuasive case law, learned treatises, and pertinent public policy considerations." F.D.I.C. v. Ogden Corp., 202 F.3d 454, 460–61 (1st Cir. 2000) (citation omitted).

legal advice with respect to specific customer complaints." Doc. no. 91 at 10. It asserts that communications with Norcon were for the "purpose of enabling counsel to render fully informed advice to its client, Windsor." Id. Windsor therefore maintains that these communications are covered by the attorney-client privilege. The affidavits from Windsor's counsel, its President, and Norcon's Principal also attempt to make this case. See Doc. nos. 91-1, 91-2, 91-3. Attorney Gaskin asserts that his firm "relies on Norcon's expertise to provide legal advice in connection with investigating and evaluating potential legal complaints and lawsuits, formulating strategy regarding responding to such situations, and resolving such situations." Doc. no. 91-1 at 2. Matthew Jesson, Norcon's Principal, maintains that his firm provides "litigation consulting in the form of expert building/construction-related consultation to lawyers to assist them in providing legal advice to their clients." Doc. no. 91-3 at 1. In addition to the affidavits, each red folder includes a cover sheet indicating that the file was "Privileged Work Product" and providing certain information about the individuals involved in constructing the file and file's purpose.

Unfortunately for Windsor, merely stating that the communications were for the purpose of legal advice does not

meet the requisite burden.[10] "Blanket claims of privilege are 'extremely disfavored,' and instead a party asserting privilege must establish its elements as to each disputed question." Jenks, 2012 WL 2679495, at *8 (quoting In re Grand Jury Matters, 751 F.2d 13, 17 n.4 (1st Cir. 1984)). Indeed, "[d]etermining whether documents are privileged demands a highly fact-specific analysis—one that most often requires the party seeking to validate a claim of privilege to do so document by document." In re Grand Jury Subpoena (Mr. S.), 662 F.3d 65, 71 (1st Cir. 2011) (citation omitted). Here, however, Windsor has painted with a broad brush and left the document by document privilege analysis to the court. Its assertions regarding the triangular relationship between Windsor, its counsel, and Norcon – which the defendants go to great lengths to describe - are often unsupported by the withheld documents. The majority of the documents do not involve Windsor's counsel at all. Moreover, Norcon's involvement is rarely for the purpose of helping the attorneys provide legal advice.

Thus, the affidavits and cover sheets are not enough to

[10] Earlier in this case, Windsor referenced Judge Orrick's rulings on privilege and work product in Cover v. Windsor. Doc. no. 76 at 1-2. The court takes note of those rulings, but also notes that while they concern the same set of documents, they do not constitute binding authority on this court.

preserve privilege as to all the communications and documents. See Klonoski v. Mahlab, 953 F. Supp. 425, 432 (D.N.H. 1996) (finding affidavits "insufficient to support the claimed privilege, given the record" in the case). The cover sheets themselves, as they appear to fall within the realm of legal advice, are privileged and need not be produced. Beyond the cover sheets, it was only through a review of each of the 114 files that the court was able to properly categorize which are privileged and which are not.

Anticipation of litigation

Second, the application of the work product doctrine hinges on whether the communications were made in anticipation of litigation. As a preliminary matter, the doctrine applies to "material prepared by agents for the attorney as well as those prepared by the attorney himself." United States v. Nobles, 422 U.S. 225, 238–39 (1975). The First Circuit has held that documents are prepared in anticipation of litigation "if, in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained *because of* the prospect of litigation." Maine, 298 F.3d at 68 (emphasis in original) (internal quotation marks omitted) (quoting United States v.

Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998)). The doctrine does not apply to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation. This is true even if the documents aid in the preparation of litigation." Id. at 70 (citations omitted). This court has provided guidance that is particularly useful where, as here, the issue concerns the communications and documents produced by an agent of counsel:

> When a party or the party's attorney has an agent do work for it in anticipation of litigation, one way to ensure that such work will be protected under the work product doctrine is to provide clarity of purpose in the engagement letter. Otherwise stated, clearly the most effective way to guard against inadvertent loss of the protection offered by the work product doctrine is to ensure that management's written authorization to proceed with the investigation identifies, as specifically as possible, the nature of the litigation that is anticipated. An affidavit from counsel indicating that such work was done at his direction in anticipation of specified litigation will also help a party meet its burden under Rule 26(b)(3) of establishing that the work was done in anticipation of litigation.

Pacamor Bearings, Inc., 918 F. Supp. at 513 (internal quotation marks, brackets, and citations omitted).

Windsor's burden is to demonstrate that each document or communication was prepared in anticipation of litigation. It has attempted to meet that burden by representing that it communicates with counsel about complaints for which it

specifically anticipates a legal claim. It claims that Norcon then "becomes involved to investigate and inform the opinion of counsel in dealing with the complaint or claim and to facilitate resolution." Doc. no. 91 at 13. Attorney Gaskin asserts that his firm involves Norcon "[w]hen Windsor receives complaints that it deems constitute potential legal issues." Doc. no. 91-1 at 3. Craig Flynn, President of Windsor, claims that Windsor resolves many inquiries and complaints in-house, and that it involves counsel and Norcon only "where there is actual or threatened litigation against Windsor." Doc. no. 91-2 at 3. Jesson maintains that Norcon provides counsel services related to "actual and potential litigation." Doc. no. 91-3 at 2. He further asserts that Norcon "does not provide warranty processing for Windsor," and is not consulted regarding every warranty claim and complaint. Id. at 3. As mentioned above, Windsor also sought to protect its files by including a cover page designating the contents as "Privileged Work Product."

As in the case of attorney-client privilege, the affidavits and cover pages are not enough to win the day for Windsor. The communications rarely mention actual or threatened litigation, and the potential for each complaint to escalate to litigation is often not apparent. Additionally, nothing in the documents provided for *in camera* review supports the affidavit statements

regarding how Windsor determines when to involve counsel and Norcon.

Windsor offers a couple of additional arguments on work product. It seeks to define its business as "manufacturing and supplying architectural wood trim," and maintains that the Norcon documents were created outside of the normal course of that business. Doc. no. 91 at 14. It therefore reasons that the documents are protected by the work product doctrine. However, processing claims for defective trim is clearly part of Windsor's business, if not its central focus. Windsor also asserts that because Windsor, its counsel, and Norcon have reviewed the communications and documents in the context of two other class actions, they should be covered by the work product privilege. However, the legal standard asks whether the documents were prepared in anticipation of litigation; it is not enough that those documents were later analyzed for purposes of litigation. Thus, the files that contain communications regarding the threatened or pending class actions merit protection; the files that were created before the class actions arose are not.

Windsor has not met its burden of showing that the documents and communications were created in anticipation of litigation. Thus, the work product doctrine analysis also

required an examination of each communication and document in the red folders.

Review of specific documents[11]

During its *in camera* review, the court identified three categories into which the red folders fall. First, there are communications and documents that clearly involve threatened litigation. These folders are protected under the work product doctrine, and often the attorney-client privilege as well. Second, there are communications and documents where Norcon is communicating with builders or suppliers, or having internal discussions, regarding Windsor's business relationships. These files are not protected under either the attorney-client privilege or work product doctrine and must be produced. Third, there are files that involve homeowner claims and do not reference threatened litigation or relate primarily to business considerations. This is the bucket into which most of the documents fall. The documents in this bucket were further

[11] In its December 23, 2019 order (doc. no. 85), the court held that discovery regarding WindsorOne +Protected fell outside the scope of certification discovery. That determination turned on the differences between the Traditional product and the +Protected product. In many of the claim files, Windsor provided homeowners and builders with +Protected product as part of their settlement. These documents do not address the composition of +Protected, or any other substantive information about that product, and are therefore discoverable if not otherwise protected.

divided into two groups. First, there were communications to or from Windsor's lawyer, usually regarding edits to home inspection reports. These documents are protected, as they involve legal advice regarding responses to customer complaints. Second, there were many documents and communications regarding rot claims that had nothing to do with legal advice or anticipated litigation. These documents must be produced.

The court notes one logistical matter before delving into its decision regarding specific documents. Many of the red folders contain documents that fall into more than one category. To prevent duplicative classification, the court will note any exceptions and provide brief explanatory parentheticals for each.[12]

1. Documents related to threatened litigation

The documents which clearly relate to threatened litigation are protected and Windsor is not required to produce them. These communications and documents related either to specific lawsuits threatened by individual homeowners or to class actions

[12] The page numbers refer to the Bates-stamp numbers in the red folders. "Privileged" indicates that the specified pages are covered by the attorney-client privilege and need not be produced. "Work product" indicates that those pages are covered by the work product doctrine and need not be produced. "Business" indicates that those pages relate to business considerations and must be produced.

against Windsor. These communications are covered by the work product doctrine because they were exchanged in anticipation of litigation. See Maine, 298 F.3d at 66. Many of these documents are also covered by the attorney-client privilege because they were exchanged for the purpose of legal advice. See Prof'l Fire Fighters of N.H., 163 N.H. at 615. Therefore, the following files are protected and need not be produced by Windsor: Devine bldr (WM2006-NF072-NH); Cuevas (WM2008-NF041-NH) (p. 5 is work product, pp. 8-10 are privileged, all other pages are discoverable); White (WM2008-NF043-NH) (pp. 4-7 work product, pp. 10-40 privileged, all other pages discoverable; p. 52 (business)); McCrillis (WM2009-NF023-NH) (pp. 4-21 work product, pp. 24-33, 36, 38, 45-47 privileged, all other pages discoverable); Foscaldo (WM2009-NF060-NH); Folland (WM2011-NF096-NH)(pp. 4-5 work product, all other pages discoverable); Roberts, Donald (WM2014-NF036-NH) (pp. 26-32 work product, all other pages discoverable); Decoulos (WM2015-NCG021-NH) (pp. 4-10 work product, all other pages discoverable); Snelling (WM2017-NCG021-NH) (pp. 4-39 work product, all other pages discoverable); Kjellman (WM2018-NCG005-NH) (pp. 4-72, 76-84, transferred page (p. 7 from manila folder) work product, all other pages discoverable); McDonald, Scott (WM2019-NCG010-NH).

2. Documents related to business considerations

The documents and communications that relate to Windsor's business considerations are not protected and must be produced. In determining how to settle certain claims, Norcon and Windsor discussed Windsor's business relationship with the lumber supplier - such as the amount of trim purchased by the supplier on an annual basis - or the supplier's relationship with the builder. Additionally, Norcon and Windsor occasionally communicated directly with the supplier about its business relationship with the builder. As to these communications, Windsor failed to meet its burden to demonstrate that either the attorney-client privilege or the work product doctrine applies. The attorney-client privilege does not apply to these documents because they "relate only to business or technical data." Pacamor Bearings, 918 F. Supp. at 511 (citation omitted). Moreover, the work product doctrine does not apply because the documents and communications were "prepared in the ordinary course of business." Maine, 298 F.3d at 70 (citation omitted). Thus, the following file must be produced: Schell (WM2006-NF076-NH).

In addition, in each file there is a document labeled "Exterior Trim Complaint Pre Inspection Form," which contains background information about each claim. There is no indication

that this document related to legal advice or was prepared in anticipation of litigation. It appears that it was a standard part of Windsor's claim process and was consistently drafted in the ordinary course of business. Therefore, the form included in each of the folders is discoverable.

3. Documents related to homeowner claims

The files related to homeowner claims required the court to assess each document and communication to determine whether it is protected. Communications between Windsor/Norcon and Windsor's counsel concerning inspection reports are protected by the attorney-client privilege because they are for the purpose of legal advice. However, as to communications and documents that do not involve an exchange with counsel, but simply the day-to-day administration of the claims process, Windsor has failed to meet its burden to demonstrate they are protected by the attorney-client privilege or the work product doctrine.

a. Communications with Windsor's counsel

After a thorough review, the court has determined that the following files are protected by the attorney-client privilege: Maynard (WM2006-NF066-NH) (pp. 4-5, 7-12, 15-26, 28-32 privileged, all other pages discoverable); Downey (WM2007-NF005-NH) (pp. 4-7, 12-36 privileged, all other pages discoverable);

Cummings (WM2008-NF008-NH) (pp. 4, 22-29, 31-32 privileged, all other pages discoverable); Stevenson (WM2008-NF011-NH) (pp. 29-34, 36 privileged, all other pages discoverable; pp. 8, 23 (business)); Muhlern (WM2008-NF024-NH) (pp. 4-8, 13, 62-67, 69-71, 73-75 privileged, all other pages discoverable); Feiner-Dunn (WM2008-NF035-NH) (pp. 6-31 privileged, all other pages discoverable); Dalton (WM2008-NF057-NH) (pp. 5-24 privileged, all other pages discoverable); Coronis (WM2009-NF007-NH) (pp. 19-21, 23-27 privileged, all other pages discoverable; pp. 13, 31-32 (business)); Rohde (WM2009-NF030-NH) (pp. 5-7 privileged, all other pages discoverable); Tether (WM2009-NF037-NH) (p. 9 privileged, all other pages discoverable); Madden (WM2010-NF026-NH) (pp. 4-35 privileged, all other pages discoverable; p. 38 (business)); St. Ledger (WM2017-NCG031-NH) (pp. 10-11 privileged, all other pages discoverable).

b. Documents and communications regarding claims[13]

[13] Many of the documents and communications involve the settlement of claims made by homeowners and builders. While documents involving settlement may ultimately not be admissible at trial, they are discoverable if they are relevant and not privileged. See Barclay v. Gressit, No. 2:12-cv-156-JHR, 2013 WL 3819937, at *1 (D. Me. July 24, 2013) (first citing Levick v. Maimonides Med. Ctr., No. 08 CV 03814(NG), 2011 WL 1673782, at *2 (E.D.N.Y. May 3, 2011) ("[E]vidence regarding settlement agreements is often excluded at trial under Rule 403 of the Federal Rules of Evidence because of the danger of unfair prejudice and misleading the jury. Under Rule 408 of the Federal

The court has determined that the following files[14] are not protected and must be produced: Alexandropoulos (WM2006-NF006-NH); Wallace Gormley (WM2006-NF010-NH); Falso (WM2006-NF013-NH) (pp. 18-20 (business)[15]); Gray (WM2006-NF014-NH); Johnson (WM2006-NF025-NH); Nierenberg (WM2006-NF031-NH); Howard (WM2006-NF033-NH); Walker (WM2006-NF057-NH); Saba (WM2007-NF015-NH); Maniatty (WM2007-NF014-NH); Gold (WM2007-NF025-NH); Begley (WM2008-NF012-NH); Sherman (WM2008-NF023-NH); Starkey (WM2008-NF026-NH); Keene (WM2008-NF031-NH); Rough Diamond (WM2008-NF042-NH); Sorger (WM2008-NF046-NH); Frost (WM2008-NF047-NH); Barton

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Rules of Evidence, settlement agreements are also generally held to be inadmissible at trial. However, a settlement agreement may nonetheless be subject to discovery if it meets the standard of relevance required for discovery, as set by Rule 26(b) of the Federal Rules of Civil Procedure.") (footnote, citations, and internal quotation marks omitted); then citing Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.")).

[14] Some of the documents included in these files are notes made by Norcon regarding communications with homeowners, builders, and others. While these notes were made by Norcon, they are part of the claim files and are thus clearly within Windsor's "possession, custody, or control." Fed. R. Civ. P. 34(a)(1).

[15] While the files in this category must be produced because they relate to homeowner claims and do not contain privileged documents, the court continues to note pages that concern business issues for the sake of clarity and precision.

(WM2008-NF058-NH); Matarazzo (WM2008-NF059-NH); Pasco (WM2008-NF060-NH); Ashton (WM2008-NF061-NH); Gavin (WM2008-NF062-NH); Berman (WM2008-NF063-NH); Porter St. Condos (WM2008-NF067-NH); Coogan (WM2009-NF019-NH); Mastin (WM2009-NF041-NH); Fichter (WM2009-NF046-NH); Murphy (WM2009-NF051-NH); Wyant (WM2009-NF052-NH); Pollock (WM2009-NF057-NH); Smyth Library (WM2009-NF059-NH); Hiley (WM2010-NF008-NH); Donovan (WM2010-NF015-NH); Buskey (WM2010-NF021-NH); Plisinga (WM2010-NF022-NH); Cullpepper (WM2010-NF023-NH); Walters (WM2010-NF024-NH); Mitchell (WM2010-NF036-NH) (p. 9 (business)); Dennesen (WM2010-NF047-NH); Pregent (WM2010-NF055-NH); Hurley (WM2010-NF060-NH); Patterson (WM2010-NF088-NH); Dunn (WM2011-NF012-NH); Rogers (WM2011-NF036-NH); Fire Station (WM2011-NF037-NH); BV Golf Course (WM2011-NF040-NH) (pp. 19-20 (business)); Byrne (WM2011-NF054-NH); Bourdon (WM2011-NF063-NH) (pp. 14-15 (business)); Stashkiewich (WM2011-NF064-NH); Meehan (WM2011-NF065-NH); Brown (WM2011-NF066-NH); Saros (WM2011-NF067-NH); Barderry Ln (WM2011-NF071-NH); Merrill (WM2011-NF076-NH); 675 Main St (WM2011-NF085-NH); Holmes (WM2011-NF086-NH) (pp. 10-11, 16 (business)); Potter (WM2011-NF087-NH) (pp. 11-12, 15, 17 (business)); Colosi (WM2011-NF089-NH); Byock (WM2011-NF101-NH); Ryan (WM2011-NF102-NH); Hotaling (WM2011-NF103-NH); Pettibone (WM2011-NF104-NH); Craven (WM2011-NF105-NH); Blouin (WM2011-NF106-NH); 12 Poplar (WM2011-NF111-

NH); Wortman (WM2011-NF112-NH); Bates (WM2011-NF113-NH); 19 Birch Ln (WM2011-NF114-NH); Pinnacle Ridge (WM2012-NF025-NH); Staithes Rd (WM2012-NF026-NH); MacDonald (WM2012-NF027-NH); Skarin (WM2012-NF051-NH); McWhirter (WM2012-NF073-NH); Sevey (WM2013-NF007-NH) (pp. 45, 54 (business)); Ward (WM2013-NF046-NH) (p. 8 (business)); Lorden (WM2013-NF061-NH); Dewan (WM2013-NF064-NH); Henskens (WM2013-NF078-NH); 29 Silverbrook Lane (WM2014-NF011-NH); Williams (WM2014-NF014-NH); Hill (WM2014-NF051-NH); Morin (WM2014-NF057-NH); Dobbins (WM2015-NCG002-NH) (pp. 8-12, 14-15, 33-35, 44, 47 (business)); 48 Colby Hill (WM2015-NCG010-NH) (p. 27 (business)); Smith, Chris (WM2015-NCG017-NH) (pp. 14-15, 19-20 (business)); Gardner (WM2015-NCG020-NH); Begley #2 (WM2015-NCG027-NH) (pp. 29-31 (business)); 440 Tandy Brook Rd (WM2015-NCG032-NH); Parry, Susan (WM2015-NCG038-NH).

Conclusion

Based on the foregoing reasons, the court orders Windsor to produce the documents and files specified above to Begley. Windsor shall produce the responsive information by July 31, 2020.

SO ORDERED.

Andrea K. Johnstone
United States Magistrate Judge

July 6, 2020

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The comments that follow were received after the established cut off date and before the October 5, 2021 Advisory Committee on Civil Rules meeting.

MSBA

August 23, 2021

Via Email

TO: Judicial Conference Advisory Committee on Civil Rules Discovery Subcommittee

RE: Invitation for Comment on Privilege Log Practice

Minnesota State Bar Association

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Dear Secretary,

I write as Chair of the Minnesota State Bar Association's (MSBA) Court Rules and Administration Committee (Committee). Our Committee's purpose is to review proposed changes to state and federal court rules and comment on those proposed changes, as well as proactively petition our state court for rule amendments.

Recently, the Judicial Conference Advisory Committee on Civil Rules published an Invitation for Comment on Privilege Practice regarding Federal Rules of Civil Procedure 26(b)(5)(A), which requires parties to provide a privilege log for documents withheld from discovery on the basis of an expressly asserted privilege. After reviewing this issue and seeking input from practitioners in the Minnesota bar, our Committee recommends the following amendments regarding privilege log practice:

26(b). Discovery Methods, Scope, and Limits

(5) *Claiming Privilege or Protecting Trial-Preparation Materials*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming 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 the information itself privileged or protected, will enable other parties to assess the claim. <u>Describing the nature of the documents, communications, or tangible things not produced or disclosed by category shall not be sufficient; the withholding party must describe each document, communication, or tangible thing, and identify the claim to privilege or protection; and</u>

<u>(iii) Upon the request of the receiving party, iteratively meet and confer as soon as practicable whereat the receiving party may request further information about specifically identified withheld documents, communications, or tangible things, and the withholding party must provide sufficient information to allow the other party to review the claim of privilege or protection.</u>

26(f). Conference of the Parties; Planning for Discovery Discovery Conference and Discovery Plan.

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information, including whether parties' emails with their respective litigation counsel will be excluded from privilege logs, if any; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

Detailed privilege logs facilitate expedient and fair litigation by providing parties with a clear guide as to what documents have been withheld and the basis for their withholding. It is the opinion of the Committee that categorical privilege logs do not provide fair notice, frequently requiring parties to seek further clarification and information to determine what has been withheld. Item by item privilege logs preclude this needless effort. However, the Committee is also aware that courts have required an exacting level of detail, on pain of waiver, for privilege logs. This level of unnecessary detail does not serve to facilitate an expeditious and equitable resolution to actions.

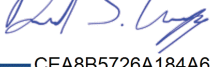
To resolve the tensions between category privilege logs, which provide too little information, and exacting privilege logs, which require too much labor to produce, our Committee believes a middle ground is desirable. Document review tools enable parties to produce spreadsheets providing the bates number and privilege claim for withheld documents. This is sufficient as a starting point, but there should be a requirement that parties meet and confer following the production of the privilege spreadsheet to ensure that all necessary information sufficient to review a claim of privilege is available to the receiving party. This allows parties to clarify any issues of concern or misunderstanding and, in the event the parties are not able to resolve issues, facilitates a more informed hearing with the court.

The Committee believes that a Rule 26(f) conference would benefit from the parties discussing whether litigation counsel's emails must be included in the privilege log or may be omitted categorically. This will preclude unnecessary discussions later in litigation and will save time and effort from parties having to collect, tag, and withhold from production their communications with their litigation counsel.

The Committee believes these proposed changes would benefit practitioners by simplifying the discovery process.

Sincerely,

DocuSigned by:



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Chair, MSBA Court Rules and Administration Committee

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Re: Comment on Privilege Log rule changes

To the Committee:

As a civil rights attorney for 30 years, I am concerned to maintain the rigor of discovery protections against a retrenchment of government and corporate secrecy in the guise of privilege. At the beginning of every case, government agency and corporate defendants sit astride a mountain of evidence while individual plaintiffs start with virtually nothing but their own experience. Every day we have to fight the growing assertions of privilege that tend to shelter material evidence we need to bear our burden of proof. At the discovery stage, defendants complain bitterly that demands are burdensome and overbroad. At the dispositive motion stage, they complain that we have not adequately shown widespread and longstanding abuse. They persistently seek to narrow the scope of discovery and broaden the burden of proof.

The key point of Fed.R.Civ.P. 26(b)(5)(A) is that proponents of privilege "expressly make the claim" of privilege to "enable other parties to assess the claim." This plaintiffs cannot do if defendants need merely describe "categories" of documents excluded. For instance, a defendant might list "attorney-client correspondence" which appears to be safely privileged unless it is shown to include e-mails sent to third parties who are not within the scope of privilege. Attorney work product is a category that is frequently abused by the inclusion of records that were created for non-litigation purposes. Plaintiffs need the ability to challenge claims of "work product" privilege to show "substantial need" under Rule 26(b)(3)(A)(ii).

It is ironic that as information technology makes large volumes of records more accessible, reviewable, sortable, portable, and less costly to retrieve, those with the most sophisticated information tools complain most stridently about the burden of having to use them. As one who has reviewed lots of intra-agency data requests, I have been amazed at agency requests for exact, detailed information culled from huge sets of data that are responded to the same day.

I hope the Committee will not further relax the rules that protect transparency in litigation in a way that tends to favor government agencies and corporations as against individuals.

Sincerely,

James V. Cook, Esq.
Attorney-at-Law

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