

# The Sedona Conference WG1

## Draft Commentary on Privilege Logs

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**THE SEDONA CONFERENCE**  
**WORKING GROUP – DRAFTING TEAM – PRIVILEGE LOGS**

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The drafting team is tasked with developing a Sedona Conference commentary that: (i) identifies the goals of Rule 26(b)(5) and what parties are currently doing to meet the requirements, and where they are falling short; (ii) identifies and exemplifies the principal issues with privilege logs in the modern era under the current rules and standard practices (*i.e.*, time, expense, and failure to meet the court's and parties' needs); (iii) recommends a framework for logging in a defensible and useful manner, including practical approaches and methodologies for mitigating common privilege log issues; (iv) addresses appropriate and reasonable methods for challenging log entries and remedying improper log designations and challenges; and (v) recommends ways to move the law forward in a reasoned and just way to ensure privilege log procedures are aligned with Federal Rule of Civil Procedure 1 and 26(b)(5), while at the same time ensuring that parties have the ability to obtain discoverable evidence necessary to reasonably litigate cases.

**Limitations:**

We are **not** tasked with addressing the process for or burden of privilege review by the responding party – how to determine whether a document is, in fact, privileged.

**I. INTRODUCTION**

**A. Rules Affecting Privilege Logs.**

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**i. FRCP 26(b)(5)(A).**

There is nothing in the Federal Rules of Civil Procedure (“FRCP”) that explicitly requires the creation and exchange of a formal privilege log. However, logs are used as the mechanism by which parties comply with FRCP 26(b)(5)(A) (and FRCP45(e)(2)(A) - discussed below). Specifically, FRCP 26(b)(5)(A) governs how a party must make a privilege assertion, stating:

*(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 that, without revealing information itself privileged or protected, will enable other parties to assess the claim.<sup>1</sup>

Practically speaking, the format of a privilege log allows a party to “expressly make a claim” of privilege or protection in a way that “describes the nature” of the withheld document “in a manner that, without revealing information itself privileged or protected” allows “other parties to assess the claim.”<sup>2</sup>

As the Committee Notes indicate, “Th[is] [R]ule 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.”<sup>3</sup> Notwithstanding, parties typically satisfy their burden by preparing so-called “privilege logs” that contain certain information.<sup>4</sup> A “privilege log,” however, is not the only

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<sup>1</sup> FRCP 26(b)(5)(A).

<sup>2</sup> *Id.*

<sup>3</sup> FRCP 26, Advisory Committee Notes (1993 Amend.).

<sup>4</sup> Section II.A.ii, *infra* (discussing information courts typically require in a privilege log); *Caudle v. District of Columbia*, 263 F.R.D. 29, 35 (D.D.C.2009) (“A privilege log has become an almost universal method of asserting privilege under the Federal Rules.”); *see also Courtland Co., Inc. v. Union Carbide Corp.*, No. 2:19-CV-00894, 2021 WL 665532, at \*1 (S.D.W. Va. Feb. 12, 2021); *Ho v. Ernst & Young, LLP*, No. C05-04867 JF HRL, 2008 WL 205595, at \*1 (N.D. Cal. Jan. 24, 2008).

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option.<sup>5</sup> Nor is there a “monolithic form of privilege logs.”<sup>6</sup> Simply put, privilege logs with alternative formats are permissible so long as the party’s underlying responsibility to provide particularized and adequate information is satisfied. Nevertheless, to meet the requirements of 26(b)(5)(A), parties often exchange logs in formats substantially similar to the traditional document by document privilege log in Exemplar A.

a. The goal of FRCP 26(b)(5) and the privilege log.

The Committee Notes provide more detail on the goals of FRCP 26(b)(5), stating FRCP 26(b)(5)(A) “provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute.”<sup>7</sup>

From a responding party’s perspective, the goal of a log is typically to provide sufficient information about the withheld responsive privileged content, but at the same time not waive privilege over protected information or disclose privileged content. From a requesting party’s perspective, the goal of a log is to assess whether there are any documents that may have been withheld inappropriately, that are relevant to the claims and defenses of a case.

Historically, parties can get into disputes about what is required in a log, and while courts have differed, the fields in Exemplar A are traditionally provided in a privilege log to meet the requirement of Rule 26(b)(5)(A).<sup>8</sup>

b. The challenges of modern privilege logging.

The exponential growth of ESI has significantly raised the scope, burdens and costs with traditional document by document privilege logging even leading some to question whether privilege logging is useful. The Federal Rules Committee Notes acknowledge this debate,<sup>9</sup> as

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<sup>5</sup> See, e.g., *Oracle USA, Inc. v. Rimini St., Inc.*, No. 210CV00106LRHVCf, 2020 WL 5750850, at \*5 (D. Nev. Sept. 25, 2020) (privilege log not needed because discussion of category and volume of documents at hearing, along with declarations, was sufficient); *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 29 F. Supp. 3d 142, 150 (E.D.N.Y. 2014) (finding no abuse of discretion where the court “exercised her discretion to allow Plaintiffs to use a declaration to satisfy their disclosure obligation under FRCP 26(b)(5)(A)”; *Genesco, Inc. v. Visa U.S.A., Inc.*, 302 F.R.D. 168, 191 (M.D. Tenn. 2014) (finding that no privilege log was necessary where the plaintiff’s counsel submitted affidavits and other documents to the court that “provide[d] an ample basis to assess the privilege issues raised by the parties’ discovery motions.”).

<sup>6</sup> *SecurityPoint Holdings, Inc. v. United States*, No. 11-268C, 2019 WL 1751194, at \*2 (Fed. Cl. Apr. 16, 2019) (citing *Deseret Mgmt. Corp. v. United States*, 76 Fed. Cl. 88, 91 (2007)); *Patriot Rail Corp. v. Sierra R.R. Co.*, No. 2:09-CV-0009 TLN AC, 2016 WL 1213015, at \*2 (E.D. Cal. Mar. 29, 2016) (“The undersigned will not set forth for Pacific exactly what its privilege log must look like. That is something for Pacific to work out, so long as the privilege log – whatever its format – permits this court, and interested parties, to assess its claim of privilege.”)

<sup>7</sup> FRCP 26(b)(6) Advisory Committee Notes to the 2006 Amendments.

<sup>8</sup> See *infra* Section II.A.

<sup>9</sup> FRCP 26(b)(6) Advisory Committee Notes to the 2006 Amendments (“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. When the

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have many commentators.<sup>10</sup> The reason parties expend so much on these extensive logs is a practical one—the fear that they will miss something and inadvertently waive privilege.<sup>11</sup> Indeed, the waiver of privilege can be a significant issue for many parties and clients.<sup>12</sup> Despite these concerns and potential burdens, parties cannot lose sight of the fact that they have an obligation to support assertions of privilege when withholding discoverable documents from production. This *Commentary* seeks to explore the intersection between that duty to log privileged material and various ways to mitigate the burden.

Further, the content and organization of new ESI technologies have made traditional document by document privilege logging more challenging and require creative new strategies. For instance, how should parties treat links, attachments, and strings of e-mails? What about non-traditional ESI communications (e.g. Slack, Zoom, Text Messaging)? The tedium of logging massive amounts information and the desire for consistency within the log can be a source of lengthy and frustrating effort on the part of the producing party. As explored further in this *Commentary*, despite the challenges new technologies present, other technologies can be leveraged to streamline the efforts associated with privilege logging.

c. Working solutions and recurring issues.

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review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed.”).

<sup>10</sup> See, e.g., *Chevron Corp. v. Weinberg Grp.*, 286 F.R.D. 95, 99 (D.D.C. 2012) (“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.”); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008) (“In actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or in camera review of the documents themselves.”). See also The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 155 (2016) (“[T]he current method used by most parties for identifying privileged documents and for creating privilege logs appears to be a broken process”); Report of the Special Committee on Discovery and Case Management in Federal Litigation of the New York State Bar Association, June 23, 2012, at 73 (“Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive case, especially one with many e-mails and e-mail strings.”).

<sup>11</sup> See, e.g., FRCP 26(b)(6) Advisory Committee Notes to the 2006 Amendments (“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. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed.”); Facciola & Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework* 2009 Fed. Cts. L. Rev. 19, 51 (2009) (describing benefits of their proposed approach to include avoiding “fewer marginal claims of privilege [ ] asserted for fear of waiver or otherwise”).

<sup>12</sup> See, e.g., *FG Hemisphere Assocs., L.L.C. v. Republique du Congo*, 2005 U.S. Dist. LEXIS 3523, at \*14 (S.D.N.Y. Mar. 7, 2005) (“The unjustified 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”).



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Parties have found several solutions and alternatives to the traditional document by document privilege log to meet the requirements of the Federal Rules. Typically, these involve agreement between the parties for the exchange of information that does not necessarily conform to a standard privilege log. For example, parties may agree to exchange alternative logs, categorical logs, metadata only logs, or even agree to forgo logging altogether.<sup>13</sup>

In Federal Court, such alternative agreements can be hammered out as early as the Rule 26(f) conference. In fact, FRCP 26(f)(3) explicitly notes parties must state their view and proposals regarding “any issues about claims of privilege or of protection as trial preparation materials, including –if the parties agree on a procedure to assert those claims after production–whether to ask the court to include their agreement in a order under Federal Rule of Evidence 502.”<sup>14</sup>

Practically speaking though, parties may agree to delay addressing privilege log issues until later in the case. Nonetheless, alternative logging can be established through the agreement of the parties, though, as discussed below, local rules may require or encourage these methods as a matter of course.

However, in some cases, courts have ordered specific logging outcomes in place of, or despite attempts by the parties to come to some agreement.<sup>15</sup> Further, as a practical matter, parties are often bogged down in lengthy meet and confers and motion practice over the format and content of logging.

In the era of modern privilege logging, litigants have many considerations to balance, and are often left with less than ideal choices regarding privilege. Requesting parties have to weigh which issues to raise, and without much insight, determine which logged documents (if successfully challenged), may provide the best information to allow the requesting party to advance its claims and defenses.

Responding parties have to weigh how important privilege assertions are for their documents, and balance the risk of disclosure of privileged information in the hands of an opponent, as well as potential for waiver, against the cost of aiming for perfection of review and logging. Parties may make these decisions with or without the considerations of a 502(d), or other clawback provision. Such factors and tradeoffs are often strategic – balancing the case clock, resources and budgets, but also an evaluation of how much information to disclose or withhold in a manner that will survive a log challenge. This *Commentary* proposes several principles for privilege logs in an effort to address these challenges move the law forward in a reasoned and just way.

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<sup>13</sup> See *infra* Section III.

<sup>14</sup> FRCP 26(f)(3)(B).

<sup>15</sup> See, e.g., *Everlast World's Boxing Headquarters Corp. v. Ringside, Inc.*, No. 13-2150, 2015 U.S. Dist. LEXIS 3049 (D. Kan. Jan. 12, 2015) (ordering Defendant to supplement and redo certain aspects of its privilege log to address deficiencies).



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## ii. **FRCP 45(e)(2)(A) – Non Party Privilege Assertions.**

Substantially the same to FRCP 26(b)(5)(A), FRCP 45(e)(2)(A) governs obligations to a non-party subpoena recipient to assert privilege or protection, stating:

### *(2) Claiming Privilege or Protection.*

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

Courts have treated FRCP 45(e)(2)(A) to the same standards as FRCP 26(B)(5)(A) and parties traditionally create a privilege log to comply.<sup>16</sup>

## iii. **FRCP 26(b)(1) – Proportionality.**

Historically, and prior to the 2015 FRCP amendments, the courts singularly used a burden and expense analysis to determine appropriate privilege logging efforts.<sup>17</sup> In 2015, the Federal Rules were amended to add the concept of “proportionality” to the scope of discovery under Rule 26(b)(1).<sup>18</sup> Specifically, the rule now states that “the scope of discovery” includes “any nonprivileged matter that is relevant to any party’s claim or defense and *proportional* to the needs of the case . . . .”<sup>19</sup> The rule further provides factors to determine proportionality, include:

[C]onsidering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.<sup>20</sup>

FRCP 26(1).

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<sup>16</sup> See *infra* Section III.B.

<sup>17</sup> *Infra* Section III.A.

<sup>18</sup> 2015 Advisory Comm. Note to Rule 26(b)(1); see also JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY, 6 (Dec. 31, 2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> (“Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality. . . .”).

<sup>19</sup> FRCP 26(b)(1) (emphasis added).

<sup>20</sup> FRCP 26(b)(1).

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Following the 2015 Amendments, few courts have discussed directly the application of these factors to privilege logs. Application of proportionality to the privilege logging process therefore raises questions and concerns, including the relationship between Rule 26(b)(1) and Rule 26(b)(5)(A) and the parties' obligations and burdens when privilege log disputes arise. These and other issues are address below, in Section III.A.

#### iv. **FRCP 26(g) – Discovery Certifications.**

Federal Rule of Civil Procedure 26(g) requires an attorney's signature that a "reasonable inquiry" has been conducted in issuing or responding to a discovery demand. Parties and attorneys have been sanctioned under 26(g) for failing to conduct this "reasonable inquiry" in accordance with the rules.<sup>21</sup>

It is unclear whether Rule 26(g) applies, or should apply, to the production of privilege logs. Are the production of a privilege logs akin to a document production or other discovery disclosure that require signature under Rule 26(g)? Should one attorney ultimately be responsible for the entire content of the log (logs that include thousands and thousands of documents that could take massive team efforts to compile), or, alternatively, should an attorney's signature suggest a "reasonable inquiry" was made into the privilege log making process, if not each and every privilege assertion? Certifications have been required in some cases where a categorical long was used, but not explicitly under Rule 26(g).<sup>22</sup> [*These questions are posed for purposes of discussion at the WG1 Conference.*] We explore this concept further in Section IV.A.2.

#### v. **Other Federal Rules that May be Implicated – FRCP 1 and 29 and FRE 502.**

##### a. FRCP 1- just, speed, efficient.

FRCP 1 emphasizes the overarching Scope and Purpose of the Rules is to govern civil procedure in federal courts and states the rules "should be construed, administered, and employed by the court and the parties to secure the *just, speedy, and inexpensive* determination of every action and proceeding."<sup>23</sup>

As discussed in this *Commentary*, the time, expense and effort to create privilege logs in the traditional document-by-document manner has increased dramatically with advent of ESI and the exponential increase in the size of discoverable information. Further, many courts and

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<sup>21</sup> See, e.g., *DR Distribs., LLC v. 21 Century Smoking, Inc.*, 2021 U.S. Dist. LEXIS 9513 (N.D. Ill 2021) (sanctioning defendants and their attorney when the party failed to properly issue litigation holds and preserve relevant information, citing, Rule 26(g) (among other reasons) as justification for sanctions against the attorney when the court found he failed to conduct a reasonable inquiry before signing disclosures).

<sup>22</sup> See *infra* Section III.B.

<sup>23</sup> FRCP 1 (emphasis added).

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commentators question whether the information provided by many parties in privilege logs is useful.<sup>24</sup>

Courts have used Rule 1 in other discovery matters to justify decisions that they believe secure just, speedy and inexpensive determinations.<sup>25</sup> With the burdens, expenses, challenges and delays privilege log efforts and disputes cause, Rule 1 should be a guidepost for the courts to address and resolve these issues.

b. FRCP 29 – party stipulation.

Many of the proposals suggested by this *Commentary* would be subject to party negotiation. Despite whether or not the pertinent jurisdiction has model rules or robust case law on what is needed for privilege logs, the parties are free to stipulate as to what they are willing to do and accept in connection with the format of a privilege log. FRCP 29 states that “[u]nless a court orders otherwise, the parties may stipulate that...other procedures governing or limiting discovery be modified.” This means that the parties are free to devise the privilege log strategy that is best for their instant case, and the court should abide by the terms of that agreement.

c. FRE 502.

Federal Rule of Evidence 502 clarifies privilege waiver rules in Federal Court and sets out mechanisms whereby parties can obtain further protections against the waiver of attorney client privileged information and information protected as attorney work product.<sup>26</sup> Naturally, waiver rules are relevant when parties conduct privilege reviews, assert various privileges using privilege logs, and defend against any claims of waiver included, or not included on a log.

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<sup>24</sup> See, e.g., *Chevron Corp. v. Weinberg Grp.*, 286 F.R.D. 95, 99 (D.D.C. 2012) (“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.”); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008) (“In actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or in camera review of the documents themselves.”). See also The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 155 (2016) (“[T]he current method used by most parties for identifying privileged documents and for creating privilege logs appears to be a broken process.”); Report of the Special Committee on Discovery and Case Management in Federal Litigation of the New York State Bar Association, June 23, 2012, at 73 (“Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive case, especially one with many e-mails and e-mail strings.”).

<sup>25</sup> See, e.g., *Duffy v. Lawrence Mem. Hosp.*, No. 2:14-cv-2256, 2017 U.S. Dist. LEXIS 49583 (D. Ka. Mar. 31, 2017) (finding, among other reasons, that Rule 1 supports Defendant’s request for a protective order to randomly sample over 15,000 records, rather than manually review them, to comply with the court’s discovery order).

<sup>26</sup> Fed. R. Evid. 502. See also The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 103 (2016); The Sedona Conference, *Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders*, 23 SEDONA CONF. J. 8 (forthcoming 2022).

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Rule 502 is broken into several sections. Rule 502(a) governs intentional waiver. Rule 502(b) governs inadvertent disclosure and is sometimes referenced as the “default” rule, applying to inadvertent waivers when no other rule is implicated.<sup>27</sup> Rule 502(d) permits, by court order, a protection against waiver that is stronger than 502(b), in that the parties can change the standard of care required for review.<sup>28</sup> Rule 502(e) permits agreement against waiver, as limited only to the parties in that agreement, unless incorporated in another court order under 502(d).

As a corollary to privilege log arguments, commentators, including Sedona, have urged parties continue to use 502(d) to protect against disclosure in a matter. They have argued the use of a 502(d) or 502(e) clawback would help reducing the burden of privilege review and privilege logging.<sup>29</sup> The reasoning supporting the use of 502 is that any such inadvertent disclosure (whether or not supported by a log) would not necessitate waiver with the appropriately scoped Rule 502 order. Thus, should a court agree to the merits of a privilege, Rule 502(d) would allow for a party to clawback its privileged material that (absent a 502(d) order) could potentially have been waived.

While not directly impacting the format of any logging, Rule 502, particularly 502(d) can be an additional shield against waiver during the otherwise time consuming privilege logging process.

#### **vi. Federal District and State Local Rules, Standing Orders.**

In the absence of more specific direction in the federal rules, some federal jurisdictions have adopted local rules to address privilege logs.<sup>30</sup>

For example, SDNY and EDNY’s local rule states, “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.”<sup>31</sup> As another example, the District of Connecticut Rule 26(e) explicitly states that parties need not log “written or electronic communications between a party and its trial counsel after commencement of the action and the work product material created after commencement of the action.”<sup>32</sup>

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<sup>27</sup> The Sedona Conference, Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders, 23 SEDONA CONF. J. 12 (forthcoming 2022).

<sup>28</sup> The Sedona Conference, Commentary on Protection of Privileged ESI, 17 SEDONA CONF. J. 103-04 (2016).

<sup>29</sup> *Id.* at 104 (“In sum, courts may enter orders that provide greater protection than is provided in subsections (a) and (b) of Rule 502. By reducing the risk of waiver, such an order provides parties and their counsel with a blank canvas to design and implement creative mechanisms to limit the risk of waiver for the disclosure of privileged information and reduce the tremendous cost of identifying and logging privileged documents.”).

<sup>30</sup> See, e.g., 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* 7-10 (Aug. 4, 2020), available at <https://www.lfcj.com/modernize-privilege-log-requirements.html> (providing a survey of various local rules of privilege logs).

<sup>31</sup> S.D.N.Y. Civ R. 26.2(c).

<sup>32</sup> D. Conn. R. 26(e).

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Some states have also enacted their own rules governing privilege logging. Recently, New York State adopted revised Uniform Rules for the New York Supreme Court and County Court that requires “meet and confer at the outset of the case” and affirmatively includes the use of categorical logs in the privilege log discussions.<sup>33</sup> These changes to the State Courts Uniform Rules were adopted and influenced from similar rules in the New York State Supreme Court’s Commercial Division.<sup>34</sup>

Some judges are providing standing orders on the issue of what they expect by way of privilege logs, or what may be excluded from privilege logs. As one example, Judge Carr in the N.D. Ohio states, “Where the [discovery] dispute involves claims of attorney-client privilege or attorney work product, it is not necessary, unless I order otherwise, to prepare and submit a privilege log.”<sup>35</sup>

Even where not mandated, e-discovery committees in jurisdictions may provide model orders to encourage the use of alternative logging procedures. For example, the Seventh Circuit’s Electronic Discovery Committee has a model privilege log order that encourages metadata-only logging, with the option for categorical logging for certain categories a party deems burdensome to provide on a metadata-only log.<sup>36</sup> The Southern District of New York’s Pilot Program for Complex Civil Cases made an explicit recognition that communications with party counsel and work product created after the commencement of an action did not need to be logged.<sup>37</sup>

## **B. Previous Sedona Publications.**

In several prior Sedona publications, the Sedona Conference has touched upon privilege logging issues:

- The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 101-04, 106, 118, 142, 147-48, 150, 154 – 167, 172, 188-89, (2016) (discussing the history of privilege logging and logging practices, while

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<sup>33</sup>N.Y. Comp. Codes R. & Regs. Tit. 22 § 202.20-a.

<sup>34</sup> David Ferstendig, *Significant Amendments to Uniform rules*, NYSBA (Feb. 8, 2021), available at <https://nysba.org/significant-amendments-to-uniform-rules/>; David Ferstendig, *Amendments to Uniform Rules*, NYSBA (Mar. 23, 2021), available at <https://nysba.org/amendments-to-uniform-rules/>

<sup>35</sup> Judge Carr Civil Cases - Case Management Preferences, <https://www.ohnd.uscourts.gov/judge-carr-civil-cases-case-management-preferences> (last accessed Sep. 7, 2021). [LOOK for additional cites/examples for next round of drafting.]

<sup>36</sup> Seventh Circuit Council on eDiscovery and Digital Information, *Model Discovery Plan and Privilege Order*, eDiscovery Council.com (available at <https://www.ediscoverycouncil.com/content/model-discovery-plan-and-privilege-order>).

<sup>37</sup> SDNY Pilot Program for Complex Civil Cases - [https://www.nysd.uscourts.gov/sites/default/files/pdf/Complex\\_Civil\\_Rules\\_Pilot\\_14.11.14.pdf](https://www.nysd.uscourts.gov/sites/default/files/pdf/Complex_Civil_Rules_Pilot_14.11.14.pdf).



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addressing privileges and protection issues, including recommending processes, tools and technologies to reduce the cost and burden of logging).

- The Sedona Principles, Third Edition: *Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 45, 67, 80-83, 90, 92, 168 (2018) (discussing updates to Sedona Principles, including recommendations when considering logging procedures, as well as recommending parties discuss privilege logging issues early and consider alternative logging approaches when necessary).
- The Sedona Conference, *Cooperation Proclamation* (2008) (discussing how cooperation is consistent with zealous advocacy and FRCP Rule 1, this proclamation encourages parties to work together to resolve discovery issues and its principles are equally applicable to privilege logs).
- The Sedona Conference, *Commentary on Rule 45 Subpoenas to Non-Parties*, Second Edition, 22 SEDONA CONF. 1, 60, 82 (2021) (providing an overview of Rule 45 subpoenas to non-parties, the article also discusses the requirement to provide a privilege log to comply, and notes that logging can be a factor in the burden to non-parties and in shifting expenses).
- The Sedona Conference, *Commentary on the Effective Use of Federal Rules of Evidence 502(d)*, 23 SEDONA CONF. J. 1, 19, 48-49 (2021) (discussing the interaction of Rule 502, and in particular, 502(d) clawback orders, with the privilege logging process).

Although not a Sedona publication, the Facciola-Redgrave framework has long been cited by Sedona as one publication that proposed alternative paths for logging and strongly encouraged cooperation and judicial involvement.<sup>38</sup> The publication encourages parties to use categorical indices of privileged documents,<sup>39</sup> leveraging principles of proportionality and making determinations through incremental cooperation between the parties.

### **C. Initiatives by Other Groups.**

Various groups and organizations have spent considerable time evaluating potential solutions for the modern day predicaments caused by the burden of preparing or assessing privilege logs with the explosion of electronic discovery and variation in jurisdictional expectations. In August 2020, the Lawyers for Civil Justice submitted suggestions for rule changes to the Advisory Committee on Civil Rules. Their report identified the patchwork of efforts advanced by different

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<sup>38</sup> Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Ct. L. Rev. 19 (2010).

<sup>39</sup> See *id.* for full discussion of application of the framework, including the potential for parties to request affidavits to support the evidentiary context for each withheld category of documents.

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courts across the country to embrace flexibility in the privilege logging process.<sup>40</sup> The LCJ provided an additional extensive proposal to amend the rule, along with proposed text for a rule change, to the Advisory Committee in August 2021.<sup>41</sup>

The Judicial Conference Advisory Committee for Civil Rules has asked for, and received, over 500 pages of comments in advance of its Fall 2021 meeting as to whether a rule change will have a positive effect on the practice of preparing and receiving privilege logs.<sup>42</sup> The Federal Practice Task Force of the ABA Section of Litigation was also involved in collecting comments from practitioners on the use of privilege logs in federal court litigation, to advise the Advisory Committee as it evaluates potential rule changes. The Advisory Committee has also recorded the conversations of two separate meetings devoted to discussing issues with privilege logs in advance of the Fall 2021 meeting.<sup>43</sup>

Based on the comments received and the discussions from those meetings, the Advisory Committee recently released its draft Agenda Book for its October 5, 2021 meeting, which identifies some possible rule approaches under discussion to address the privilege logging process. While tentative in the proposals discussed, it is likely the Committee will be looking at issues surrounding specific privilege log topics, including (1) whether to amend FRCP 26(f)(3)(D) and FRCP (16)(b) to incorporate early discussion and planning on the method to be used when preparing a privilege log and discussion of rolling logs, (2) whether additional discussion of categorical logs will provide courts flexibility to no longer mandate document-by-document logs, and (3) whether acknowledgement of certain exclusions from logging as presumptively proper would be possible.<sup>44</sup> The Committee expects to be gathering additional information in advance of that meeting.

The Electronic Discovery Reference Model (EDRM) has prepared a draft Streamlined Privilege Log Protocol, promoting it as an alternative to traditional privilege logging. It combines early rollout of metadata based logs as a first step, with more substantive information for a later selected sample of log entries.<sup>45</sup> As another example of groups endeavoring to lessen the burden of privilege logs, the University of Colorado's Institute for the Advancement of the American Legal System launched a project to establish set discovery protocols to address a wave of anticipated insurance cases as a result of the COVID-19 pandemic. In addition to facilitating other

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<sup>40</sup> Lawyers for Civil Justice, Suggestion for Rulemaking to the Advisory Committee on Civil Rules, 7-10 (August 4, 2020).

<sup>41</sup> [https://www.uscourts.gov/sites/default/files/2021-10-05\\_civil\\_rules\\_agenda\\_book\\_final\\_9.16\\_1\\_0.pdf](https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_9.16_1_0.pdf), at pages 244-247.

<sup>42</sup> [https://www.uscourts.gov/sites/default/files/invitation\\_for\\_comment\\_on\\_privilege\\_log\\_practice\\_0.pdf](https://www.uscourts.gov/sites/default/files/invitation_for_comment_on_privilege_log_practice_0.pdf); [https://www.uscourts.gov/sites/default/files/comments\\_on\\_privilege\\_log\\_practice.pdf](https://www.uscourts.gov/sites/default/files/comments_on_privilege_log_practice.pdf).

<sup>43</sup> [https://www.uscourts.gov/sites/default/files/2021-10-05\\_civil\\_rules\\_agenda\\_book\\_final\\_9.16\\_1\\_0.pdf](https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_9.16_1_0.pdf), at pages 198-209.

<sup>44</sup> [https://www.uscourts.gov/sites/default/files/2021-10-05\\_civil\\_rules\\_agenda\\_book\\_final\\_9.16\\_1\\_0.pdf](https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_9.16_1_0.pdf), at pages 186-193.

<sup>45</sup> <https://edrm.net/wiki/edrm-streamlined-privilege-log-protocol/>



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discovery efficiency, the protocols also proposed less burdensome logging requirements, including categorical logs.<sup>46</sup>

## II. REQUIREMENTS, BURDENS, AND CHALLENGES WITH RULE 26(B)(5)(A)

### A. Requirements.

#### i. What does the Rule require?

The current text of FRCP 26(b)(5)(A) reads:

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.

Prior to 1993, there was nothing in the FRCP about privilege logging, though some District Courts had requirements/local rules for logs. When subparagraph (5) was added to the Rule 26(b) in 1993, the [\*Notes of the Advisory Committee\*](#) explained that a specific format was not required and could vary based on the needs of the case:

Paragraph (5) is a new provision. 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.

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

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<sup>46</sup> See Brittany K. T. Kauffman & Brooke H. Meyer, New Pandemic Discovery Protocols for Business Interruption Insurance Litigation, 50 COLO. LAW. 51, 54-55 (2021).

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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.

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. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items “otherwise discoverable.” 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 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).

The explicit intent of the rule change was to reduce the need for in camera examination of documents. The Committee Notes also acknowledge that the obligation associated with claiming a privilege is related to the breadth of the underlying document requests.

## **ii. Practically, what does this mean?**

The most common way parties undertake satisfaction of the requirements of FRCP 26(b)(5)(A) is by creating document-by-document logs. A standard document-by-document log typically requires, for each document, the Bates number, the type of document, date sent or last

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modified, author, recipients, a brief narrative describing the subject matter or communication, and which privilege(s)/doctrine(s) are asserted.<sup>47</sup> Attorneys are typically identified in the entry. Some document-by-document logs may include additional information like custodians, job titles of the persons on the log, RFPs that the document is responsive to, or a statement that the privilege has not been waived.<sup>48</sup>

The required format for a log may be determined by rule or agreement. Local/judge rules require or permit certain log formats. Different jurisdictions have different rules, from explicitly permitting categorical logs to explicitly requiring document-by-document logs. For example, S.D.N.Y. Local Rule 26.2 reads “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. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form.”<sup>49</sup> (Emphasis added.) The Commercial Division of the Supreme Court of New York adopted Rule 11-b of Section 202.70(g) which establishes a preference for categorical privilege logs.<sup>50</sup> The United States District Court Northern District of California Guidelines for the Discovery of Electronically Stored Information Guideline 2.02 requires parties to discuss at the 26(f) conference, “Opportunities to reduce costs and increase efficiency and speed, such as . . . using agreements for truncated or limited privilege logs . . .”<sup>51</sup> Similarly, the Middle District of Tennessee’s Administrative Rule 174-1, ¶ 8(b) provides an expectation that the parties will “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).”<sup>52</sup>

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<sup>47</sup> “[T]he customary contents of a privilege log” include “a description of the type of document[,] . . . its topic, date, the writer and recipient, and an explanation as to why the matter is deemed to be privileged (which privilege was being invoked and on what grounds).” “‘Customary contents’ of a privilege log include a proper date range and the writer and recipient of the covered communications.” *3d Eye Surveillance, LLC v. United States*, 2021 US Claims LEXIS 1747, at \*10 (Fed. Cl. Aug. 27, 2021), citing *Yankee Atomic Elec. Co. v. United States*, 54 Fed. Cl. 306, 309 (2002).

<sup>48</sup> “Therefore, the Court will require the Defendants to submit new, more descriptive logs to Plaintiffs containing the following information: (1) the identity of each person listed as author and their role in preparing the documents; (2) the identity of each recipient, the role in which they received the documents and whether they are a party or non-party; (3) a more elaborate description of the specific document, or specific portion of the document, which is claimed to be protected by any privilege, without revealing the substance of the privileged communication; (4) identify any Bates stamp number or any other identifiable notation; and, (5) identify the type of privilege being asserted (i.e., attorney-client privilege, work product, deliberative process, executive privilege).” *Trudeau v. New York State Consumer Prot. Bd.*, 237 F.R.D. 325, 335 (N.D.N.Y. 2006).

<sup>49</sup> [https://nysd.uscourts.gov/sites/default/files/local\\_rules/rules-2018-10-29.pdf](https://nysd.uscourts.gov/sites/default/files/local_rules/rules-2018-10-29.pdf). See *Auto Club of New York, Inc. v. Port Authority of New York and New Jersey*, 297 F.R.D. 55, 59 (S.D.N.Y. 2013) (Per Local Rule 26, 2, “a 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.”).

<sup>50</sup> <https://www2.nycbar.org/pdf/report/uploads/20072891-GuidanceandaModelforCategoricalPrivilegeLogs.pdf>.

<sup>51</sup> [https://www.cand.uscourts.gov/filelibrary/1117/ESI\\_Guidelines-12-1-2015.pdf](https://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines-12-1-2015.pdf).

<sup>52</sup> <https://www.tnmd.uscourts.gov/sites/tnmd/files/AO%20174-1%20entered%209-12-18.pdf>.

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Parties sometimes address privilege log alternatives through agreement, but agreement may not be possible, or may need to be amended as the document review and production proceeds and the parties develop a better understanding of the sources of discovery and the potential privilege issues in the case. Even with agreements as to process/form, requesting parties may continue to request for additional information beyond what is on the log and challenge log entries.

In larger, complex cases, privilege log format often is addressed through agreed or ordered Protocols/Case Management Orders in conjunction with other initial discovery stipulations and orders.

## **B. Burdens and Challenges.**

Privilege log challenges are often expensive and time-consuming for both parties. There are several factors that can cause this, including the sheer volume of ESI, timing pressures, the content and format of the log, and concerns about waiver. In addition, the burdens and challenges facing the parties may spill over to the courts, where requests for in camera review of documents to resolve privilege disputes can tax judicial resources.

### **i. Volume and timing.**

Since 1993, there has been a dramatic rise in the volume of email and other electronic forms of communications. The sheer volume of data at issue can make privilege logging expensive and time-consuming for the producing party.

Because preparing a privilege log can be time consuming and expensive, many producing parties may delay work in the hopes that the matter will be resolved. Often the privilege log is addressed after the substantive review completes or winds down. However, in cases with sizeable “rolling” productions, protocols are often put in place by agreement or order to have privilege logs “rolling” sequentially with the productions. This can facilitate earlier identification and resolution of concerns over the format, level of specificity, and substance of the privilege claims. Parties may want to resolve privilege log disputes prior to taking key depositions or filing or responding to critical motions, in the event that the privilege log challenge results in the production of additional documents. In addition, parties must be careful not to unreasonably delay the production of an adequate privilege log, lest the court consider a waiver as a result.<sup>53</sup>

### **ii. Content of the log.**

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<sup>53</sup> See, e.g., *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005).

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Many elements of a common document-by-document privilege log can pose their own burdens and challenges.

a. Identifying senders/recipients – privileged parties.

Issues arise with corporate or institutional defendants. Specifically, there may be questions of who is included within the control group of the “party” within the ambit of privilege, and who is a third-party. Additionally, there may be a request to provide corporate affiliations/positions for individuals listed on the log. Although it may be relatively straightforward for a corporate party to generate a list of names and job titles of the individuals listed on the log, this task becomes far more complex if the documents on the log span a great range of time. It requires consulting multiple databases to determine what Ms. X’s title was in June of 2003, etc.

Parties typically need a way to identify attorneys on the log, either by designating attorneys with an asterisk or “Esq.,” or by providing an attorneys list.<sup>54</sup> In-house attorneys representing corporations or institutions may wear multiple hats. Asserting privilege based on an in-house attorney may give rise to a question of whether they are providing business or legal advice in the communication.

There may also be communications on the log for which no attorney is listed, and so additional facts about that communication may have to be provided. Although courts recognize that a document may be privileged even if an attorney is not a direct sender or recipient of a piece of correspondence, without some other indicia on the log indicating these documents were prepared for the purpose of obtaining legal advice or in anticipation of litigation, there is a question as to why they should be considered privileged.<sup>55</sup>

b. Basis of privilege.

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<sup>54</sup> *In re Haynes*, 577 B.R. 711, 737, 2017 Bankr. LEXIS 2265, \*43 (Bankr. E.D. Tenn. 2017) (“The most glaring defect relates to the Court’s repeated direction to UpRight Law to provide information about the roles of the individuals identified in the logs and information about who is the client and who is the attorney. Such information is necessary because the party here is a law firm whose business practices are at the center of the ultimate issues before the Court. . . . Because UpRight Law has refused to identify the attorney and client (or the source of legal advice shared in interclient communications), the Court finds that UpRight Law has failed to provide adequate information under Rule 26(b)(5)(A).”)

<sup>55</sup> *See, e.g., Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28, 43 (E.D.N.Y. 2013) (“Most of the documents on their privilege log were sent from a non-attorney—usually Ms. Mellon or Ms. Bakke—and there is no explanation offered for why their writings should be considered attorney work product.”). *Norton v. Town of Islip*, CV 04-3079 (PKC) (SIL), 2017 WL 943927 (E.D.N.Y. Mar. 9, 2017). *United States v. Davita, Inc.*, 301 F.R.D. 676, 682 (N.D. Ga. 2014) (“Thus, the lack of attorneys on either side of an otherwise confidential corporate communication is not fatal to a claim of privilege. The Court, rather, must examine the claims of privilege individually to ascertain whether the documents are entitled to attorney-client protection.”).



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Producing parties typically identify the type of privilege(s) under which a document or category of document is being withheld, i.e., Attorney-Client, Attorney Work Product, or other privileges. However, merely identifying the nature of the claimed privilege(s) may not fulfill the requirement to provide information needed to assess the claimed privilege.<sup>56</sup> For example, it may be necessary to add information to log entries to substantiate claims of work product or common interest privileges.<sup>57</sup>

c. Subject matter.

Producing parties often include some information about the subject matter of the documents as to which privilege is claimed. The extent to which courts require subject matter descriptions and the level of specificity required varies, although the touchstone appears to be whether the details provided are useful to assess the claim of privilege.<sup>58</sup> For example, the Second Circuit and Third Circuit have held “ cursory ” descriptions, such as “ Fax Re: DOL Findings,” “ Fax: Whistleblower article,” “ daily log entries,” or “ notes/correspondence,” are insufficient.<sup>59</sup> By contrast, logs that specifically state that the document includes

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<sup>56</sup> *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 664 (S.D. Ind. 1991) (requiring the log to list, for each separate document, the authors and their capacities, the recipients (including copy recipients) and their capacities, the subject matter of the document, the purpose for its production, and a detailed, specific explanation of why the document is privileged or immune from discovery); *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 641-642 (S.D. N.Y. 1991) (index including date, addressor, addressee, document type, and grounds for nondisclosure found insufficient).

<sup>57</sup> See, e.g., *Pritchard v. Dow Agro Scis.*, 263 F.R.D. 277 (W.D. Pa. 2009) (log must specify whether the claim is one for factual versus opinion work product); *Companion Prop. & Casualty Ins. Co.*, Civil Action No. 3:15-cv-01300-JMC, 2016 WL 6539344 (D.S.C. Nov. 3, 2016) (for categorical log, party ordered to produce “ a list of anticipated litigation(s) for the documents withheld on the basis of work product protection dated before February 14, 2014, and with respect to each item on the list, an identification of the point in time that the litigation was anticipated, the facts that caused Plaintiff to anticipate litigation, and a general description of the types of and categories of documents that were created in anticipation of that litigation.”); *3d Eye Surveillance, LLC v. United States*, 2021 US Claims LEXIS 1747, at \*10 (Fed. Cl. Aug. 27, 2021) (requiring description of the common interests shared among participants to communications claimed to fall within common interest privilege) (citing *Yankee Atomic Elec Co. v. United States*, 54 Fed. Cl. 306, 309 (2002)).

<sup>58</sup> See, e.g., *Johnson v. Ford Motor Co.*, 309 F.R.D. 226, 233-34 (S.D. W.Va. 2016) (noting that “ courts have not been entirely consistent about the level of detail that is necessary to comply with Rule 26(b)(5)(A) ”); *Spilker v. Medtronic, Inc.*, No. 4:13-CV-76-H, 2015 WL 1643258, at \*6 (E.D.N.C. Apr. 13, 2015) (“ “ When a party relies on a privilege log to assert these privileges [i.e., attorney-client privilege and work product protection], the log must as to each document ... set [ ] forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed. ” ) (quoting *Rohlik v. I-Flow Corp.*, No. 7:10-CV-173-FL, 2012 WL 1596732, at \*4 (E.D.N.C. May 7, 2012)); *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust*, 230 F.R.D. 398, 406 n. 14 (D. Md. 2005) (“ standard for testing the adequacy of the privilege log is whether, as to each document, it sets forth facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed. ” ); *Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 662 (D. Colo. 2000) (finding assertion of attorney-client privilege inadequate where the party did not identify the lawyers involved in the conversation, the people present during the conversation, or a “ description of the nature of the communication sufficient to enable plaintiffs to assess the applicability of the claimed privilege ” ).

<sup>59</sup> See *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473-74 (2d Cir. 1996) and *R.J. Reynolds Tobacco v. Philip Morris, Inc.*, 29 F. App'x 880, 882 (3d Cir. 2002). See also *In re Gen. Instrument Corp. Sec. Litig.*, 190

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communications of legal advice on an issue have passed muster.<sup>60</sup> And, for purposes of a claim of common interest rule, it may be sufficient to identify the parties to the communication on the theory that the fact that the documents are discoverable material is enough to show that the subject matter is relevant to the parties' claims and defenses to support application of the common interest rule.<sup>61</sup>

As producing parties have moved towards automating drafts of privilege logs from document databases, some have included metadata filenames in the logs. This information can be useful, but usually will not be sufficient to substitute for information needed to assess the basis for the claim of privilege, particularly where the filenames are cryptic or technical and cannot be explained even by the author/witness.<sup>62</sup>

d. Degree of specificity.

As shown above, there is no clear standard on how specific a log must be apart from the general requirement that the withholding party must provide enough information to “enable other parties to assess the claim” of privilege. This can raise concerns for both requesting parties—who may have to expend time and resources pressing for more details when presented with a conclusory log—and producing parties—who may have to expend time and resources responding to knee-jerk demands for more specific logs. The specificity of logs may also raise concerns that the log itself discloses privileged information (although this concern is

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F.R.D. 527, 530 (N.D. Ill. 2000) (finding descriptions such as “Explanation re: Primestar Relationship,” “NLC Employee Stock Options,” and “Filing with SEC,” were not “even marginally specific” to allow assessment of claims of privilege) and *Norton v. Town of Islip*, CV 04-3079 (PKC) (SIL), 2017 WL 943927 (E.D.N.Y. Mar. 9, 2017). (finding descriptions insufficient where they were largely limited to unadorned phrases such as “Norton Litigation,” “Law Enforcement,” and “Litigation” because “the log fails to explain whether [the withheld documents] were created for the purposes of obtaining legal advice, contain legal advice, sought out legal advice, or were prepared in anticipation of litigation” with respect to the identified issues).

<sup>60</sup> See, e.g., *Spilker v. Medtronic, Inc.*, No. 4:13-CV-76-H, 2015 WL 1643258, at \*6 (E.D.N.C. Apr. 13, 2015) (finding log sufficient where it provided descriptions such as “Memo made at direction of counsel and sent to counsel for purpose of seeing legal advice regarding medical procedure”, “Email requesting advice of counsel regarding FDA request,” and “Email requesting advice of counsel regarding FDA request”); *Vaughan v. Celanese Americas Corp.*, No. 3:06CV104-W, 2006 WL 3592538, at \*3 (W.D.N.C. Dec. 11, 2006)” (finding log sufficient where it provided descriptions such as “Email string containing confidential communications with outside counsel and in-house counsel regarding employee benefits and labor issues in VECTRAN and PBI transactions” and “Email string containing confidential communications with outside counsel and in-house counsel regarding Kuraray's proposal regarding treatment of benefits in Vectran transaction”).

<sup>61</sup> See, e.g., *Elat v. Ngoubene*, 2013 WL 4478190 (D. Md. Aug. 16, 2013) (“It is immaterial that Defendants did not state the documents’ general subject matter because, as discoverable material in this case is necessarily ‘relevant to a[] party’s claim or defense,’ these communications also must be ‘relevant to a[] party’s claim or defense,’ i.e., communications that would be covered by the common interest rule, if it applies”).

<sup>62</sup> *Johnson v. Ford Motor Co.*, 309 F.R.D. 226, 233-34 (S.D. W.Va. 2016) (finding log insufficient when it included “enigmatic file names” that the author of the document could not understand, such as “DI\_UA.xls,” “Appendix 1 Ford.pdf,” “Appendix 14 Toyota.pdf,” and “Charts.xls;” the file names “shed no light” on claim that the documents contained privileged information).



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tempered by Rule 26(b)(5)(A)(ii)'s instruction that the withholding party is not required to reveal "information itself privileged and confidential").

Because there is no clear standard on how much specificity required, this creates a tension between parties and can result in excessive challenges to the sufficiency of a privilege log. As with other aspects of the discovery process (such as document requests and search terms), getting to the "right" level of specificity can be facilitated through early discussion among the parties and the court to specify what type and level of specificity to use for the privilege logs and a process for requesting parties to request for more specific information, but protect a producing party from abuse. For example, the parties and court may benefit from early production of a sample log and a time-limited process for the parties to meet and confer on any concerns about the log and present disputes to the court on the sufficiency of the nature of the information provided in the log. Thereafter, if either party perceives continued obstruction or excessive challenges, that complaint can be addressed to the judicial officer supervising discovery.

### **iii. Format of the log.**

Although a document-by-document privilege log may be the safest method for satisfying the requirements of Rule 26(b)(5)(A), as explained above, it also arguably is the most burdensome.

### **iv. Waiver.**

Failure to provide a privilege log that sufficiently substantiates the claim of privilege may lead to waiver of privilege for the withheld materials, although most courts offer the producing party an opportunity to cure defects in the log.<sup>63</sup> Parties may be reluctant to do a categorical log out of concern that, if a court finds a description of an entire category is insufficient, the privilege will be lost for all materials withheld in that category.<sup>64</sup> A more common result,

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<sup>63</sup> See, e.g., *Johnson v. Ford Motor Co.*, 309 F.R.D. 226, 234–35 (S.D.W. Va. 2015) ("When a party provides an inadequate or untimely privilege log, the Court may choose between four remedies: (1) give the party another chance to submit a more detailed log; (2) deem the inadequate log a waiver of the privilege; (3) inspect in camera all of the withheld documents; and (4) inspect in camera a sample of the withheld documents.") (citations omitted); *Meade v. Gen. Motors, LLC*, 250 F. Supp. 3d 1387, 1396 (N.D. Ga. 2017) (finding claims of privilege waived where producing party's log used "broad categorical descriptions that were uninformative and misleading," despite prior instructions from court to substantiate claims of privilege).

<sup>64</sup> See, e.g., *Neelon v. Krueger*, 2015 U.S. Dist. LEXIS 29146, at \*12 (D. Mass. Mar. 10, 2015) ("The magistrate judge's ruling that the [categorical] privilege log provided by Plaintiff provided inadequate detail regarding the putatively privileged documents and that he waived his privileges and protections as to such documents (except as to presumptively privileged documents) was not clearly erroneous and is AFFIRMED, except as provided below."); *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69 (S.D.N.Y. 2006) ("As explained in the introductory section of this order, I previously granted the plaintiffs' request to submit a categorical log for the foreign prosecutions documents, but I specifically ruled that if I were to find any categorical justification inadequate, all documents within that category would be ordered produced. . . . [I]n this case, a more detailed log would be not only of a material benefit to the defendants, but, in fact, it would be absolutely necessary for them to assess many of the plaintiffs' claims. The vast majority of the categorical justifications provided by the plaintiffs are inadequate, and, as explained below, all

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however, is that a court will require the producing party to provide more detailed sub-categories or document-by-document information.<sup>65</sup> When waiver is found, it generally is imposed as a sanction for bad faith, abusive, or recalcitrant behavior with respect to production of a sufficient log.<sup>66</sup>

#### v. *In camera* review.

In camera review of documents remains a time-consuming process for courts, and there is a sense that the need for *in camera* examination of documents has not decreased. Whether to conduct an *in camera* review lies within the court's discretion and should not be conducted if review is not warranted.<sup>67</sup> The decision on whether to conduct in camera review turns on many factors including the needless use of the court's resources.<sup>68</sup> To reduce the burden and to

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corresponding documents must be produced in their entirety.”); *McNamee v. Clemens*, No. 09 CV 1647 SJ, 2013 WL 6572899, at \*3 (E.D.N.Y. Sept. 18, 2013) (Waiver because of failure to submit a timely adequate privilege log; first log submission was a categorical log and second log submission was itemized, but did not describe subject of privileged documents adequately).

<sup>65</sup> See, e.g., *Coventry Cap. US LLC v. EEA Life Settlements Inc.*, No. 17CIV7417VMSLC, 2020 WL 7383940, at \*8 (S.D.N.Y. Dec. 16, 2020), objections overruled, No. 17 CIV. 7417 (VM), 2021 WL 961750 (S.D.N.Y. Mar. 15, 2021) (parties agreed in stipulated discovery order to produce categorical logs but then a party complained that the information provided was insufficient so court ordered producing party to provide names of attorneys involved in any of the communications, and identify which logged communications were sent by those attorneys, before the parties met-and-conferred to address any open issues); *EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.*, No. 3:12-CV-00463, 2018 WL 3628890, at \*1 (M.D. Tenn. Mar. 29, 2018), *aff'd sub nom. EPAC Techs., Inc. v. Thomas Nelson, Inc.*, No. 3:12-CV-00463, 2018 WL 3322305 (M.D. Tenn. May 14, 2018) (categorical log found insufficient by court because of party's failure to provide metadata for each document included within a category so party ordered to amend it).

<sup>66</sup> See, e.g., *Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 126 n.2 (2007) (“While an inadequate privilege log may be the basis for disallowing a privilege, such a finding is in the nature of a sanction and, at least in the first instance, should be weighed in terms of the intent of the party producing the defective log and against the harm caused by disclosure of what might otherwise be privileged documents.”) [citations omitted]; *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005) (rejecting a per se rule under which a privilege is deemed waived if a proper privilege log is not initially produced, but finding waiver when a sophisticated litigant produced a log five months after the expiration of the Rule 34 time limit); *Muro v. Target Corp.*, 250 F.R.D. 350, 360 (N.D. Ill. 2007) (“[B]lanket waiver is not a favored remedy for technical inadequacies in a privilege log.”) (citing *Am. Nat'l Bank & Trust Co. of Chi. v. Equitable Life Assurance Soc'y of U.S.*, 406 F.3d 867, 879 (7th Cir. 2005) (holding that Magistrate Judge abused his discretion by finding that defects in privilege log merited a sanction of blanket waiver, absent a finding of bad faith. “The magistrate judge's sampling procedure to determine bad faith was too arbitrary to be accurate and with a consequence that was onerous. . . . Simply having a good-faith difference of opinion is not sanctionable conduct.”)); *E.B. v. N.Y. City Bd. of Educ.*, 2007 WL 2874862 (E.D.N.Y. Sept. 27, 2007) (waiver not an appropriate sanction after delay in producing privilege log when plaintiffs had previously sent letter indicating they were withholding documents on the grounds of attorney-client privilege and work product).

<sup>67</sup> See, e.g., *Washtenaw Cty. Emps.' Ret. Sys. v. Walgreen Co.*, No. 15 C 3187, 2020 WL 3977944, at \*3 (N.D. Ill. July 14, 2020) (“But ultimately the question of whether to engage in an *in camera* review lies within the Court's discretion, and the Court ought not to engage in an *in camera* review of even a manageable number of documents if the review is not warranted. Where a court's discretion is involved, two judges can reach two correct yet contrary conclusions based on identical fact patterns.”) (citations omitted).

<sup>68</sup> See, e.g., *Washtenaw Cty. Emps.' Ret. Sys. v. Walgreen Co.*, No. 15 C 3187, 2020 WL 3977944, at \*3 (N.D. Ill. July 14, 2020) (citing *Am. Nat. Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc. of the United States*, 406

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preserve the court's resources, a court may provide guidance to parties to apply to contested documents and recurrent privilege issues.<sup>69</sup> The default to *in camera* review is no longer sustainable due to the technological advances and immense storage capacity resulting in voluminous, mechanically produced privilege logs that may be of little use.<sup>70</sup> However, requiring a log with details describing the privilege may alleviate the need for *in camera* review.<sup>71</sup>

## vi. New forms of communication.

There are not many cases addressing privilege log issues with new forms and types of communication technology. There are cases that require a party to specify the document or communication type that may be extended to new forms of communication. For example, see *Neelon v. Krueger*,<sup>72</sup> finding a categorical log inadequate when one category included “communications,” defined as “e-mails, letters, skype texts, notes on conversations, memos, phone text messages, and other forms of documentation or any communication.”

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F.3d 867, 879-880 (7th Cir. 2005)) (“The judicial discretion to review the described documents *in camera* has turned on multiple factors, including the burden involved in reviewing the sheer number of documents, but the thrust of these cases is that *in camera* review is more critical before compelled disclosure, so courts might make sure that the disclosed materials truly are not privileged.”); *see also*, *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 307 (D.D.C. 2009) (“[D]eeming the log a waiver is the most draconian but the least consumptive of judicial resources while *in camera* inspection of all of the withheld documents is the most forgiving but the most consumptive of judicial resources. Indeed, the determination by the trial judge that a document is or is not privileged may have to be reviewed by an appellate court, using additional judicial resources. That expenditure of resources can be particularly wasteful when, as often happens, the documents will never be offered into evidence.”).

<sup>69</sup> *See, e.g.*, *Chabot v. Walgreens Boots All., Inc.*, No. 1:18-CV-2118, 2020 WL 3410638, at \*3 (M.D. Pa. June 11, 2020) (“To lessen the burdens associated with *in camera* review, the Court may dictate its holding on contested issues, which the parties will then apply when determining whether its documents are privileged.”).

<sup>70</sup> *See, e.g.*, *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 99 (D.D.C. 2012) (“But, the descriptor in the modern database has become generic; it is not created by a human being evaluating the actual, specific contents of that particular document. Instead, the human being creates one description and the software repeats that description for all the entries for which the human being believes that description is appropriate. . . This raises the term ‘boilerplate’ to an art form, resulting in the modern privilege log being as expensive to produce as it is useless.”). *See also*, *Earthworks v. U.S. Dep’t of the Interior*, 279 F.R.D. 180, 193 (D.D.C. 2012); *Lurensky v. Wellinghoff*, 271 F.R.D. 345, 355 (D.D.C. 2010) (finding “privilege logs to be on the whole 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); *Marshall v. D.C. Water & Sewage Auth.*, 214 F.R.D. 23, 25 n.4 (D.D.C. 2003); *Mitchell v. Nat. R.R. Passenger Corp.*, 208 F.R.D. 455 (D.D.C. 2002). *But see*, *Avery Dennison Corp. v. Four Pillars*, 190 F.R.D. 1, 2 (D.D.C. 1999) (“I have found that counsel rarely provides more than minimal information in the logs they submit which usually tell me the date of the document, its author and recipient, and the briefest possible description of its contents (‘Letter from client to attorney’). Finding such a log useless, I have instead cut to the quick and ordered the production of the documents at issue.”).

<sup>71</sup> *See, e.g.* *Bethea v. Merchants Comm. Bank*, Civil Action No. 11-51, 2012 WL 5359536, n.5 (D.V.I. Oct. 31, 2012) (“[p]roviding information [a description] pertinent to the applicability of the privilege or protection should reduce the need for *in camera* examination of the documents.”).

<sup>72</sup> 2015 U.S. Dist. LEXIS 29146, at \*12 (D. Mass. Mar. 10, 2015).

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### III. METHODOLOGIES TO MITIGATE BURDENS & CHALLENGES

Several methodologies have evolved over time to attempt to reduce the burdens and challenges posed by the privilege logging process.

#### A. Privilege Log Exclusions.

Identifying and listing reasonable privilege log exclusions can greatly reduce the burdens associated with privilege logs for parties (both the issuing and receiving parties). There are three categories of privilege log exclusions that parties commonly incorporate into ESI protocols to reduce the burden of generating a privilege log. Each of the three options allow parties mass exclude categories of documents (either thru metadata or following eyes-on review) from logging.

- Date – Parties can negotiate and limit the date scope for documents on a privilege log. Similar to defining the relevant period for document productions, parties can limit the privilege log to exclude post-complaint privileged communications or certain temporal periods where a party had frequent privileged communications.
- Participant / Content – Parties can exclude categories of documents from the privilege log based on content (e.g., litigation related) or the source of legal advice (e.g., outside counsel). For example, parties can exclude communications exclusively between outside counsel and the client. Parties can also exclude communications related to the underlying litigation (e.g., pleadings, settlement, or litigation strategy).
- Redacted Documents – Parties can agree to leave redacted documents off the privilege log when the bibliographic information provided on a privilege log is available on the face of the redacted document. The producing party would need to list the privilege asserted in the text of the redaction box OR provide a bates / assertion log only (e.g., an excel with the bates numbers for redacted documents and the basis for redaction—WP v. ACP). The party should also include a Redacted field in the accompany load file. There is precedent for this type of exclusion.<sup>73</sup>

In addition to agreements by parties, courts have routinely found that, for example, post-

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<sup>73</sup> *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).

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litigation communications with counsel<sup>74</sup> and billing entries<sup>75</sup> do not need to be logged.

However, whether or not it is appropriate to agree to any or all of these exclusions should be evaluated based on the nature of the case and the documents reasonably sought in discovery.

## **B. Categorical Logs – Pre-2015 Amendments.**

To help reduce the burdens posed by the content and format of a privilege log, parties have attempted to use what is commonly called “categorical logs.” A categorical log is a table of withheld documents, where documents are grouped based on similar characteristics, and may share a single common description providing information to substantiate the claim of privilege. The producing party will categorize the nature of the document (by a topic category) during review. Once identified by category, the documents will be organized by similar sender/recipient groups. The log will reflect date range applicable to that type of category and sender/recipient group as a separate log line. Often, the log will also reflect the number of documents withheld pursuant to that category. See Exemplar B.

An often cited basis for the use of categorical logs is an Advisory Committee Note to the 1993 Amendments to FRCP 26. For example, in *Shufeldt v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.*, No. 3:17-CV-01078, 2020 WL 1532323 (M.D. Tenn. Mar. 31, 2020), the court said that “[w]here a document-by-document privilege log would be unduly burdensome, courts have permitted a categorical log” and then cited the following Advisory Committee Note: “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.”<sup>76</sup>

Some jurisdictions have implemented local rules that say categorical logs are presumptively proper.<sup>77</sup> In addition, some states affirmatively require parties to discuss if using categories is

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<sup>74</sup> See, e.g., *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 139 n.22 (3d Cir. 2009) (declining to require preparation of a privilege log for all post-complaint privileged communications because doing so “would have a chilling effect on the attorney-client relationship”); *Aetna Inc. v. Mednax, Inc.*, No. 18-CV-02217-WB, 2019 WL 6250850, at \*7 (E.D. Pa. Nov. 22, 2019) (holding that a privilege log did not need to be prepared for communications between a party’s attorneys, experts, and consultants retained in anticipation of litigation because burden of laborious privilege review “would far exceed any likely benefit” of finding relevant documents); *Quincy Mutual Fire Ins. Co. v. Atlantic Specialty Ins. Co.*, 2019 WL 3409980, at \*7 (D. Mass. July 29, 2019) (holding that defendant was not “require[d] to produce a privilege log for documents that post-date April 17, 2015 considering the amount in controversy and the burden that logging such documents would impose.”).

<sup>75</sup> *ResCap Liquidating Tr. v. Primary Residential Mortg., Inc.*, No. 016CV4070SRNHB, 2020 WL 5988494, at \*2 (D. Minn. Oct. 9, 2020) (“The Court finds that the burden of providing a privilege log for 175 pages of billing entries outweighs the potential benefit. . . . However, the Court is willing to conduct a limited in camera audit of a subset of the billing entries.”).

<sup>76</sup> *Shufeldt*, 2020 WL 1532323, \*5 (M.D. Tenn. Mar. 31, 2020).

<sup>77</sup> See, e.g., NY R USDCTS&ED Civ Rule 26.2 (“[W]hen asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category.”).



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more efficient (NY state courts).<sup>78</sup> Even in states where document-by-document specific logs are required, there may be some exception for categorical logs for some portion of the privileged population.<sup>79</sup> There are several cases authorizing categorical logs as a less burdensome means of establishing privilege.<sup>80</sup> There are a fair number of cases confirming that parties are making affirmative use of this option.<sup>81</sup>

Courts have differed on what showing, if any, is needed to do a categorical log in lieu of a document-by-document log. Many courts require a showing of burden or base their decision to permit a categorical log on a showing of burden.<sup>82</sup> One of the initial cases to evaluate use of a

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<sup>78</sup> *N.Y. Comp. Codes R. & Regs. Tit. 22* § 202.20-a.

<sup>79</sup> Delaware Chancery practice guidelines, p 17 (<https://courts.delaware.gov/forms/download.aspx?id=99468>).

<sup>80</sup> *United States v. Magnesium Corp. of America*, No. 01-00040, 2006 WL 1699608 (D. Utah June 14, 2006) (ordering a categorical log for documents generated after institution of action, with (1) time period, (2) list of authors, recipients, copyees, (3) representation by counsel that the documents were privileged; and did not require a subject matter or topic be disclosed for the documents identified on the categorical log); *Auto. Club of NY, Inc. v. Port Auth. of NY & NJ*, 297 FRD 55 (SDNY 2013) (holding categorical logs are adequate if they provide information about the nature of the withheld documents sufficient to enable the requesting party to make an intelligent determination about the validity of the assertion of the privilege); *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 109 (S.D.N.Y. 2008) (“To lessen the burden posed by reviewing and recording a large quantity of protected communications, [attorney representing plaintiff who is challenging the subpoena] may provide a categorical privilege log rather than a traditional, itemized privilege log . . .”).

<sup>81</sup> See, e.g., *Mfrs. Coll. Co. v. Precision Airmotive LLC*, No. 3:12-cv-853-L (N.D. Tex. June 6, 2014) (Party providing categorical log had to identify authors and recipients of all documents, provide subcategories for each type of privilege claimed, and subdivide a litigation category into three subcategories designated by the court); *CC-Aventura, Inc. v. Weitz Co., LLC*, 2008 U.S. Dist. LEXIS 24324, 2008 WL 828117 (S.D. Fla. March 27, 2008) (“It is particularly important that Weitz Defendants identify the date on which each of the insurance companies assumed the defense of this litigation; e.g., one category of documents withheld might be ‘communications between counsel and the carrier with respect to litigation strategy between January 1, 2008 (the date that the carrier assumed the defense of this litigation) and the present.’”); *In re Imperial Corp. of America*, 174 F.R.D. 475 (S.D. Cal. 1997) (Plaintiffs ordered to provide a log with an “aggregate listing of the numbers of withheld documents,” “an identification of the time periods encompassed by the withheld documents,” and an affidavit representing that the withheld documents were trial preparation materials or contained information reflecting confidential communications between counsel and plaintiff.)

<sup>82</sup> *Tyco HealthCare Grp. LP v. Mut. Pharm. Co.*, No. 07-1299 (D.N.J. May 2, 2012) (party required to produce a document-by-document post-complaint privilege log, because the party did not establish that logging potentially less than 3000 documents would be unduly burdensome); *Sprint Communs. Co. L.P. v. Big River Tel. Co., LLC*, 2009 U.S. Dist. LEXIS 78249, 2009 WL 2878446 (D. Kan. Sept. 2, 2009) (court ordered a party who logged approximately 1000 documents in one category to either provide a supplemental log with more specific subcategories or move for a protective order relieving it of the obligation to log, accompanied by evidence showing burden); *Bethea v. Merchants Comm. Bank*, Civil Action No. 11-51, 2012 WL 5359536 (D.V.I. Oct. 31, 2012) (“The Committee’s example is particularly instructive because it discusses a hypothetical request to produce documents of a particular type from a twenty year period and advises the responding party to object to the breadth of the request but to produce either the documents or a descriptive privilege log for the number of years for which the request is not unduly burdensome (in their hypothetical, three years). *Id.* In other words, the Committee does not contemplate that a responding party can comply with Rule 26(b)(5) merely by lumping summaries of voluminous but privileged materials into a one-to-two page, categorized list. Rather, the responding party must identify a time period for which it believes production is reasonable, and produce documents and/or a descriptive privilege log for those items claimed to be privileged during that period of time. . . . [I]n this circuit, a categorical privilege log may be permissible only where the responding party has established undue burden with specificity.”)

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categorical log on a showing of burden was *SEC v. Thrasher*.<sup>83</sup> In that case, counsel had already represented that the privileged documents reflected communications between defense attorneys and that all of these documents had been kept in confidence, so the court only then required as additional privilege substantiation: “(1) an identification of the time period encompassed by the withheld documents; (2) a listing of the individuals who were authors or addressees or were copied on the documents; [and] (3) a representation by counsel as to whether all of the documents either (a) were prepared to assist in anticipated or pending litigation or (b) contain information reflecting communications between (i) counsel or counsel’s representatives and (ii) the client or the client’s representatives, for the purpose of facilitating the rendition of legal services to the client.”<sup>84</sup>

Other courts do not require a showing of burden, rather focus on what information the requesting party needs, or the potential risk of revealing privileged information in a document-by-documents log.<sup>85</sup> Yet some other courts seem to refuse to permit categorical logs.<sup>86</sup>

Parties continue to dispute whether the information provided categorical logs and document-by-document logs “enable other parties to assess the claim [of privilege].” It is the experience of the authors of this *Commentary* that the use of categorical logs has not been as effective at reducing costs and burdens on either the producing or receiving party, as compared to some of the other mitigation measure proposed by this *Commentary*. For example, in order to group “like” documents into a single category, there often can be much manual effort associated with analyzing and combining records off of the metadata of withheld documents to determine they should be associated in a single category. In addition, if categories are not described with sufficient particularity, it can lead to discovery disputes, which are costly and time consuming, and those disputes may result in the court requiring the amendment of the log, thereby eliminating any efficiencies the producing party sought to achieve with this type of log. A categorical log, as identified in this *Commentary*, is different from a “metadata plus topic log” that is discussed later in this *Commentary*.<sup>87</sup>

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<sup>83</sup> *S.E.C. v. Thrasher*, No. 92 CIV. 6987 (JFK), 1996 WL 125661, at \*2 (S.D.N.Y. Mar. 20, 1996).

<sup>84</sup> *Id.*

<sup>85</sup> *United States v. Gericare Med. Supply Inc.*, No. Civ. A. 99-0366-CB-L, 2000 WL 33156442, at \*4 (S.D. Ala. Dec. 11, 2000) (“defendants have not explained how a categorical privilege log impaired their ability to test the plaintiff’s claim of work product protection, which rises or falls as a unit.”); *In re Motor Fuel Temperature Sales Practices Litig.*, 2009 U.S. Dist. LEXIS 34026, 2009 WL 959491 (D. Kan. Apr. 3, 2009) (defendants required to review post-litigation attorney communications because they did not make an adequate showing of the burden of review, but they could categorically group the documents in a privilege log).

<sup>86</sup> *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 an itemized log was required); *Neelon v. Krueger*, 67 F. Supp. 3d 467, 470 (D. Mass. 2015), *aff’d in part, modified in part, vacated in part* by 2015 WL 1037992, at \*4 (D. Mass. Mar. 10, 2015) (“The first problem is that the plaintiff does not assert the privilege as to individual documents but rather as to categories of documents. As discussed, *infra*, this is no more than a variant of a blanket assertion of the privilege, which, as noted, does not comply with the requirements of the law.”)

<sup>87</sup> See *infra* III.F.iii.



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With the 2015 Amendments to Rule 26, the concept of proportionality came into focus. To determine whether and to what extent these Amendments had an effect on the use of categorical logs, cases discussing them are included in the section below regarding proportionality.

C. **Rule 26(b)(1) Proportionality.**<sup>88</sup>

The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 SEDONA CONF. J. 1, 67 (2018), Comment 2.b. suggests that “[p]roportionality should be considered and applied by the court and parties to all aspects of the discovery and production of ESI including . . . preparation of privilege logs.” This portion of the Commentary addresses the nature and extent to which parties and the courts have considered and applied proportionality to privilege logs, and then offers a framework moving forward.

i. **The Rules at issue – FRCP 26(b)(5)(A) and 26(b)(1).**

a. **Rule 26(b)(5)(A).**

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

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.

FRCP 26(b)(5)(A).

As described earlier in Section II.A.i, this Rule permits privilege logs with alternative formats so long as the party’s underlying responsibility to provide particularized and adequate information is satisfied.

b. **Rule 26(b)(1).**

Rule 26(b)(1) says, in pertinent part:

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<sup>88</sup> **NOTE to Working Group and Steering Committee:** There was significant discussion within the original Brainstorming Group and the current Drafting Team regarding whether and to what extent proportionality should apply to the privilege logging process. Although a majority of the DT members agree that it does, some did not, and so there was no consensus on the entirety of the language in this Section at the time this draft was finalized.

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Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and ***proportional to the needs of the case***, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.<sup>89</sup>

Although the concept of proportionality was present in Rule 26 prior to the 2015 Amendments,<sup>90</sup> the word "proportional" was not introduced until then. Its introduction was coupled with the concept being moved from Rule 26(b)(2) to Rule 26(b)(1). Some commentators have argued that this move signaled that proportionality relates to the overall scope of discovery and is not merely a limit on discovery.<sup>91</sup>

**ii. Burdens and relationships between Rules 26(b)(5)(A) and 26(b)(1).**

**a. The burden remains on the party resisting discovery.**

The amendments to Rule 26(b)(1) were not intended to alter the burdens on parties in discovery. The 2015 Advisory Committee Notes include the following explanation:

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the

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<sup>89</sup> FRCP 26(b)(1) (emphasis added).

<sup>90</sup> In 1983, Rule 26(b)(1) was amended to limit discovery that was duplicative, unduly burdensome or expensive, "taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." FRCP 26(b)(1) (1983); 97 F.R.D. 165, 172. The Advisory Committee Notes for the 1983 Amendments stated that the limits of Rule 26(b)(1) were intended to address the problem of "disproportionate discovery." 97 F.R.D. 165, 218; *see also Eagle Air Med Corp. v. Sentinel Air Med. All.*, No. 218CV00680JCOMPAL, 2018 WL 3370528, at \*4 (D. Nev. July 10, 2018) ("Federal judges were urged to evaluate the nature of the case, the limitations on a financially weak litigant to bear the burden of expensive discovery, and the need to prevent discovery from becoming a 'war of attrition or as a device to coerce a party, whether financially weak or affluent.'") (citing 97 F.R.D. 165, 218).

<sup>91</sup> *See, e.g.,* Robert D. Keeling, Ray Mangum, *The Burden of Privacy in Discovery*, 20 Sedona Conf. J. 415, 420–21 (2019) ("Most recently, in 2015, the scope of discovery under Rule 26(b) was amended to 'restore[] the proportionality factors to their original place in defining the scope of discovery.' No longer are the proportionality considerations described as separate 'limitations' on an inquiry governed solely by relevance. Under the revised Rule 26(b)(1), proportionality once again stands on equal footing alongside relevance in defining the scope of discovery.")

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court have a collective responsibility to consider the proportionality of *all discovery* and consider it in resolving discovery disputes.<sup>92</sup>

Thus, although the need to consider proportionality is now front and center, there is no requirement that the party seeking discovery demonstrate that it is proportional before the discovery is produced—the burden remains on the party resisting discovery.<sup>93</sup>

b. The relationship between Rule 26(b)(1) and Rule 26(b)(5)(A).

By enumerating six factors to be considered in evaluating whether requested discovery is “proportional” to the needs of the case, Rule 26(b)(1) involves a more nuanced approach to discovery than just focusing on undue burden.<sup>94</sup> In the six years since this language was inserted into Rule 26(b)(1), however, few courts appear to have undertaken a proportionality analysis based on Rule 26(b)(1) as it relates to privilege logs.<sup>95</sup> The limited number of courts that have done so have reached varying conclusions on its applicability.

As discussed in Section III.A., if a category of documents, like communications with outside counsel post-dating the filing of the complaint, can be excluded by agreement of the parties

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<sup>92</sup> Advisory Committee Notes to 2015 Amendment to Rule 26 (emphasis added).

<sup>93</sup> See, e.g., *Huseby, LLC v. Bailey*, No. 3:20-CV-00167 (JBA), 2021 WL 3206776, at \*6 (D. Conn. July 29, 2021) (the moving party must make a *prima facie* showing of relevance, after which it is up to the responding party to justify curtailing discovery); *N. Shore-Long Island Jewish Health Sys., Inc. v. MultiPlan, Inc.*, 325 F.R.D. 36, 48 (E.D.N.Y. 2018) (same); *Oxbow Carbon & Mins. LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 6 (D.D.C. 2017).

<sup>94</sup> Courts regularly evaluate all six proportionality factors. See, e.g., *Velez v. City of Chicago*, No. 18 C 8144, 2021 WL 1978364 (N.D. Ill. May 17, 2021) (“We need to point out here that the City’s proportionality objection is all but a non-starter. Proportionality is assessed in terms of the . . . Fed.R.Civ.P. 26(b)(1) [factors]. Like other concepts, proportionality requires a common sense and experiential assessment.”) (citing cases)

<sup>95</sup> See, e.g., *Finger v. Jacobson*, No. CV 17-2893, 2019 WL 7557821, at \*1 (E.D. La. May 10, 2019) (“The privilege log is also proportional to the needs of the case given the parties’ relevant access to the requested materials. There is no argument that Finger does not have control over his own records even if they are in possession of his former counsel. The privilege log may also aid in resolving the issues in this litigation, and the burden or expense does not outweigh its likely benefit. While Meyer has intimated that he may need to charge a fee to confect a privilege log, neither party has informed the Court (1) whether any documents exist that were actually withheld, or (2) the numerosity of said documents. The parties do not address any of the other proportionality factors under Rule 26, and there is thus no evidence of them before the Court. The privilege log is also proportional in that the negotiations with LHH are germane to the instant proceedings.”) (internal citations omitted); *Hassienzadeh v. Bellevue Park Homeowners Assoc.*, No. C18-13585-JCC, 2020 WL 3271769, at \*3 n.3 (W.D. Wash. June 17, 2020) (dictum) (“Whether a discovery request is proportional may depend on the costs of generating an expansive privilege log.”).

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or other means,<sup>96</sup> there will be no need to log them.<sup>97</sup> Although there can be good reasons to demand that these communications be logged,<sup>98</sup> in most cases it should not be necessary. Based on the facts of the case, courts may step-in to preclude the logging of such documents but these decisions rarely use the term “proportionality” as the basis.<sup>99</sup>

In situations involving a more contentious privilege logging topic than post-litigation communications with counsel, courts citing proportionality as a basis for their decisions tend to do so regarding the manner or form in which the withholding party may satisfy its burden to substantiate its assertion of privilege.<sup>100</sup> Specifically, whether a “categorical log”<sup>101</sup> is appropriate in lieu of a document-by-document log.<sup>102</sup>

In addition, some courts have engaged in a proportionality-esque analysis but rely on Rule 26(b)(5)(A) rather than Rule 26(b)(1). These courts often cite the Advisory Committee Note to the 1993 amendments of Rule 26(b)(5) in permitting the producing party to prepare a categorical privilege log rather than a traditional document-by-document privilege log.<sup>103</sup> In so doing, these

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<sup>96</sup> For example, by local rule. *UnitedHealthcare of Fla., Inc. v. Am. Renal Assocs. LLC*, No. 16-CV-81180, 2017 WL 6210835, at \*4 (S.D. Fla. Dec. 7, 2017) (“Local Rule 26.1(e)(2)(C) states that no privilege log is required for attorney-client communications or work product material that post-date commencement of the action. Therefore, no privilege log is required here.”)

<sup>97</sup> See *In re Aetna Inc. Litig.*, 2020 WL 2770192, at \*2 (C.D. Cal. Mar. 6, 2020) (permitting party to forego logging 8,800 “plainly privileged” documents because it would be unduly burdensome and party provided declaration to support its position).

<sup>98</sup> For example, if the sole basis for withholding a communication is based on the work product doctrine and there is a basis to believe that the attorney was not acting in connection with litigation but, rather, solely because of a routine business need.

<sup>99</sup> Compare *In re Snap Inc. Sec. Litig.*, No. CV1703679SVWAGRX, 2018 WL 7501294, at \*1 (C.D. Cal. Nov. 29, 2018) declining request for an order requiring party to prepare a privilege log of documents dated after commencement of the litigation because not **proportional** to the needs of the case) (citing cases) (emphasis added); but see *Close Armstrong LLC v. Trunkline Gas Co., LLC*, No. 3:18-CV-270-PPS-MGG, 2021 WL 1207592, at \*8–9 (N.D. Ind. Mar. 31, 2021) (even for post-complaint communications, party must still comply with its privilege log obligations but if the party believes doing so would impose undue burden and expense outweighing any benefit, it may seek relief from the required item-by-item listing on a privilege log in the form of a protective order, “especially in light of the Advisory Committee’s Note on the 1993 Amendment to Fed. R. Civ. P. 26(b), which acknowledges the challenge that voluminous privileged documents can pose”) (citation omitted).

<sup>100</sup> The term “privilege” as used in this Section is meant to encompass not only the attorney-client privilege but also the work product doctrine, and any other privileges/doctrines a party may assert.

<sup>101</sup> See Section III.B for a definition of “categorical log.”

<sup>102</sup> See, e.g., *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) (applying the Rule 26(b)(1) proportionality standard and concluding that a document-by-document log, rather than a “categorical log” was proportional); *Norton v. Town of Islip*, No. CV043079PKCSIL, 2017 WL 943927, at \*8 (E.D.N.Y. Mar. 9, 2017) (“In determining whether a categorical log is appropriate, Courts consider whether its justification is ‘directly proportional to the number of documents withheld.’”) (quoting *Auto. Club of New York, Inc. v. Port Auth. of New York & New Jersey*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013)).

<sup>103</sup> See, e.g., *Benson v. Rosenthal*, No. CV 15-782, 2016 WL 1046126, at \*10 (E.D. La. Mar. 16, 2016) (“The court has discretion to limit the burden of preparing a Rule 26(b)(5) privilege log when the typically detailed requirements of a log would be unduly burdensome and certain documents are obviously protected by the attorney-client privilege

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courts conclude that preparing a traditional log would be unduly burdensome based on the facts presented in the case, and that a categorical log is more appropriate.<sup>104</sup> However, these courts are clear that the categorical log must provide sufficient information to evaluate the protections asserted.<sup>105</sup>

Thus, although many courts have engaged in a proportionality type analysis within the Rule 26(b)(5) context, it appears that no court has held that its application absolves a party of its obligation to satisfy its burden to substantiate the assertion of privilege. To the contrary, some make a point of saying that burden alone is not enough to circumvent the preparation of a log.<sup>106</sup> One has gone so far as to reject the conflation of a proportionality analysis involving information sought by a subpoena versus the creation of a privilege log related to that information.<sup>107</sup> This *Commentary* agrees that a party asserting privilege must provide sufficient information to the opposing party and the court, consistent with the requirements of Rule 26(b)(5)(A), to allow them to evaluate the claim. However, if that party has a good faith basis to assert that a modification to

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or work product doctrine.”) (citing Fed. R. Civ. P. 26(b)(5), advisory committee notes to 1993 amendment, West pamph. at p. 162 (rev. ed. 2015)); *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).

<sup>104</sup> See *EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.*, No. 3:12-CV-00463, 2018 WL 3628890, at \*1 (M.D. Tenn. Mar. 29, 2018), *aff'd sub nom. EPAC Techs., Inc. v. Thomas Nelson, Inc.*, No. 3:12-CV-00463, 2018 WL 3322305 (M.D. Tenn. May 14, 2018).

<sup>105</sup> See, e.g., *id.*; *In re Aenergy, S.A.*, 451 F. Supp. 3d 319, 325 (S.D.N.Y. 2020) (stating that just because federal and local rules permit categorical privilege logs, it does not obviate a party's obligation to provide sufficient detail); *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 that the court had discretion to limit a party's burden by allowing a categorical log but the categories must be sufficiently articulated); *Shufeldt*, 2020 WL 1532323, at \*5 (holding that categorical logs were permitted where a document-by-document log would be unduly burdensome but the log must still provide information needed to evaluate claims of privilege); *3rd Eye Surveillance, LLC v. United States*, No. 15-501C, 2021 WL 3828654, at \*3 (Fed. Cl. Aug. 27, 2021) (noting that the required description will depend on the case and categories may be appropriate for voluminous documents; continually logging post-litigation communications would amount to disproportional burden but “customary contents” of log still required).

<sup>106</sup> See *Norton*, 2017 WL 943927 at \*8 (rejecting argument that a privilege log need not be prepared due to the burden associated with preparing a log).

<sup>107</sup> *Main St. Am. Assurance Co. v. Savalle*, No. 3:18CV02073(JCH), 2021 WL 1399685, at \*3 (D. Conn. Apr. 14, 2021) (drawing a distinction between whether “the information sought by the subpoena” is disproportional to the needs of the case versus whether “creating the privilege log” is somehow disproportionately burdensome and holding that a privilege log was required notwithstanding any alleged burden; “This tortures the meaning and purpose of Rule 26's proportionality requirement, which focuses on the marginal utility of the discovery sought”). Although this distinction precluded an application of proportionality to the privilege logging process, it is a good reminder that if the underlying request for documents is disproportional to the needs of the case, there may be grounds to avoid production (and, therefore, logging) altogether. See *In re Blue Cross Blue Shield Antitrust Litig. (MDL No. 2406)*, No. 2:13-CV-20000-RDP, 2017 WL 2889679, at \*2 (N.D. Ala. July 6, 2017) (“Finally, to the extent that other documents might exist that are not shielded by these privileges, searching for them among the greater volume of privileged documents is disproportionate to the needs of this case. . . . Here, given the likelihood that most of the responsive documents relating to Professional Liability insurance coverage will be subject to some privilege or work-product protection, the burden and expense of searching for the remaining non-privileged responsive documents outweighs the potential benefit.”).



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the substance and/or format of what is required is appropriate based on proportionality, this *Commentary* also agrees that the parties and, if necessary, the court should consider its application.

This does not mean a producing party may invoke the concept of proportionality to circumvent its obligations to support its assertion of privilege with an appropriate log (or equivalent). It also does not mean a requesting party may seek unreasonably to force a document-by-document privilege log if the particular facts and circumstances of a case do not warrant one. If disputes arise, the onus should remain on the responding party to justify its withholding of documents and ESI but it may seek to reduce a perceived burden by agreement or court order. Parties should also evaluate carefully the pros and cons of alternatives, including categorical logs versus metadata plus topic logs (as those terms are defined and discussed in this *Commentary*).

#### **D. Rule 45 – Non-Party Subpoena Recipients.**

Non-Parties who are subpoenaed for documents are also subject to the obligation to expressly make a claim of privilege for withheld documents. The applicable Rule 45(e)(2) reads:

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person 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; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

Additionally, Rule 45(d)(3)(A)(iii) requires the court to quash a subpoena, “on timely motion,” where it “requires disclosure of privileged or other protected matter, if no exception or waiver applies . . . .”

Courts, in general, require non-parties asserting privilege to substantiate that assertion of privilege as a party must pursuant to Rule 26(b)(5); failure to do so may result in a finding of

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waiver.<sup>108</sup> Courts also have required non-parties to substantiate their assertions of privilege even though doing so imposes a burden on the non-party.<sup>109</sup> Similarly, courts have held that a non-party seeking to quash a subpoena because it requires disclosure of privileged materials must, in general, substantiate its assertion of privilege.<sup>110</sup> However, some courts have permitted non-parties to substantiate their assertions of privilege through other, less burdensome means.<sup>111</sup>

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<sup>108</sup> See, e.g., *In re Grand Jury Subpoena*, 274 F.3d 563, 575-76 (1st Cir. 2001) (“[A]lthough [Rule 45] does not spell out the sufficiency requirement in detail, courts [consistently] have held that the rule requires a party resisting disclosure to produce a document index or privilege log. A party that fails to submit a privilege log is deemed to waive the underlying privilege claim.”) (internal citations omitted) (citations omitted); *Schaeffer v. City of Chicago*, No. 19 C 7711, 2020 WL 7395217, at \*3 (N.D. Ill. Dec. 15, 2020) (noting that the non-party was required to provide a privilege log with the same level as detail as would be required for a party’s privilege log pursuant to Rule 26(b)(5)); *Mosley v. City of Chicago*, 252 F.R.D. 445, 449 (N.D.Ill.2008) (noting that “Rule 45(d)(2) (A)’s requirement of a privilege log is mandatory” and “non-parties under Rule 45 have a choice: they can either prepare a privilege log or waive any claim of privilege”); *Williamson v. Recovery Ltd. P’ship*, No. 2:06-CV-292, 2016 WL 4920773, at \*2 (S.D. Ohio Sept. 15, 2016) (holding that a non-party’s failure to prepare a privilege log resulted in waiver: “the Court cannot sustain its claim of privilege, and it will enforce the subpoena”).

<sup>109</sup> See, e.g., *Ensminger v. Credit L. Ctr., LLC*, No. 19-2147-JWL, 2019 WL 6327421, at \*4 (D. Kan. Nov. 26, 2019) (rejecting a non-party’s argument that he need not comply with a subpoena because it would be burdensome to create a privilege log: “While the court recognizes there are resources involved in creating and evaluating a privilege log, the court does not find it so burdensome as to constitute good cause for granting a protective order”); *Meyer v. Bank of Am., N.A.*, No. 2:18-CV-218, 2018 WL 6436268, at \*6 (S.D. Ohio Dec. 7, 2018) (“Here, even in Defendant’s account, the universe of potentially privileged communications is limited to 2,700 emails. With current discovery technology, the review of these emails and the creation of a corresponding privilege log is not unduly burdensome, particularly given (1) the amount in controversy in this case, (2) the importance of the issues at stake, and (3) the fact that the discovery Plaintiffs requested here is, at least, of ‘moderate relevance’ to their claims and defenses . . . .”) (internal citations omitted); but see *Dell Inc. v. DeCosta*, 233 F. Supp. 3d 1, 3 (D.D.C. 2017) (quashing a subpoena, in part, served on the party’s former counsel because it “would impose an undue and disproportionate burden on [former counsel] to prepare a privilege log of the thousands of documents that [former counsel] could reasonably be expected to ‘possess’ after a decade of . . . representation but most of which would be protected by the attorney-client privilege or attorney work-product doctrine”).

<sup>110</sup> See, e.g., *Brown v. Tax Ease Lien Servicing, LLC*, No. 3:15-CV-208-CRS, 2017 WL 6940735, at \*4 (W.D. Ky. Aug. 21, 2017) (“Here, examination of the motion to quash immediately reveals that the law firm has made a blanket assertion of the attorney-client privilege without providing any privilege log as required by Rule 26(b)(5). Such a blanket assertion of the privilege is insufficient. Because [the non-party] makes merely a blanket assertion of the privilege without providing a privilege log or other means of identifying the affected documents, this ground in support of its motion to quash is unpersuasive.”) (internal citations omitted); *Dong Gun Shin v. Infinity Ins. Co.*, No. 1:18-CV-1954-SCJ, 2018 WL 8951202, at \*2 (N.D. Ga. Oct. 1, 2018) (declining to quash a subpoena where, *inter alia*, the non-party and related party had not submitted a privilege log such that the court could not “determine whether the contents of the file sought by [the requesting party] are protected by the attorney-client privilege”); *In re Kidd*, No. 3:20-CV-00800 (KAD), 2020 WL 5594122, at \*13 (D. Conn. Sept. 18, 2020) (“Given the undisputed absence of a proffered privilege log, Judge Farrish did not commit clear error in declining to grant the motion to quash on the basis that the inclusion of privileged materials exacerbated the burden on the Respondents.”).

<sup>111</sup> See, e.g., *Lake as Tr. of Richard D. Lake Revocable Living Tr. Dated Aug. 24, 2011 v. Charlotte Cty. Bd. of Cty. Commissioners*, No. 2:20-CV-809-JLB-NPM, 2021 WL 2351178, at \*2 (M.D. Fla. June 9, 2021) (“[R]ather than require [the non-parties] to produce privilege logs of withheld or redacted materials, they may categorically withhold or redact privileged communications, and must provide a certification by both the subpoenaed party and [the plaintiff] that none of the withheld or redacted documents were distributed to or reviewed by anyone other than [the plaintiff], [plaintiff]’s counsel, [the non-parties], or their respective staffs. Alternatively, if the subpoenaed party or [the plaintiff]



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Consistent with The Sedona Conference's earlier position, the party and non-party should meet and confer about potential means of reducing the burden on the non-party associated with preparing a privilege log.<sup>112</sup> Importantly, however, such accommodations may be inappropriate for non-parties that are not disinterested in the case (for example, due to a relationship with a party or an interest in the litigation).<sup>113</sup>

If a non-party attempts to substantiate its assertion of privilege through an alternative to a traditional privilege log, it must still be mindful that it is its burden to provide sufficient information to the requesting party and the court to substantiate its assertion of privilege.<sup>114</sup>

#### **E. Technology.**

Parties are increasingly using technology to reduce the burdens associated with privilege logs. Most commercial document review platforms allow metadata export on a document-by-document basis. In addition, parties are using the below tools to automate the privilege log generation process and reduce the amount of typing / coding done by reviewers to generate a privilege log.

- Leveraging Exportable Coding Fields:
  - Building in coding fields or menus to assign categories to privileged documents (if constructing a categorical log) or subject matters (if constructing a document-by-document log).
  - However, this results in large numbers of documents on the logs having a similar description; or perhaps a large number of choices that are difficult to apply consistently.

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refuse to provide such a certification, then the subpoenaed party must produce a privilege log in compliance with Rule 45(e)(2)(A)(i)-(ii).”).

<sup>112</sup> See The Sedona Conference, *The Sedona Conference Commentary on Rule 45 Subpoenas to Non-Parties*, Second Edition, 22 Sedona Conf. J. 1, 82 (2021) (“The party issuing a subpoena should seek to minimize the burden of privilege claims on the non-party. For example, the issuing party and the non-party may agree to exclude some potentially privileged and protected information from the subpoena based upon dates, general topics, or subjects. To minimize the burden on the non-party, the subpoenaing party should consider alternatives to the traditional privilege log.”).

<sup>113</sup> *Id.* at 31 (“Where a non-party has a relationship to a party, that relationship may impact cost shifting and coordination among the parties and the non-party. Therefore, courts would need to balance the competing interests of the parties and the non-party in the requested documents and ESI.”).

<sup>114</sup> See, e.g., *Swasey v. W. Valley City*, No. 2:13-CV-768 DN, 2016 WL 6947022, at \*2 (D. Utah Jan. 15, 2016) (ordering a non-party to “provide more specificity” regarding roughly 200 emails over a roughly four year period that the non-party grouped into a single category on its privilege log); *In re Motion for Protective Ord. for Subpoena Issued Stein L. Firm*, No. CV 03-9354 JSL (VBK), 2006 WL 8444493, at \*5 (D.N.M. Feb. 10, 2006) (finding waiver where, *inter alia*, “[t]he privilege log that the [non-party] produced listed fourteen categories of documents in summary fashion without the detail that [Rule 45] requires.”).

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- Propagating descriptions to duplicates and near duplicates:
  - Once a document receives a final privilege log description, that description is copied/pasted (propagated) to all hash duplicates (exact matches) in the database.
  - Simple/easy solution in most review databases. Can also apply the description propagation to emails within the same chain/thread.
- Name normalization tool
  - Review databases allow teams to create “entities” that capture all aliases / email addresses for individuals. The tool can then normalize the different iterations of the individual into a single (normalized) name. *E.g.*, [jsmith@abccorp.com](mailto:jsmith@abccorp.com); [joe.smith@abccorp.com](mailto:joe.smith@abccorp.com); [joe@abccorp.com](mailto:joe@abccorp.com); [jmith@gmail.com](mailto:jmith@gmail.com) all normalize on the privilege log to “Smith, Joe.”
  - Name normalization can raise issues, however, if a party requests email addresses to help identify the affiliations of each person on the log.
- Email threading
  - Allows parties to identify a “last-in-thread” email message.
  - Typically used to reduce volume for review and organize a review population.
  - Can also be used to streamline the privilege log by only logging the most inclusive email threads.
  - Parties still need to account for metadata of suppressed emails – consider metadata only for those and provide email thread ID. Can be sent as an overlay, but this is not an easy process and the receiving party needs to understand that the suppressed thread metadata will not match one-to-one with the thread on the privilege log.
  - Courts split on whether each message in the thread must be logged or if one entry will suffice.<sup>115</sup>

#### **F. Alternative Construction of Logs.**

If no log format is required by the rule itself, then parties are free to create the log that provides the necessary information in the most efficient manner possible. There are other ways to provide the information efficiently, and organized to understand the areas of potential disputes. These alternative methods may not be the most effective method for all types of cases, as the nature of the documents to be logged will heavily impact the chosen method. Litigants should consider their document population and select the option that will most efficiently provide the receiving

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<sup>115</sup> 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). See also *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.* (Rhoads I), 254 F.R.D. 216, 222 (E.D. Pa. 2008); *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.* (Rhoads II), 254 F.R.D. 238 (E.D. Pa. 2008) (clarifying the scope of Judge Baylson’s earlier order regarding which e-mails were privileged).

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party the information necessary to substantiate the reason for the withholding of otherwise responsive information.

#### **i. Categorical logs.**

As explained elsewhere in this *Commentary*, including Section III.B., categorical logs have been utilized by parties to try and reduce their privilege logging burdens. This format, however, can present its own issues, including resistance from opposing parties and courts if the content of the log is deemed to be insufficient to satisfy the requirements for Rule 26(b)(5)(A).

When does it make the most sense to use it? When your jurisdiction encourages it – if you are in New York, you should strongly consider how to make this solution work for your case, or at least for large subsets of your document population. See Exemplar B. Also, if your case involves a large number of documents withheld that are similar in nature, just repetitive over time. For example, do you anticipate 75% of your privileged documents involve communications with outside counsel advising the client on a permit application and subsequent challenge? Can you bucket them into reasonably organized categories? For example, does your privileged document population heavily involve discussions with outside legal counsel pertaining to lead up or after the initiation of the action? Are the privileged documents likely going to involve the same communicants (within each category)?

#### **ii. Metadata logs.**

What is it? A metadata log is a table of withheld documents that provides only the metadata fields that can be extracted from the withheld documents, potentially with a designation for privilege bases (ACP, WP, etc.), but without a substantive privilege description sentence. See Exemplar C. Generating such a log is generally a fairly straightforward process as it simply involves exporting existing metadata associated with documents that have been determined to be privileged. The parties may agree to in the first instance provide a document level metadata log that provides the existing metadata for fields that correspond to information that would be on a traditional document by document privilege log. The parties can agree to a sampling process to provide additional information for withheld documents for a percentage of documents, focusing on entries for which the metadata does not provide enough information for requesting party to understand why certain documents were withheld.

How is it prepared? The information is pulled from the metadata of the native document maintained in the review platform. The fields can be exported from the review platform into a spreadsheet type table for further editing. Common examples of such fields are: Priv Log ID, From, To, CC, BCC, Date, File Type (Email / Attachment / Standalone document OR Email / Spreadsheet / Word processing document / Spreadsheet / etc.). Additional fields that may be included are:

- Privilege basis – extracted from a review platform’s coding/tagging selection of ACP, WP, etc.

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- Email subject – note that where this field is provided there is the possibility that the field may contain privileged information and may need to be redacted
- File name – note that where this field is provided there is the possibility that the field may contain privileged information and may need to be redacted
- Custodian
- Date/Time Created / Last Modified
- (File) author – note that where this field is provided it may not accurately reflect the actual author of the file given the tendency to reuse previous documents as the starting point for new documents
- Family ID
- Email Thread ID
- Hash Value
- Other Legal Person – reflecting the name of legal personnel involved in earlier in time communications within the email chain; this field cannot be extracted from metadata and would have to be manually populated

For metadata logs, you may need to consider providing a “key” of legal personnel – names and affiliations / positions – as well as for third parties that the producing party indicate do not break the privilege.

Is there precedent for it? Yes, and No... In the *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, case,<sup>116</sup> the Court allowed a party to remedy a deficient categorical log by providing either an itemized log or a metadata log for a particular category). In *McEuen v. Riverview Bancorp, Inc.*,<sup>117</sup> the Court held that providing a list of specific metadata fields on a log for documents kept on a withheld hard drive would be satisfy the privilege log requirements. However, in *LaVeglia v. TD Bank*,<sup>118</sup> the Eastern District of Pennsylvania rejected a proffered metadata log as insufficient because it did not provide any basis for the privilege assertion. Similarly, in *McNamee v. Clemens*,<sup>119</sup> the Eastern District of New York court determined a metadata privilege log was insufficient because the “subject line contains, in many instances, exceedingly unhelpful descriptions. Examples of such vague subjects include single word descriptions, such as: ‘tomorrow,’ ‘Media,’ ‘My info,’ ‘statement,’ ‘Costs,’ ‘Letter,’ ‘notes,’ ‘Inquiry,’ and ‘Discussion.’ These types of descriptions clearly do not provide sufficient information as to the content of the documents to enable plaintiff or the Court to evaluate whether each of the withheld documents is privileged . . .”

When does it make the most sense to use it? When the data population identified to be withheld is voluminous, agreeing to a metadata log allows for serving a log much sooner than could occur with a traditional log.

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<sup>116</sup> *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, case, 2021 U.S. Dist. LEXIS 62959, 2021 WL 1207122 (S.D.N.Y. Mar. 31, 2021).

<sup>117</sup> *McEuen v. Riverview Bancorp, Inc.*, 2013 U.S. Dist. LEXIS 192490, at \*7-\*8 (W.D. Wa. Oct. 1, 2013).

<sup>118</sup> *LaVeglia v. TD Bank*, No. 2:19-cv-01917 (E.D. Pa. Jan. 10, 2020).

<sup>119</sup> *McNamee v. Clemens*, No. 09 CV 1647 SJ, 2013 WL 6572899, at \*3 (E.D.N.Y. Sept. 18, 2013).

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### **iii. Metadata plus topic logs.**

What is it? Similar to a metadata log, a “metadata plus topic log” is a table of withheld documents that provides the metadata fields that can be extracted from the withheld documents, omitting a full privilege description sentence. However, it will include a category, or topic, description as a separate field. Examples of a category/topic field could include things such as: contract drafting and evaluation; settlement analysis; consumer outreach; internal investigation. *See Exemplar D.*

How is it prepared? Similar to a metadata log, most fields can be extracted from a review platform with minimal effort. However, the category/topic field will reflect an independent assessment by a reviewer of the category that most closely describes the withheld document. The producing party will prepare a set of coding options/tags for the most likely categories, which can be amended/supplemented as review progresses. Whichever tag the reviewer selects for that document will be exported as the privilege topic field.

When does it make the most sense to use it? Again, when the data population identified to be withheld is voluminous, agreeing to a metadata plus topic log allows for serving a log much sooner than could occur with a traditional log. The benefit of a metadata plus topic log over a traditional metadata log is that by providing an associated topic, the log helps to narrow the entries that the requesting party may choose to challenge or request additional information for. Simply by providing a topic, the logged documents can now identify areas of dispute by topic, providing for a more streamlined and effective dispute resolution process.

**Propose to Membership:** Does the example provided at EXEMPLAR D provide you sufficient information to narrow the areas of dispute or question on the log?

### **iv. Different logs for different, non-traditional sources.**

New forms of communication present unique challenges, as the manner in which the present do not allow for easy export of the same information that would be expected on a metadata type log. For example, does a text message chain between attorney and client over several weeks, in which non-privileged content is also discussed, constitute one communication or several? For Slack content or Teams channels, how do you log a question posed by one participant to the entire room, where responding communications span several days and intermixed messaging?

It may be more efficient, and lead to fewer, focused disputes, to prepare a log of non-traditional sources in a format separate from traditional ESI sources, as the fields necessary to substantiate the privilege are likely to be different. For example, for a withheld Slack channel communication, where the producing party has processed the Slack channel communications in 24 hour slices, the producing party can log the channel by providing field such as: Date, Participants, Channel Name, Privilege Basis, Topic/Subject Matter. Note that the Participants field would only reflect the individuals that were in that channel/room in that allotted date/time slice.



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## **v. Linked/serial communications.**

While the use of email threading allows for efficient review and production of email communications, minimizing the need to review, or to log, plentiful duplicative content, there remains the potential for responsive communications to be withheld on basis of privilege without being disclosed in a metadata based log. Consider where an email between attorney and client is then forwarded by the non-attorney participant to a third person. The metadata log would only reflect the communication between the non-attorney and the third person, and the original communication with the attorney may be not only suppressed from production, but also fail to be accounted for on the metadata log.

For ease of communicating such information, but also minimizing the burden of reviewing and logging each associated non-inclusive emails, producing parties can consider providing the log entry for the most inclusive email, with whatever description or topic fields have been negotiated, and then provide a secondary log of the metadata for all suppressed non-inclusives. By providing Thread ID, the receiving party can link the fuller description inclusive email entry with other emails in the same thread from the non-inclusives metadata log to identify which other individuals participated in the withheld chain. But the producing party would avoid the unnecessary burden of providing descriptions or topics for the suppressed portions of the communication. Note: you would need to do this only for withheld documents. Documents that are produced in redacted form should already reflect the metadata associated with non-inclusive portions of the email thread on the face of the redacted document, so there should be no need to provide additional metadata for suppressed content on a separate log.

This practice may be supported specifically in those jurisdictions where each element of an email chain must be disclosed to substantiate privilege, such as the Eastern District of Pennsylvania (*Rhoads Indus. Inc. v. Building Materials Comp. of Am.*, 254 F.R.D. 238 (E.D. Pa 2008)).

## **G. Timing.**

[**NOTE** for future drafting: incorporate further into this section the concepts of iterative/phased or rolling logs – there is some below already]

Courts, in general, hold that assertions of privilege must be made and substantiated (for instance, through a privilege log) at the time of each production, and that failure to do so may result in a finding of waiver.<sup>120</sup> These decisions imply that privilege logs should be served on a “rolling

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<sup>120</sup> See, e.g., *Valley Forge Ins. Co. v. Hartford Iron & Metal Inc.*, No. 115MC00103TWPDML, 2018 WL 1948882, at \*4 (S.D. Ind. Apr. 25, 2018) (“The Magistrate Judge explained how privilege designations work. ‘So when Keramida for the first time served its documents in response to the subpoena following the April Order, privilege designations were made as to specific documents and a privilege log was created and served. That is how privilege designations typically are made—at the time of production.’ The Court agrees with the Magistrate Judge’s sound reasoning regarding this Court’s April Order.”) (internal citation omitted); *Jochem v. PolyMedica Corp.*, No. 05-14259-CIV, 2006 WL 8433830, at \*1 (S.D. Fla. June 8, 2006) (“[T]he Defendants did not fulfill their obligation to

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basis.” However, the so-called “rolling” production of privilege logs may not be appropriate in every case. For example, in cases involving large volumes of documents, it is typical for the producing party to apply a “privilege screen” to the documents and to withhold all documents hitting on that screen from its initial productions until they can be subjected to further privilege review. Does this initial withholding, or de-prioritization for review, give rise to a duty to log those screened documents (even if no final determination has been made)? In order to minimize disputes, it may be in the parties’ joint interest to delay the production of privilege logs until the second-level review is complete and any non-privileged documents are produced to the requesting party. The parties should meet and confer early in the case regarding the appropriateness of such an agreement in their case.

If the parties opt to make such an agreement concerning the provision of privilege logs, they should be mindful of the case schedule and provide a deadline that provides the parties time to meet and confer regarding any concerns with those assertions of privilege, and if necessary, to seek relief from the Court sufficiently in advance of the discovery deadline to enable the parties to conduct any necessary follow up document discovery and/or examine witnesses about any documents that are later produced (because the claim of privilege has been withdrawn voluntarily or production is compelled by the court).

#### **H. Early Case Communication (Discovery Protocols & Court Interaction).**

The parties should meet and confer regarding privilege issues at their initial Rule 16(f) conference. At this conference, the parties should specifically discuss, and if possible reach agreement, on the following:

- When assertions of privilege must be made and substantiated (*i.e.*, are privilege logs to be provided on a rolling basis or after all document productions have been completed?);
- How assertions of privilege are made and substantiated (*i.e.*, a traditional line-by-line log, a metadata+ log, etc.);

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substantiate their claim of privilege and to provide a privilege log at the time of production (or before the Motion to Compel was filed). The Defendants thereby waived, at least in a procedural sense, their claim of privilege.”); *Brown v. Barnes & Noble, Inc.*, 474 F. Supp. 3d 637, 647 (S.D.N.Y. 2019), *reconsideration denied*, No. 116CV07333RAKHP, 2020 WL 1082464 (S.D.N.Y. Mar. 5, 2020), and *aff’d*, No. 116CV07333MKVKHP, 2020 WL 5037573 (S.D.N.Y. Aug. 26, 2020), and *aff’d*, No. 116CV07333MKVKHP, 2020 WL 5037573 (S.D.N.Y. Aug. 26, 2020) (“Plaintiffs allege that BN waited for two and a half years before finally providing its privilege log. However, it appears that, at most, BN delayed production of its log by a few months, insofar as it did not provide a log with each tranche of its ESI production from its corporate-level custodians. This Court does not condone waiting on the production of a privilege log until the end of a rolling ESI production. Producing parties should provide a log with each production tranche and/or on a rolling basis. This allows the receiving party to timely raise issues about withheld documents. It also allows for the review of smaller subsets of documents and smaller *in camera* reviews (if necessary), allowing for early clarification of privilege issues. Such a process is fairer to the requesting party, more efficient, and less costly. Additionally, Rule 26 contemplates the supplementation of privilege logs throughout discovery.”) (citing Fed. R. Civ. P. 26(e)); *City of Gallup, New Mexico v. Hotels.com., L.P.*, No. CV 07-644 JEC/RLP, 2010 WL 11500086, at \*4 (D.N.M. Aug. 12, 2010) (“Defendants shall serve Plaintiff with a privilege log at the time of production.”).

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- Whether any privileges or protections could apply in the case (*e.g.*, bank-examiner privilege, self-evaluative audit privilege, spousal privilege, doctor-patient privilege) and whether those warrant special/unique privilege procedures;
- Whether to request that the court appoint a special master to resolve privilege disputes;
- Whether to enter into a Rule 502(d) order, and the terms of that order; and
- How privilege disputes will be presented to the Court, including whether to employ a sampling methodology (and what methodology) for documents to be presented to the court for *in camera* review.

As shortly thereafter as practicable, the parties should memorialize any agreements reached in a proposed order to be entered by the court. If there are any disagreements, the parties should present those to the court for resolution at the same time.

#### IV. DISPUTE RESOLUTION & REMEDIES

##### A. Certification of Process and/or Log.

##### 1. Types of certifications.

Sedona does not take a position about the applicability of certifications under FRCP 26(g) to enforce the accuracy of privilege calls. However, in narrow circumstances, parties and courts have used certifications relating to the privilege log process to reduce disputes. These limited certifications can inform receiving parties about the privilege log process and build trust between the parties about the privilege log. Because privilege logs are arguably covered by FRCP 26(g) (certifying discovery responses, disclosures, and objections), parties can also use meet and confers and ESI protocols to inform each other of their privilege log processes without a separate certification.

Parties can consider using several different types of certifications. For example, in cases where a receiving party can identify issues with a party's privilege log, courts have ordered a certification from counsel that (1) the documents on the privilege log were reviewed by an attorney; and (2) the attorney made a good faith determination that the documents are privileged.<sup>121</sup> When using a categorical privilege log, Judge Facciola and Judge Redgrave have called for attorneys to provide an affidavit attesting to facts supporting the privileged or protected status of documents in that category.<sup>122</sup> Attorneys might also certify that certain individuals listed on a privilege log are officers, employees, or other individuals protected by the attorney client privilege.<sup>123</sup>

<sup>121</sup> *E.g.*, *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, 2018 WL 2676165, at \*1 (N.D. Ala. Jan. 29, 2018) (noting that the magistrate judge had required the responding party to "certify that each document listed had actually been examined and determined to be privileged").

<sup>122</sup> The Facciola-Redgrave Framework, 4 Fed Cts. L. Rev. 20, 47 (2009).

<sup>123</sup> *E.g.*, *Christian Coal. Int'l v. United States*, No. 2:01CV377, 2002 WL 1482523, at \*3 (E.D. Va. May 31, 2002).

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Understanding that perfection is not the standard in discovery, a certification can be used to describe the process a producing party uses to create the privilege log and certify that the process was followed in good faith and with reasonable diligence. It should be noted that Sedona cautions that unless parties agree otherwise, they “should not be required to produce documentation of their discovery processes unless there has been a showing of a specific deficiency in their discovery processes (*see* Comment 6.b.), and, even then, the production requirement is subject to the normal protections afforded by the attorney-client privilege or the work product doctrine.”<sup>124</sup> In some situations, a certification of the process alone will suffice. For example, due to the burden faced in *Fifty-Six Hope Road Music, Ltd. v. Mayah Collections, Inc.*, the Plaintiffs’ counsel did not have to provide a log but was required to attest to the sufficiency of the privilege review and provide a reasonable estimate of the number of withheld documents.<sup>125</sup> Plaintiff was required to log any allegedly privileged documents that were shared with third parties.<sup>126</sup>

## 2. Rule 26(g) and professional conduct.

Most applicable rules do not explicitly require attorneys to provide any kind of certification. The process of asserting a privilege is controlled by Rule 26(b)(5) and Rule 45(e)(2)(A)), which, as discussed above, both require a producing party withholding information on the basis of privilege or work product-protection 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. Neither Rule requires such descriptions be certified by counsel.

Rule 26(g) requires every discovery request, response, or objection be signed by counsel and provides that by signing, the attorney or party:

certifies that to the best of the person’s knowledge, information, and belief formed after reasonable inquiry

...

with respect to a discovery request, response, or objection, it is:

- (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
- (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

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<sup>124</sup> The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production A Project of the Sedona Conference Working Group on Electronic Document Retention and Production*, 19 SEDONA CONF. J. 1, 127 (2018). Other commentators advocate for transparency regarding a responding party’s discovery process. *E.g.*, Paula Schaefer, “*Trust Me*” Versus Transparency in Civil Document Discovery, 50 U. Tol. L. Rev. 491, 500 (2019).

<sup>125</sup> No. 2:05-cv-01059-KJD-GWF, 2007 WL 1726558, at \*6-8 (D. Nev. June 11, 2007).

<sup>126</sup> *Id.*

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(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.<sup>127</sup>

An attorney that signs a discovery request, response, or objection that violates Rule 26(g) without substantial justification faces sanctions, either by party motion or the court on its own.<sup>128</sup>

One might interpret a privilege log as a privilege “objection” or “response” that requires a Rule 26(g) signature. Courts occasionally turn to Rule 26(g) to impose sanctions in the privilege log context, however this does not appear to be common.<sup>129</sup> In these scenarios, courts have found that deficient privilege logs undermine the basis for objecting to discovery requests, complete with a Rule 26(g) signature, on privilege grounds.

New York State Commercial Division’s Rule 11-b established a preference for categorical privilege logs and requires the producing party to certify “with specificity those facts supporting the privileged or protected status of the information included within the category.” Rule 11-b(b)(1). Additionally, the certification must “describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted.”

Rule 9 of the ABA Model Rules for Lawyer Disciplinary Enforcement provides grounds for discipline that include violating rules of professional conduct of any jurisdiction and willfully violating a valid order of the court imposing discipline. ABA Model Rule 3.1 requires a lawyer not assert an issue in a proceeding “unless there is a basis in law and fact for doing so that is not frivolous.” This might apply to the assertion of a privilege objection itself in the same way as Rule 26(g) results in an implied certification. ABA Model Rule 3.3, prohibits a lawyer from knowingly making a false statement of fact or law or fail to correct a false statement of material fact or law previously made to the tribunal. This rule might also apply where an attorney makes representations to the court in the context of a privilege challenge. ABA Model Rule 3.4(d) prohibits a lawyer from failing to make a “reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”<sup>130</sup> This could apply to assertions of privilege and the preparation of a privilege log. Importantly, though, “discipline referrals and the imposition of

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<sup>127</sup> Fed. R. Civ. P. 26(g)(1)(B).

<sup>128</sup> *Id.* 26(g)(3).

<sup>129</sup> *Kosjer v. Coffeyville Res. Crude Transportation, LLC*, No. 17-1181-JTM, 2018 WL 1151515, at \*4 n. 15 (D. Kan. Mar. 5, 2018) (suggesting that in redoing their privilege log, the responding parties “would be well-advised to comply with the certification requirements of Fed. R. Civ. P. 26(g), lest they incur sanctions by way of attorneys’ fee”). *In re Spoonmore*, 370 B.R. 833, 840 (Bankr. D. Kan. 2007) (holding that the responding party’s initial objections and deficient privilege log warranted the imposition of sanctions under Rule 26(g)(2)); *Precision Pine & Timber, Inc. v. United States*, No. 98-720 C, 2001 WL 1819224, at \*6 (Fed. Cl. Mar. 6, 2001) (imposing sanctions under Rule 26(g) where responding party asserted general privilege objections).

<sup>130</sup> Alabama, Maine, Texas, Georgia, Illinois, Pennsylvania, and New York’s rules do not include this same obligation. *See Paula Schaefer, Attorneys, Document Discovery, and Discipline*, 30 Geo. J. Legal Ethics 1, 43 n. 102 (2017)).



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discipline for document discovery misconduct that occurred in federal court are exceedingly rare.”<sup>131</sup>

Thus, the use of certifications outside of specific jurisdictions requiring them in certain situations remains a tool that parties can use to build trust and resolve disputes over accuracy. They are also a tool used by courts to resolve privilege disputes.

## **B. Resolving Disputes.**

### **i. Preliminary communications to narrow issues.**

Rather than proceeding directly to court, engage with opposing counsel first. What appears to be a potentially contentious issue may be nothing more than a simple oversight or unintentional error by the party who produced the privilege log. For example, an entry on a log may be designated as both privileged and work product but the date of the document calls into question whether litigation reasonably could have been anticipated at that time. This may be the result of a simple coding error and lack of sufficient quality control in the final preparation of the log. If an error is brought to the responding party’s attention, the party may withdraw the work product claim. Additionally, it may be that the process and format that the parties agreed on at the beginning of discovery does not, in practice, meet the responding party’s needs. This may be because of a misunderstanding or miscommunication, or may also be a function of counsel making decisions before knowing what the discovery would actually include. It may not be too late to alter the format or provide additional information. To this end, rather than letting these issues sit until it is time to set a formal meet and confer in advance of a motion to compel, it is worth communicating with the opposing party more informally to address what appear to be oversights, mistakes, and inadvertently poor entries. Try to narrow the issues before engaging in more contentious discovery dispute resolution.

### **ii. Formal meet-and-confer.**

Typically, the applicable rules will require that parties hold a formal “Meet and Confer” prior to the filing of a motion. Even if the filing of a motion is not imminent, a formal conference should be set when informal discussions have reached a stalemate or when issues with a privilege log appear to be intentional, systemic, or involve genuine issues regarding how the law should be applied to a particular document.

A formal conference can be used to identify any areas where the parties agree, where a compromise can be had, and where court intervention is needed. To this end, consider providing a concrete plan for the conference with a scope of documents to be discussed (e.g., specific document identifiers). Try to identify specific entries and problems so that a constructive discussion can be had about them. Use the conference to resolve misunderstandings and narrow

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<sup>131</sup> *Id.* at 20.

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the issues. Remember that, a specific and well-defined concern is more likely to be considered than an ambiguous complaint.

As agreements to provide additional information are made, set periodic deadlines to provide the parties' position or supplemental information. Such deadlines will keep responding parties accountable and provide an additional basis to seek court intervention to resolve the privilege dispute.

### **iii. Status conference.**

If a discovery status conference was built into the discovery protocol or case schedule, parties may use it to encourage recalcitrant counterparts to come to the table to resolve disputes before the parties go before the judge.

Any discovery protocol or case schedule should call for submission of status reports on a scheduled basis. If the case has any degree of complexity, the case schedule should call for telephonic or video status conferences on a regular basis. It is not unusual, for example, to schedule weekly, biweekly or monthly status conferences to enable the parties to obtain guidance and rulings from the court. For example, in *Consumer Financial Protection Bureau v. Navient*, M.D. Pa., No. 3:17-CIV-101, which involved hotly contested disputes involving the deliberate process privilege, weekly conference calls were conducted by the court-appointed special master. The calls were conducted on the record. Rulings were often made during or shortly after those conference. The special master issued scores of orders, with only one being challenged. Among the issues resolved by the special master were challenges to the adequacy of the categorical privilege logs prepared in that case.

Regularly scheduled status conferences enable efficient resolution of discovery imbroglis that have the potential to bog down the case. They should not be treated as pro forma events. These status conferences provide counsel with the opportunity to engage in meaningful dialogue that can lead to agreements to resolve uncertainties and confusion created by inadequate privilege logs. They also afford the Court an opportunity to provide guidance and issue rulings to resolve disputes concerning privilege logs.

The burden of making the most of a status conference, however, lies with the parties and not the court. It is the responsibility of counsel to apprise the court of problems with privilege logs, and regularly scheduled status conference enable counsel to do so in a timely manner. Submission of letters to the court suitably in advance of the status conference is essential to assuring the court is adequately prepared to address disputes with respect to privilege logs.

If there is a problem but counsel does not make the court aware of it, it is unlikely that problem will be discussed at the status conference. More importantly, if counsel have not given the court notice of the problem in advance of the status conference, the court will not be in a position to resolve the problem or provide meaningful guidance. Thus, it makes sense that any discovery protocol or case scheduling order require counsel to submit agenda letters in advance of

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each status conference. The agenda letter can be a joint submission, or a submission on behalf of each of the interested parties. If a joint letter is submitted, the parties positions on the matter at issue should be summarized.

Merely informing the judge that there is a problem is not as effective as framing why the problem exists and suggestions for how it may be resolved. Informing the court that that a privilege log seems inadequate is not as effective as stating that a privilege log with one thousand entries is concerning because only three hundred documents have been produced. Advising the court that the privilege log does not provide sufficient descriptions of the information being withheld is not as meaningful as providing examples of the inadequate descriptions.

Specificity, however, may not always be an option so counsel should be prepared to defend a privilege log using broader but reasonable facts. For example, if there are five hundred thousand documents in the discovery corpus but the first production consists mostly of the general counsel's documents, the disparity between the volume of documents in the production and the number of privilege log entries becomes more understandable.

#### **iv. Fast-track court guidance.**

Many courts or individual judges have adopted standing orders designed to facilitate the resolution of discovery disputes, including privilege log issues, to avoid unnecessary briefing of the issues. Typically, the procedure allows for the complaining party to submit a short email outlining the concern, the opposing party then gets to respond with another short email, and then a judge will often do one of the following: decide the issue based on the emails only; schedule a phone conference to discuss the matter and provide a ruling at the end of the conference; or conduct the phone conference but reserve a ruling until more formal briefing takes place and/or other measures are taken.

Phone conferences are typically held very soon after the email exchanges and allow for a potentially quick resolution of the dispute without the need for extensive and expensive motions practice. In some instances, the court will place strict limits on the length of letters or briefs.

This "fast track" process can lead to the prompt resolution of a dispute, but if a party believes the resolution should be documented for future reference, it should consult with the court as to its preference on how this should be accomplished.

#### **v. Formal court resolution.**

A quick resolution of a privilege log dispute may not always be the best option for one of the parties. If the documents at issue are particularly complex or voluminous it may not be feasible to explain the concerns in a one-page email or rely on an inadequate sample of documents. In other scenarios, the court also may not feel comfortable ruling on a potential waiver of privilege without allowing the parties to brief the legal issues fully and present relevant documents for in camera review.

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Parties must be careful, however, not to expect the judge to do all of the work or to view hundreds or thousands of documents without a strong reason. In camera review is not a right – there must be a legitimate need to ask a judge to spend valuable time and resources reviewing documents (and be prepared to pay for the cost of a special master). Accordingly, the parties and the court will need to balance several factors when attempting to resolve these types of disputes, including the relevance of the documents at issue, the burdens on the parties, proportionality, and the tension between open discovery and protecting privileges.

Consider creative options to work with the other parties and the court, at all stages of the process, to address disputes. For example, if a court is faced with a large set of documents for in camera review, a sample set can be reviewed to make a preliminary assessment of the validity of the complaining party's challenges.<sup>132</sup> If a sample set of the withheld documents is to be reviewed, make sure that the sample size is statistically sound and that the documents from privilege log are drawn on a random basis to enable the court to draw valid conclusions from its review.<sup>133</sup> If review of the sample set indicates the challenge is likely unfounded, the complaining party may be forced to pay for a special master, for example, to review the rest of the documents if that review is ordered.<sup>134</sup> If the challenge is sustained, the court may find that the overly broad designation of documents as privileged should be sanctioned by having the party claiming the privilege pay for the cost of the review.

Another creative option would be to have a court appointed special master review the data set of a party and prepare a privilege log.<sup>135</sup> The producing party would retain the right to review the documents before any production to the other side is made.

### **C. Incorporate Into the Discovery Protocol.**

Planning ahead for potential disputes regarding privilege logs, and discovery in general, can make resolution of those disputes, with minimal involvement by the court, more likely if and when they arise later. One step to facilitate this is adding certain mechanisms in the discovery protocol or similar written agreement between the parties at the outset of the case.

Consider incorporating the following concepts in a discovery protocol:

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<sup>132</sup> See, e.g., *Winfield v. City of New York*, No. 15CV05236LTSKHP, 2017 WL 5664852, at \*5 (S.D.N.Y. Nov. 27, 2017) (ordering production of sample set of documents withheld on the basis of privilege).

<sup>133</sup> See *Consumer Financial Protection Bureau v. Navient*, No. 3:17-civ-901 (M.D. Pa. ECF No. 222, Special Master Order #7, Feb. 14, 2019) (Sample size of 7% of 6,607 withheld documents statistically significant).

<sup>134</sup> **NOTE:** Additional research to be conducted on cost shifting depending on outcome of special master review.

<sup>135</sup> See, e.g., *Dornoch Holdings Int'l, LLC v. ConAgra Foods Lamb Weston, Inc.*, No. 1:10-CV-00135 TJH, 2013 WL 2384235, at \*1 (D. Idaho May 1, 2013) (Special Master was directed to obtain data set, review it for privilege, and “prepare a privilege log for the Court and Parties”).

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- A mandatory discovery conference with the judge halfway through the discovery period. Parties are more likely to agree to this at the beginning of the case because everyone is on equal footing. As discovery progresses, the prospect of having to defend one's discovery process or positions in front of the court may help keep all parties in line.
- Exchange sample privilege logs (10, 25, 50, or 100 entries) at outset of discovery to confirm format and amount of content.
- Build specific deadlines for when privilege logs will be produced (e.g., a certain time period after each production, after production is complete) that takes into account the practical reality of preparing the logs (including the cost of additional staff and resources to process the privilege log in light of the value of the case) and the receiving party's need to review and potentially challenge the logs in time to obtain documents and use them in depositions, in dispositive motions, with an expert, and/or at trial.<sup>136</sup>
- Set requirements for what privilege logs should contain, including what level of detail will be required for the description, the use of alternatives to a log<sup>137</sup> or the exclusion of certain documents from logs.<sup>138</sup>
- A requirement that privilege logs or other privilege designations are certified by counsel in accordance with Rule 26(g) (or with the same representations if in a non-FRCP jurisdiction). Such certifications might be required only for certain types of logs, e.g., categorical logs.
- A process for challenging a privilege designation. This process can include:
  - A timeline for identification of possible errors or oversights with a set timeline for the responding party to either agree and produce the documents or affirm that the privilege was properly asserted (see more below).
  - A commitment to meet and confer in advance of contacting the court or filing a motion.
  - Requiring a party objecting to privilege designations to raise specific challenges to individual or categories of documents in writing with a set time period for the designating party to respond in writing by either agreeing to remove the privilege, providing additional information to support the assertion of privilege, or affirming the party's position that no additional information is required to properly support the existence of a privilege.
  - A commitment to contact the court for a status conference or other guidance prior to filing motions.

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<sup>136</sup> See Section III.G.

<sup>137</sup> See Section III.F.

<sup>138</sup> See Section III.A.



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