

Civil Rules Discovery Subcommittee Notes

Advisory Committee on Civil Rules
(Oct. 5, 2021)

9. REPORT: DISCOVERY SUBCOMMITTEE

The Discovery Subcommittee has been busy since the full Committee's April meeting. It has held two meetings via Teams, has received abundant comment on the privilege log issues it is considering, and has also received a research memo from the Rules Law Clerk on standards used in different circuits that bear on the other issue the subcommittee is considering — filing under seal in civil cases.

The appendix to this report includes the following:

- Notes of the subcommittee's August 26, 2021 videoconference
- Notes of the subcommittee's May 24, 2021 videoconference
- Invitation for comment on privilege log issues
- Summary of comments on privilege log issues
- Rules Law Clerk's memorandum on circuit standards for filing under seal (July 15, 2021)

On both the issues the subcommittee is currently considering, it is expecting to have more information by the time of the full Committee's October 5 meeting but does not have that information in time to include in the agenda book. Accordingly, this agenda report is an effort to acquaint the full Committee with the issues presented and also to identify some rule approaches that the subcommittee has discussed while awaiting further information. The subcommittee invites feedback from the full Committee.

Privilege Logs

The Committee received two strong recommendations that it revisit Rule 26(b)(5)(A), adopted in 1993, requiring that parties withholding materials on grounds of privilege or work product protection provide information about the material withheld. Though the rule did not say so and the accompanying committee note suggested that a flexible attitude should be adopted, the report was that many or most courts had treated the rule as requiring a document-by-document log of all withheld materials. One suggestion made was that the rule be amended to make it clearer that such listing is not required, and another was that the rule be amended to provide that a listing by "categories" be recognized as sufficient in the rule.

In May, the subcommittee concluded that it should seek more information about experience under the current rule. *See infra* notes of the May 24 videoconference. Accordingly, at the beginning of June, the invitation for comment included in this agenda book was posted. That invitation produced more than 100 thoughtful comments reflected in the summary included in this agenda book. In addition, the National Employment Lawyers Association organized an online discussion with its members for the subcommittee on July 6, 2021, which provided many valuable insights. One aspect of this commentary deserves mention here, though it should be apparent from a review of the summary of comments in this agenda book — there appears to be a recurrent and stark divide between the views of plaintiff counsel (who worry that a rule change could enable defendants to hide important evidence) and defense counsel (who stress the burdens of preparing privilege logs and say they are rarely of value).

As a result of all this input, the subcommittee now has a much improved understanding of the issues presented. But before the October 5 meeting of the full Committee, it expects to receive more input from two additional events:

- On Sept. 20, 2021, the Lawyers for Civil Justice will hold an online Symposium on the Modern Privilege Log that most subcommittee members hope to “attend”
- On Sept. 22-23, 2021, Jonathan Redgrave and retired Magistrate Judge John Facciola have organized a Symposium on the Modern Privilege Log that many subcommittee members hope to “attend”

It may well be that the members of the subcommittee who are able to attend these events will be able to provide reports on the additional input these events have provided. Since more input is coming, this report is necessarily tentative. Nevertheless, it is designed to introduce the issues as now understood.

The subcommittee’s discussion on August 26 focused on a variety of rule change possibilities. Various subcommittee members expressed differing attitudes toward these ideas (as reflected in the notes included in this agenda book), so none of them is presented as a subcommittee preference.

Perhaps it is useful to begin by presenting the original proposed addition to Rule 26(b)(5)(A) submitted by LCJ:

If the parties have entered an agreement regarding the handling of information subject to a claim of privilege or of protection as trial-preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim of privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.

In early August, LCJ submitted a more extensive proposal to amend the rule, which is included in this agenda book as an appendix to the summary of comments. For the present, it bears noting that the LCJ proposal focuses on party agreements, leading the subcommittee to focus on Rule 26(f) and Rule 16(b), which might be the natural place to locate a rule provision designed to consider such an agreement and call it to the court’s attention.

Rule 26(f)/16(b) Approach

Rule 26(f)(3)(D) could be revised along the following lines to say that the parties’ discovery plan must state the parties’ views on:

- (D) any issues about claims of privilege or of protection as trial-preparation materials, including the method to be used to comply with Rule 26(b)(5)(A) and — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

791 Rule 16(b)(3)(B)(iv) could be amended in a parallel manner, providing that the
792 scheduling order may;

- 793 (iv) include the method to be used to comply with Rule 26(b)(5)(A) and any
794 agreements the parties reach for asserting claims of privilege or of
795 protection as trial-preparation material after information is produced,
796 including agreements reached under Federal Rule of Evidence 502.

797 These changes could support a committee note explaining that the parties and the court
798 can benefit from early discussion, with details, of the method to be used for creating a workable
799 privilege log. The note might also stress the value of early “rolling” privilege log exchanges and
800 warn against deferring the privilege log exchange until the end of the discovery period. It might
801 also stress the value of early judicial review of disputed privilege issues as a way to provide the
802 parties with detailed information about the court’s view on what privilege does and does not
803 apply to. The parties can then govern their later handling of privilege issues with that knowledge.

804 This approach can be supported on the ground that it is desirable to prod the parties and
805 the court to attend to the privilege log method up front. Several members of the subcommittee
806 reported that serious problems can develop when privilege logs are not forthcoming until near
807 the end of the discovery period, and disputes about them or about what was withheld therefore
808 had to be addressed at that time. A prompt in a committee note in favor of production of a
809 “rolling” privilege log might also be desirable.

810 One thing the parties might address in their Rule 26(f) conference, and the court might
811 include in a Rule 16(b) scheduling order would be categories of materials that need not be listed.
812 subcommittee discussion has suggested that often communications with outside counsel dated
813 after the commencement of the litigation might be a category exempted from listing on a log.
814 Another category that has been discussed within the subcommittee is that any documents
815 produced in redacted form need not also be listed in the log since it will be apparent from the
816 face of the redacted documents that portions have not been included.

817 This Rule 26(f) approach allows the parties to tailor any categorical exclusions or
818 methods of reporting withheld materials to their case. It bears noting that some comments
819 received asserted that some parties seem to route communications through in-house counsel, or
820 copy them on communications, in situations in which no privilege really applies. Some who
821 commented claim that this is a subterfuge designed to conceal evidence. Presumably that sort of
822 misgiving could be explored in conferences of counsel

823 Another feature of this approach is that the nature of privileges may vary significantly in
824 different types of federal court litigation. It may be that the original submissions to the
825 Committee were principally concerned with what might be called commercial litigation. But
826 comments submitted in response to the invitation for comment emphasized that very different
827 issues often exist in other types of litigation. One example involves suits for violation of civil
828 rights due to alleged police use of excessive force. Various sorts of privilege that may be invoked
829 in such litigation — internal review privilege or informer’s privilege, for example — are quite
830 different from the attorney-client and work product protections. Another example is medical

malpractice litigation, which may involve peer review, confidentiality of medical records, and other privileges that do not often appear in typical commercial litigation.

Another topic that is mentioned in many of the comments and has come up in subcommittee discussions is the possibility that technology can facilitate creation of a log. It does seem that technology can now sometimes ease the task of preparing a log, perhaps even make it a “push the button” exercise to produce a “metadata log.” But subcommittee members’ experience has been that this possibility has not proved a cure-all for privilege-log disputes. To the contrary, attempts to use technology to generate logs too often produce disputes between counsel. After a period of disputing, the technology “solution” is abandoned in favor of document-by-document logs. All of this can generate more work for the court.

Perhaps, if the parties carefully considered this high tech possibility during their Rule 26(f) conference and presented the judge with either an agreed method or their contending positions on how it should be done the court could, early in the litigation, direct use of a method that seemed effective, and also direct that an initial logging report using that method be presented fairly promptly so that if further disputes occurred they could be addressed in a timely fashion.

All in all, then, it may be that adding this topic to the Rule 26(f) discussion may provide needed flexibility that takes account of both the nature of the privileges likely to be invoked and the nature of the litigation and the litigants. And calling the court’s attention to it in relation to the Rule 16(b) scheduling order may pay dividends.

- Introducing a Categorical Approach into Rule 26(b)(5)(A)

We are told that many or most courts regard the current rule as requiring document-by-document listing. Some comments have urged that the rule be amended to state an explicit requirement of such a listing in every case. The subcommittee is not currently enthusiastic about that idea. But as noted above, there may fairly often be categorical methods to reduce the burden of satisfying the rule in light of the particulars of a given case. With or without amendments to Rule 26(f) and 16(b), it would be possible to amend Rule 26(b)(5)(A) itself to suggest alternative means of satisfying the rule. Here are sketches of some alternatives:

Alternative 1:

- (ii) describe for each item withheld — or, if appropriate, for each category of items withheld — 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.

864 Alternative 2:

- 865 (ii) describe the nature of the documents, communications or tangible things
866 not produced or disclosed — and do so in a manner that, without revealing
867 information itself privileged or protected, will enable other parties to
868 assess the claim. The description may, if appropriate, be by category rather
869 than a separate description for each withheld item.

870 Alternative 3:

- 871 (ii) describe the nature of the categories of documents, communications or
872 tangible things not produced or disclosed — and do so in a manner that,
873 without revealing information itself privilege or protected, will enable
874 other parties to assess the claim.

875 Such rule changes would counter contentions that the rule requires an itemized listing in
876 all cases, by introducing into the rule the alternative of a categorical listing. That could provide
877 desirable flexibility for courts that feel they are currently compelled to require
878 document-by-document logging.

879 Focusing first on Alternatives 1 and 2, these approaches leave at least two things
880 uncertain. First, when one says that the rule can be satisfied by a listing by “category,” it does
881 not say anything about what would be a “category.” Consider a “category” discussed during the
882 subcommittee’s Aug. 26 meeting: “materials protected by the attorney-client privilege or as work
883 product.” One could certainly say this is a category. But if it would suffice, it’s difficult to see
884 how it would differ from the pre-1993 “general objection” that “respondent will not produce any
885 materials privileged under the attorney-client privilege or protected as work product.” And one
886 goal of the 1993 change was to move beyond that sort of Delphic general objection.

887 On the other hand, the amended rule would still say that the description must “enable
888 other parties to assess the claim.” Perhaps that rule provision suffices to avoid a return to the
889 pre-1993 situation. But if the description is only by category it is difficult to see how that
890 protects against untoward results.

891 And (unlike the Rule 26(f)/16(b) approach) this approach does not deal with the timing
892 concern that the subcommittee has addressed. The amendment would not itself say anything
893 about when the categorical privilege log was presented, or whether it should be done on a rolling
894 basis. So this approach would not provide much protection against the appearance of a major
895 dispute just as the discovery period was ending.

896 Alternatives 1 and 2 also do not say what does or does not constitute a “category.” In a
897 given case, the parties may be able to negotiate categories suitable to their case; however,
898 standing alone, this rule change would seem to permit the responding party unilaterally to
899 declare the categories it is using.

900 Finally, Alternatives 1 and 2 say a categorical approach is suitable only if it is
901 “appropriate.” That raises a serious question about who decides whether it is appropriate, and
902 when. If it’s the producing party, and the use of a categorical approach emerges only at the last

moment, that seems a recipe for disputes. Several comments asserted that, despite the current rule and the supposedly widespread interpretation that it requires document-by-document logs, many plaintiffs can't get defendants to provide any type of log until they file motions to compel, and then they are presented with categorical logs that they find inadequate. It is difficult to know how general this experience is, but the reports suggest there is something to the concern.

So making such changes might, standing alone, produce difficulties. But if the Rule 26(f)/16(b) changes were made, adding this change could create new problems that don't currently exist, or worsen problems that already exist, if it were treated as enabling the responding party to decide what to do unilaterally.

Alternative 3 goes farther yet. It says using a categorical approach satisfies the rule, though with the qualifier that it be done in a manner that will "enable other parties to assess the claim." It does not say the rule only permits this option when "appropriate." And it might undercut the Rule 26(f)/16(b) approach by declaring that categorical listing is presumptively sufficient.

- Adopt a Categorical Exclusion Approach in Rule 26(b)(5)(A) Itself

The discussion above assumes that the rules would not themselves specify what "categories" of materials are exempted from disclosure under Rule 26(b)(5)(A). One possibility might be:

Alternative 1:⁴

- (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. Communications between a party and its [litigation] {outside} counsel [[created] {dated} after the commencement of the action] need not be described, or materials produced in redacted form.

Alternative 2:⁵

- (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. But items created or dated after the filing of the first complaint in the action need not be described.

Such an approach could avoid some of the pitfalls produced by the invocation of the indefinite categorical approach suggested in the previous section of this report. It would specify

⁴ This idea was included in the materials for the subcommittee's August 26 Teams meeting.

⁵ This alternative is modeled on LCJ's submission in early August. It is not the same as the original LCJ proposal, and is offered solely for illustrative purposes.

what categories need not be listed in the rule, and therefore those categories would not depend on party agreement or unilateral action by the producing party.

Given the recurrent assertions in the comments in response to the invitation for comment from plaintiff lawyers saying that some companies routinely route materials through in-house counsel as a way to shield them from discovery, one might insist on limiting Alternative 1 to “litigation counsel.” If there are in-house lawyers whose role is not limited to providing legal advice, it would not seem that all communications with those in-house lawyers should be per se excluded. That might be ameliorated by limiting this provision to “litigation” counsel. But perhaps in-house counsel are in fact handling the litigation, or partly handling the litigation. So perhaps one would limit this exclusion to “outside” counsel.

Both formulations focus on timing — in general regarding materials created or dated after the commencement of suit. One might phrase that in different ways. Alternative 2 might be hard to apply in an MDL proceeding with hundreds of cases. Alternative 1 might be susceptible to the same problem if discovery was sought in an action filed two years after the first filing centralized in the MDL. All the items pre-dating the filing of the most recent suit would seem to be caught up in this formulation.

Alternative 2 does not focus only on communications with counsel or involving counsel acting as such. Might there be a risk that a party would conclude that anything created after suit was filed is exempt from listing? Maybe it’s reasonable to assume that everything created after suit is filed is somehow “in anticipation of litigation.” But that seems unlikely in large organizations with regard to post-filing communications about the matter in suit. Consider, for example, email between supervisors about a discharged employee after the employee sued claiming the discharge was discriminatory. Since materials withheld on claims of privilege must to some extent be relevant (or they could be withheld as non-responsive), it seems odd to treat the fact they were created after the suit was filed as exempting them from disclosure. This could often prove to be overbroad.

Adding “or dated” to “created” might be challenged as inviting post-dating of materials. Though that may sound unlikely, it may be that a computer file is re-dated whenever it is opened and saved. Does that mean that it is exempted?

A different concern with focusing on whether the materials post-date the filing of the action is a possible pro-defendant bias. To comply with Rule 11, plaintiff lawyers are required to make a reasonable investigation before filing suit. If they do so, should they be required to list all the items they created, while defense counsel hired after suit was filed is protected from doing that due to the exemption? Perhaps that’s just the way of the litigation world, but it might attract criticism in a rule. This concern can be overstated; defendants may often begin their litigation preparation before suit is filed.

This brief discussion probably only scratches the surface of the difficulties the subcommittee could face in devising rule descriptions to exempt materials from disclosure. As a subcommittee member put it during the Aug. 26 online meeting, it looks very difficult to identify categories that could be “baked into” the rule.

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977 As noted at the outset, the subcommittee fully expects to receive valuable additional input
978 about these issues during the symposia in the third week of September. But this report will
979 hopefully identify at least some of the ongoing issues.

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Sealed Court Filings

981 Several parties — Prof. Volokh, the Reporters’ Committee for Freedom of the Press, and
982 the Electronic Frontier Foundation — submitted a proposal to adopt a new Rule 5.3, setting forth
983 a fairly elaborate set of requirements for motions seeking permission to seal materials filed in
984 court.

985 The submission asserted that it is universally, or almost universally, recognized that the
986 showing required to justify filing under seal is very different from the standard that supports
987 issuing a Rule 26(c) protective order regarding materials exchanged through discovery. Research
988 done by the Rules Law Clerk (included in this agenda book) confirms that report. Filings may be
989 made under seal (unless that is required by statute or court rule) only on a showing that
990 sufficiently addresses the common law and First Amendment rights of public access to court
991 files.

992 Proposed Rule 5.3 also had a number of features that do not apply to most, or any other,
993 motion practice. It seemed to propose that motions to seal be posted on the court’s web site or
994 perhaps on a shared website for many courts, rather than only in the file for the case in which the
995 motion was filed. It provided that, unlike other motions, motions to seal could not be decided
996 until at least seven days had passed since such posting had occurred.

997 The proposal also asserted that local practices on motions to seal diverged from district to
998 district. That led to research about a “sample” of local rules — the ones applying in the nine
999 districts “represented” on the Advisory Committee. There is no claim that these local rules are
1000 “representative” of local rules on sealing in other districts. But it is clear that the local rules in
1001 these nine districts differ from one another. It is also clear that many features of proposed
1002 Rule 5.3 differ from provisions in the local rules of at least some of these districts, and that if the
1003 proposed rule were adopted portions of the local rules in each of those districts would become
1004 invalid under Rule 83(a)(1).

1005 As with the privilege log issues, a recent development suggests that this report can only
1006 introduce pending issues rather than presenting the subcommittee’s views. The subcommittee has
1007 learned that the Administrative Office of the U.S. Courts (AO) has begun a study of sealed
1008 filings, but it does not have details on that study. It is hoped that by the time the Advisory
1009 Committee meets on October 5 there will be more information available.

1010 There may be reason to defer thought of adopting a new Civil Rule if the AO is
1011 addressing sealing issues more broadly. Considering that one of the proponents of a new rule is
1012 the Reporters’ Committee, one might suggest that media interest in filings in criminal cases
1013 might be stronger than the interest in civil cases. And sealing of matters related to criminal cases
1014 may be more pervasive. For example, a Federal Judicial Center (FJC) study of “sealed cases”
1015 about 15 years ago showed that a great many of those were miscellaneous matters opened for

search warrant applications that did not lead to a prosecution. Though technically they should not have remained sealed after the warrant was executed, they were not unsealed.

It also may be that — particularly to the extent sealing issues depend on the internal operations of clerks’ offices — it may be more appropriate for a body other than the rules committees to take the lead on those issues. The Court Administration and Case Management (CACM) Committee comes to mind.

Thus, it seems that the matter now before this Committee might be divided into two somewhat discrete subparts — (a) adopting rule amendments recognizing in the rules the distinctive requirements for sealed filings in civil cases and distinguishing those requirements from the more general protective order practice, and (b) adopting nationally uniform procedures for handling motions for leave to file under seal.

Before turning to those two issues, it is useful to add some information provided by Judge Boal, who consulted informally with other members of the Federal Magistrate Judges Association Rules Committee, of which she is a member (and former co-chair), and from Susan Soong (our clerk liaison) based on some inquiry among court clerks. Both these reports were based on informal inquiries, but they may shed light on the issues presented here.

Judge Boal reported that the magistrate judges she consulted saw frequent motions to seal, but did not think they had seen notable increases in the frequency of such motions, though they also thought that there are too many of these motions. It appears that the various circuits have developed their own bodies of case law applying the common law and First Amendment standards in different sealing contexts. So circuit law is the source of guidance on the standards for deciding whether to grant a motion to seal. Though these circuit standards are not identical, they all differ from the “good cause” standard for a Rule 26(c) protective order. But there seemed no reason for rules to address these distinctive circuit approaches to the standards for sealing under the common law and First Amendment rights of public access. There was, however, some support for considering a uniform set of procedures for handling motions to seal. Those procedures vary widely under the local rules of different courts. The most productive rulemaking goal might be to focus on procedures for presenting sealing requests, notifying parties and non-parties, and providing a mechanism for objection to proposed filing under seal and for unsealing previously sealed materials. Though these reactions were informal (compared to the formal comments about privilege issues submitted by the FMJA), they were instructive for the subcommittee.

Susan Soong made informal inquiries of other court clerks, and found that the general view seemed to be that there is nothing about motions to seal that calls for any distinctive treatment of those motions. Indeed, it might be that singling out such motions for additional handling in the clerk’s office would potentially burden court clerks. For example, these motions — like all motions — can be made available on PACER. That would not require any distinctive treatment in the clerk’s office. Her inquiries also confirmed what others have said — that practices on motions to seal (and probably on other motions) vary among districts. It is not easy to say for certain why these differences exist; they may be a result of judge preferences, historical practices, the fact that different courts have caseloads of different types, and the different approaches of various courts to managing discovery. As with the informal reactions

from magistrate judges, these views were instructive for the subcommittee in regard to possible rulemaking addressing the procedures for motions to seal.

Recognizing the Different Standards

A relatively simple pair of rule changes could confirm in the rules what we have been told about actual practice:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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(c) Protective Orders.

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(4) Filing Under Seal. Filings may be made under seal only under Rule 5(d)(5).

The committee note to such a rule could simply state that the standard for sealing materials filed in court is different from the standard for issuing protective orders under Rule 26(c)(1).

Uniform Procedures on Motions to Seal

The FMJA suggestions were that the standard for sealing remain as directed by the various circuits but that rulemaking attention should focus on adopting more uniform procedures for doing deciding motions to seal. It is relatively apparent that the procedures are not uniform now. Indeed, the N.D. Cal. has had an entirely new local rule changing its procedures out for comment during August.

More generally, it's likely that there are differences among districts on how to handle other sorts of motions. In the N.D. Cal., for example, 35 days' notice is required to make a pretrial motion in a civil case, absent an order shortening time. The local rules also limit motion papers to 25 pages in length, and provide specifics on what motion papers should include. Oppositions are due 14 days after motions are filed and also subject to length limitations. There is also a local rule about seeking orders regarding "miscellaneous administrative matters," perhaps including filing under seal, which have briefer time limitations and stricter page limits.

In all likelihood, most or all districts have local rules of this sort. In all likelihood, they are not identical to the ones in the N.D. Cal. An initial question might be whether motions to seal should be handled uniformly nationwide if other sorts of motions are not.

One reason for singling those motions out is that common law and constitutional protections of public interests bear on those motions in ways they do not normally bear on other motions. Indeed, in our adversary litigation system it is likely that if one party files a motion for something the other side will oppose it. But it may sometimes happen not only that neither side cares much about the public right of access to court files, but that both sides would rather defeat

or elude that right. So there may be reason to single out these motions, though it may be more difficult to see why notice periods, page limits, etc. should be of special interest in regard to these motions as compared with other motions.

A different set of considerations flows from the reality at present that local rules diverge on the handling of motions to seal. At least sometimes, districts chafe at “directives from Washington.” There have been times when rule changes insisting on uniformity provoked that reaction. Though this committee might favor one method of processing motions over another, it is not clear that this preference is strong enough to justify making all districts conform to the same procedure for this sort of motion.

Without meaning to be exhaustive, below are some examples of issues that might be included in a national rule designed to establish a uniform procedure:

Procedures for motion to seal: The submission proposes that all such motions be posted on the court’s website, or perhaps on a “central” website for all district courts. Ordinarily, motions are filed in the case file for the case, not otherwise on the court’s website. The proposal also says that no ruling on such a motion may be made for seven days after this posting of the motion. A waiting period could impede prompt action by the court. Such a waiting period may also become a constraint on counsel seeking to file a motion or to file opposing memoranda that rely on confidential materials. The local rules surveyed for this report are not uniform on such matters.

Joint or unopposed motions: Some local rules appear to view such motions with approval, while others do not. The question of stipulated protective orders has been nettlesome in the past. Would this new rule invalidate a protective order that directed that “confidential” materials be filed under seal? In at least some instances, such orders may be entered early in a case and before much discovery has occurred, permitting parties to designated materials they produce “confidential” and subject to the terms of the protective order. It is frequently asserted that stipulated protective orders facilitate speedier discovery and forestall wasteful individualized motion practice.

Provisional filing under seal: Some local rules permit filing under seal pending a ruling on the motion to seal. Others do not. Forbidding provisional filing under seal might present logistical difficulties for parties uncertain what they want to file in support of or opposition to motions, particularly if they must first consult with the other parties about sealing before moving to seal. This could connect up with the question whether there is a required waiting period between the filing of the motion to seal and a ruling on it.

Duration of seal: There appears to be considerable variety in local rules on this subject. A related question might be whether the party that filed the sealed items may retrieve them after the conclusion of the case. A rule might also provide that the clerk is to destroy the sealed materials at the expiration of a stated period. The submission we received called for mandatory unsealing

Procedures for a motion to unseal: The method by which a nonparty may challenge a sealing order may relate to the question whether there is a waiting period between the filing of the motion and the court’s ruling on it. A possibly related question is whether there must be a

1133 separate motion for each such document. Perhaps there could be an “omnibus” motion to unseal
1134 all sealed filings in a given case.

1135 Requirement that redacted document be available for public inspection: The procedure
1136 might require such filing of a redacted document unless doing so was not feasible due to the
1137 nature of the document.

1138 Nonparty interests: The rule proposal authorizes any “member of the public” to oppose a
1139 sealing motion or seek an order unsealing without intervening. Some local rules appear to have
1140 similar provisions. But the proposal does not appear to afford nonparties any route to protect
1141 their own confidentiality interests. Perhaps a procedure would be necessary for a nonparty to
1142 seek sealing for something filed by a party without the seal, or at least a procedure for notifying
1143 nonparties of the pendency of a motion to seal or to unseal.

1144 Findings requirement: The rules do not normally require findings for disposition of
1145 motions. *See* Rule 52(a)(3) (excusing findings with regard to motions under Rule 12 or Rule 56).
1146 There are some examples of rules that include something like a findings requirement. *See*
1147 Rule 52(a)(2) (grant or denial of a motion for a preliminary injunction). The rule proposal calls
1148 for “particularized findings supporting its decision [to authorize filing under seal].” Adding a
1149 findings requirement might mean that filing under seal pursuant to court order is later held to be
1150 invalid because of the lack of required findings.

1151 Treating “non-merits” motions differently: The circuits seem to say different things about
1152 whether the stringent limitations on sealing filings apply to material filed in connection with all
1153 motions, or only some of them. (This issue might bear more directly on the standard for sealing.)
1154 The Eleventh Circuit refers to “pretrial motions of a nondiscovery nature.” *See infra* Rules Law
1155 Clerk’s memo at 5. The Ninth Circuit seems to attempt a similar distinction regarding
1156 non-dispositive motions. *Id.* at 4. The Seventh Circuit refers to information “that affects the
1157 disposition of the litigation.” *Id.* at 3. The Fourth Circuit seems to view the right of access to
1158 apply to “all judicial documents and records.” And another question is how to treat matters
1159 “lodged” with the court.

1160 No doubt there are others. For the present, the basic question is whether the
1161 subcommittee should attempt to devise a set of procedural features applicable to motions to seal.
1162 One thing to be kept in mind on this subject is that doing these things could require more
1163 aggressive surgery on the current rules than the simple changes noted above. Depending on what
1164 they are, these sorts of procedures might have to be housed in a new rule on “Motions to Seal.”
1165 Perhaps that could be added to Rule 7(b). There might also be some difficulty defining motions
1166 to seal in a rule.

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1168 As should be apparent, the subcommittee remains near the beginning of its process of
1169 examining these proposals. But it has already made considerable progress in clarifying issues and
1170 working through them. It looks forward to hearing the views of the full Committee on the
1171 matters before it.

Videoconference Notes
Discovery Subcommittee
Advisory Committee on Civil Rules
August 26, 2021

On Aug. 26, 2021, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Teams. Participating were Judge David Godbey (Subcommittee Chair), Judge Robert Dow (Advisory Committee Chair), Ariana Tadler, Joseph Sellers, Helen Witt, David Burman, Susan Soong (clerk liaison), Prof. Edward Cooper (Advisory Committee Reporter), Prof. Richard Marcus (Subcommittee Reporter), and Kevin Crenny (Rules Law Clerk).

Judge Godbey opened the meeting by noting that there are basically two sets of issues before the subcommittee — privilege logs and filing under seal. Both topics are explored in materials circulated by Professor Marcus before this meeting. On the privilege log question, the subcommittee also received more than 100 comments summarized by Professor Marcus; the summary was circulated before this meeting.

Privilege Logs

Although the subcommittee has already received abundant input, further input is expected during the third week of September. On September 20, the Lawyers for Civil Justice has organized a Zoom event that most members of the subcommittee hope to “attend.” LCJ made the original proposal to review privilege log issues. Then it submitted a different proposed rule change with its comments, which is included in this agenda book as an appendix to the summary of the comments.

In addition, Jonathan Redgrave, who had also submitted comments about privilege log issues and has long provided helpful advice to the Advisory Committee, has organized (along with retired Magistrate Judge John Facciola) an online conference on September 22-23. Many subcommittee members hope to “attend” this online event.

Though more information is expected, the subcommittee began preliminary discussions of the possible amendment ideas circulated by Prof. Marcus. What might be called a low impact idea was to augment the treatment of these issues during the Rule 16(b) process and the Rule 26(f) meeting of the parties to formulate a discovery plan, as follows:

Rule 26(f)(3)(D) could be revised along the following lines to say that the parties’ discovery plan must state the parties’ views on:

- (D) any issues about claims of privilege or of protection as trial-preparation materials, including the method to be used to comply with Rule 26(b)(5)(A) and — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

Rule 16(b)(3)(B)(iv) could be amended in a parallel manner, providing that the scheduling order may:

- (iv) include the method to be used to comply with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502.

An initial reaction by one subcommittee member to the comments received, as well as the possible amendment ideas, was that the input the subcommittee has received has been very helpful. It certainly seems that people have divergent views, and also that there is a distinct split between what one might call the plaintiff and the defense sides. It will be valuable to hear what the participants in the events in the third week of September have to say about these issues.

Turning to the Rule 26(f)/16(b) approach, this member found the idea of prodding or requiring early discussion of how the privilege logs will be handled valuable. One thing is particularly important — to direct attention to these issues early in the litigation. Too often the production of a privilege log is left until the discovery period is almost over, and then there is little time to deal with disputes that may arise. Getting the court involved can be particularly important in terms of adopting a schedule for production of the log, which is in keeping with the focus of Rule 16(b) on a scheduling order. Often a rolling production of the log is desirable. Then issues may be addressed, and the parties can approach later privilege questions with reference to how the court handled the initial issues.

Another member agreed that a rolling exchange is very important; don't put this off until the end of the discovery period. Though it is premature for the subcommittee to attempt to reach a formal conclusion before we have heard from all we will hear from in September, this concern will likely endure.

Another member agreed that timing is a concern. It's usually best to address this early on, with a deadline. Otherwise the parties may let the matter slide, and then have conflicts if the producing party insists on a categorical approach. If one wanted to consider categories that might exempted from logging, two would be post-filing documents and documents produced but in redacted form. Nonetheless, it is not likely that there are categories we would want to bake into a rule, and this member is skeptical that efforts to devise rule categories of this sort will bear fruit.

Another member agreed about the importance of timing. This member was also amazed at the stark difference in attitude from those on the "plaintiff" and "defendant" side. This member is not receptive to the suggestion in some comments that the rule should explicitly require document-by-document listing in all instances. But we need more information. In particular, we need more information about whether or when producing a log that provides metadata can do most of the job. From this member's experience, when that method has been attempted, the other side is always unsatisfied with the resulting log. It would be very helpful to know what technology can now provide.

Turning to the possibility of a categorical log, another member called attention to a possible amendment to Rule 26(b)(5)(A)(ii) in the materials for the call:

- (ii) describe for each item withheld — or, [if] {when} appropriate, for each category of items withheld — 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.

This formulation makes it clear that the rule does not forbid a categorical approach. At least if this were done along with the 26(f)/16(b) approach discussed earlier, it could be useful in the parties' discussion about how the rule should be satisfied in a given case.

This idea drew a statement of concern from another member — putting that into the rule will encourage parties to push for a categorical approach, and might be read by judges to indicate that the rule favors that approach. It can be noted that the question when it is “appropriate” may itself be contentious. May the producing party unilaterally decide this would be appropriate? And what exactly does it mean to say disclosure may be by “category” of items. How about the following category: “materials covered by the attorney-client privilege or protected as work product”?

Another member suggested that if this approach were followed, it should be accompanied by a strong prod to discuss and resolve these issues well in advance of the discovery deadline.

The concern about what is a “category” returned. Sometimes the parties can agree that post-filing communications between a party and its outside counsel could be excluded from any log. But there is a considerable risk that some will read such a rule as meaning “all documents related to this topic.”

Another member cautioned that these questions are so case-dependent that it would be very undesirable to have a rule tip the balance one way or another. This member fully agreed about the desirability of addressing, and hopefully resolving, these issues early in the discovery process.

It was observed that it seems there is another divide among the comments we have received. Most who oppose any change to the rule seem to focus on smaller cases. In those cases, a document-by-document list probably works fairly well. But the greatest concerns are probably in cases involved very large amounts of discoverable material.

Another reaction to the comments was that some even opposed adding this topic to the list of things to be discussed up front at the Rule 26(f) conference. That was surprising; why would anyone take that position? A possible answer was that there has long been some resistance to the whole idea of judicial management of litigation, and some regard Rule 26(f) and Rule 16(b) as simply placing obstacles in the way of parties that want to get to trial.

On this point, it was also noted that the MDL Subcommittee has also focused on these rules as offering a place to address issues of concern to that subcommittee. There might be some resistance to expanding this “laundry list” of matters for consideration, but there’s a good argument that privilege logs and the issues of concern to the MDL Subcommittee are sufficiently important to be added to the list.

Returning to the idea of using categories, one concern might be that if this method can be used only when the other side consents it will not be very useful. It seems that the rule should somehow offer encouragement to give this less burdensome approach a try. Perhaps it would

suffice to put the idea of categorical reporting into a committee note in the 26(f)/16(b) package, but to the extent some read the current rule as requiring document-by-document listing committee note encouragement may not be sufficient. The 1993 committee note tried to make the point that document-by-document listing is not always required, but we are told that the rule has often been taken to require exactly that.

A response was that if the parties cannot agree in the Rule 26(f) process, the judge can approve the use of a categorical method tailored to the case during the Rule 16(b) process. So building it into the early discussion does not mean that each side is at the mercy of the other side.

Another point was raised about the comments received — they were not limited to the attorney-client privilege and work product protection. Those may be the main concern of many “big case” litigators, but the comments emphasize that there are a number of other privileges that can be the focus of discovery disputes. In cases involving alleged use of excessive force by the police, or in medical malpractice cases, other privilege claims may loom large. It is important for us to keep in mind the fact that our rules cover all sorts of cases, not only the ones usually handled by the lawyer members of the Advisory Committee.

Given the expected injection of further information during the conferences in September, it seemed that the subcommittee had exhausted the subject for present purposes. The report in agenda book should identify the issues and explain the concerns, but the subcommittee is not in a position to be taking a firm position on how to proceed before hearing from the participants in those September events. The agenda book must be completed before those events occur, but perhaps the subcommittee can meet after those events and determine then how best to make its presentation about privilege logs during the Oct. 5 full Committee meeting.

Sealed Filings

This set of issues was introduced as involving two somewhat distinct sets of concerns — whether to specify in the rules that there is a higher standard for filing under seal than for a protective order applying to materials produced through discovery, and whether it would be desirable not only to recognize that more demanding standard but also to prescribe procedures for deciding motions to seal.

Discussion turned first to whether it would be important in the rules to recognize something that the courts seem already to recognize — that “good cause” to support a protective order that a party who receives materials through discovery may use them only for the pending litigation (and perhaps related litigation) does not itself also support filing under seal for items deemed “confidential.” Fairly often such protective orders are entered on stipulation, and permit the parties initially to designate materials confidential and subject to the protective provision of the order without the need for further court review, but with a method for a party that wants to challenge such a designation to do so.

Most materials designated “confidential” by the parties probably never find their way into court. But filing under seal raises different issues from those presented due to exchange through discovery. Until 2000 some discovery materials were supposed to be filed in court routinely (interrogatory answers and depositions with their exhibits, but not materials produced in response

to Rule 34 requests). In 2000, Rule 5(d)(1)(A) was changed to forbid filing unless the materials are “used in the proceeding or the court orders filing.”

Court proceedings are public processes, and access to court files has long been recognized under the common law and also due to the First Amendment as open to the public. The public is entitled to monitor what its judges do, and can’t really do that if the materials on which the judges rely are sealed. The materials for the call offered a way to recognize this difference in the rules:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

* * * * *

(4) *Filing Under Seal.* Filings may be made under seal only under Rule 5(d)(5).

The committee note to such a rule could simply state that the standard for sealing materials filed in court is different from the standard for issuing protective orders under Rule 26(c)(1).

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

* * * * *

(5) *Filing Under Seal.* Unless filing under seal is directed by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified despite the common law and First Amendment right of public access to court filings.

The Rules Law Clerk’s research memo shows that there are some variations in circuit statements of the standard for filing under seal. The idea of this proposal is not that the rule would somehow supersede those stated standards, but instead use general terminology invoking the common law and First Amendment rights to public access and leave the application of a given circuit’s standard in place.

The other issue is whether (putting aside the standard), the national rules should prescribe national procedures for handling motions to seal. The national rules leave much to local arrangements regarding the handling of most motions. For example, they do not prescribe a notice period for motions. But the original rule proposal included a nationally-uniform rule forbidding a decision on a motion to seal sooner than seven days after it was filed. Perhaps, given the public interest in these motions, national uniformity of this sort is more important than local latitude. But it is worth noting that such a national rule would seem to forbid even an order shortening time on such a motion to fewer than seven days. Furthermore, the original proposal included a right for

any “member of the public” to challenge the sealing of a court filing. Perhaps a national rule with that feature would make more rapid resolution of the motion to file under seal more acceptable, since it would permit “after the fact” re-examination of the question.

A preliminary reaction was that it seems that even though there may be relatively broad agreement about the difference between the standard for permitting filing under seal, the mechanisms for addressing that question vary greatly from court to court, and perhaps from judge to judge.

The Federal Magistrate Judges Association expressed some receptivity to pursuing national uniformity on a variety of topics that were also raised by the submission the Committee received. Right now, one could say that the practices vary a lot. That may be frustrating to lawyers who practice in multiple jurisdictions.

Outreach about these issues among court clerks has revealed that the AO seems to be inaugurating a more general study of sealing of court files. The prospect of an AO project may be a reason to pause the subcommittee’s efforts pending action by the AO.

The possibility of AO action suggested that a more comprehensive approach to sealing (not limited to civil cases) might be developed. Though sealed filings in civil cases are surely important on occasion, the issues with regard to sealed filings in criminal cases may be prominent more often. Moreover, the AO may be better equipped to develop methods of dealing with these issues. There have been some guidelines from the AO in the past on these subjects, but some of them seem rather dated. One says, for example: “Sealed records must be maintained separately from other records, in a secure area.” That advice may still be pertinent to hard copy filings, but it is unlikely that hard copy filings constitute a significant proportion of the materials filed in court.

More generally, the work already done by the Rules Law Clerk on an arbitrary set of local rules on sealing — the local rules of the various districts “represented” on the Advisory Committee — showed that there were considerable differences among them. But the research was limited to the local rules of about 10% of the districts. So it may be that there are many additional differences. For present purposes, one main point is that any set of national rules about the mechanics of handling sealing motions would likely override at least some, and perhaps many, local rules. That could produce push-back in some quarters. And highly specific national rules might not be adhered to by all judges, or even all courts.

Moreover, these local rules sometimes are changing. The Northern District of California, for example, has put out a brand new local rule on sealed filings, with comments due in early September. This rewrite of the prior rule was so extensive that it was published as a replacement instead of a redline showing changes in the old rule.

There may also be valid reasons why practices differ in different courts. That’s a legitimate concern that should be kept in mind.

For the present, however, an immediate concern is determining what the AO is doing about these issues. Divergent paths between the AO and the rules committee should be avoided.

One specific illustration was mentioned — “provisional” filing. The D. Minn. local rule permitted such filing before the court ruled on the motion to seal. One question is — what happens if the motion is denied? Can the party that filed the material take it back? Is the filing automatically made public without more? One reaction was that if you want to take the document back unless the motion to file under seal is granted, you better be very clear about that in your motion to seal. But having to get the sealing order before filing the material may be a major headache for a lawyer facing a filing deadline. That concern could produce resistance to a requirement for a pre-filing ruling from the court, particularly if (as recommended in the original submission) there be a minimum notice period of 7 days before the court can rule on a motion to seal.

Another concern is the interest of third parties who may have produced materials (in response to a subpoena, for example) based on an agreement that they were confidential and would not be made public. Somewhat similarly, there may be nonparty interests that seek access to sealed filings — the media may seek such access somewhat frequently. It could be that the media would more often be interested in filings in criminal cases.

More generally, the materials for the call identified a variety of other matters raised in the original submission to the Committee, including the duration of the seal, whether parties may retrieve sealed materials after the case file is closed, whether redacted documents should be publicly filed if only part were eligible for sealing, whether the court has to make certain findings, whether there are some “non-merits” filings that do not invoke a public right of access, and others.

For the present, the goal is to present the full Committee with the range of issues that might be addressed in a national rule, if it were to go beyond recognizing the different standard for filing under seal and granting a protective order regarding materials exchanged in discovery. By October 5, we may have better information on what the AO is doing and, if so, can inform the full Committee then.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

* * * * *

(5) *Filing Under Seal.* Unless filing under seal is directed by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified despite the common law and First Amendment right of public access to court filings.

The idea is to use a generalized statement that encompasses the stated standards for filing under seal that prevail in all the circuits. The committee note could say that the goal is not to displace any circuit’s standard nor to express an opinion about whether they really differ from one another. Instead, the goal is to reinforce the point in proposed Rule 26(c)(4) that the standard is different from the standard for granting a protective order. On that, it seems, all agree.

There are statutes (the False Claims Act, for example) that direct filing under seal, so the introductory phrase recognizes such directives. The additional phrase “or these rules” might seem

to create a potential problem — it might seem to be circular — if a protective order entered in accordance with these rules were sufficient to fit within the exception. But that would seem to violate proposed Rule 26(c)(4). And there are other rules that do explicitly authorize or direct filing under seal. *See* Rules 5.2(d) (filing under seal to protect privacy); 26(b)(5)(B) (party that received information through discovery the other side belatedly claims to be privileged may “promptly present the information to the court under seal for a determination of the claim”).

Making changes such as these likely would not conflict with whatever the AO is doing or may be doing about filing under seal more generally. To the extent that filing under seal is limited by the common law or the First Amendment, it may be difficult for an AO policy to make it easier. Perhaps for policy reasons, an AO policy might make filing under seal more difficult to justify. But if it could do that presently, it likely could do so if the Civil Rules were so amended.

Another consideration here might be to proclaim by rule a nationally uniform standard for applying the common law and First amendment rights of public access to court filings. A rule could, for example, declare that the party seeking sealing bear the burden of justifying it in the face of common law and First Amendment limitations. (That would be somewhat consistent with the approach to deciding motions for a protective order — the moving party bears the burden of establishing good cause with a fairly specific showing.) Under Rule 26(c), there is no specific rule provision about burdens of proof, and it is likely that if this seemed a suitable topic to address it could be addressed in a committee note. This is not to say that sealing must always be granted if not forbidden on common law or First Amendment grounds. Those preclude the entry of a sealing order; a court may well decide that even if sealing is not forbidden in a given case, it is not warranted.

But there may be a distinct limitation on the extent to which a rule can, or should attempt to, regulate these matters. The First Amendment, for example, applies as it applies without regard to what the rules say.

The basic question on this point is whether there is any real value in this sort of rule change. If it adopts what the courts are already doing, it might be regarded as somewhat “cosmetic.”

Videoconference Notes
Discovery Subcommittee
Advisory Committee on Civil Rules
May 24, 2021

On May 24, 2021, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Microsoft Teams. Those present were Judge David Godbey (Chair, Discovery Subcommittee), Judge Jennifer Boal, David Burman, Joseph Sellers, Ariana Tadler, Helen Witt, Susan Soong (clerk liaison), Prof. Edward Cooper (Reporter to the Advisory Committee), Prof. Richard Marcus (Reporter of the Discovery Subcommittee), Julie Wilson (Rules Office), and Kevin Crenny (Rules Law Clerk).

The meeting proceeded through the issues identified in the materials circulated before the meeting.

Privilege Logs

The focus of the discussion was on (a) techniques for outreach about privilege log issues, and (b) contours of possible rule provisions on which to solicit input.

Focusing on outreach efforts, one model was what was done with the CARES Act Subcommittee. Within a fairly abbreviated time period over the summer of 2020, the Rules Office was able to gather over 100 comments about possible emergency rule ideas.

Another route (not inconsistent) would be to reach out particularly to various organizations that have provided useful comments in the past. A starting point was provided by a list in the materials prepared for this meeting:

- American Association for Justice
- ABA Section of Litigation
- American College of Trial Lawyers
- ABCNY (now New York City Bar Ass'n?)
- IAALS (at University of Denver)
- Lawyers for Civil Justice
- Magistrate Judges Ass'n
- National Center for State Courts
- National Conference of Chief Justices
- National Employment Lawyers Ass'n
- Sedona Conference

One might appropriately expand this list to include the state bar associations to which the Rules Office sends notices of publication of preliminary drafts. Moreover, there are also local bar associations in addition to the ones listed above that may have an interest. There is also the Federal Bar Council.

More generally yet, the Rules Office has a Twitter account that can be used to invite reactions. It also has an email list with about 20,000 names on it.

Some organizations also have conventions or similar gatherings in the near future that might provide an occasion for soliciting input. AAJ, for example, has helpfully gathered members during its conventions to discuss various issues with the MDL Subcommittee, the Rule 23 Subcommittee, and the Rule 30(b)(6) Subcommittee. Its convention is coming up in July, and might be an occasion for an exchange with representatives of the subcommittee. NELA also has a convention, this one in June. There should be no inconsistency between efforts to obtain insights from these groups and the more general invitation for commentary.

Another source would be people who have written on the topic. For example, Judge Facciola and Jonathan Redgrave wrote an article on privilege logs about ten years ago. Another promising candidate would be Megan Jones of Hausfeld. Quite a few other articles have appeared in recent years, and the authors of those articles might well be included on any list put together for this outreach.

A concern was raised about reaching the portion of the bar that is not involved in really big cases. One way of looking at it is to recognize that there are “terabyte cases” and “gigabyte cases” and what one might call “ordinary cases.” There may be considerable differences in attitude among lawyers who handle cases at different points on this spectrum. One possibility would be to reach out to the ABA Section for solo or small law firm practitioners. At least one view was that the privilege log problem is important principally in the gigabyte and terabyte cases.

Broad outreach might be important to gain insights on whether privilege log problems are limited to a relatively small sliver of litigation in the federal courts. For smaller cases, the task of preparing a document-by-document privilege log might not be terribly burdensome, and the chore of jumping through more Rule 26(f) or 16(b) hoops might be discouraging.

This discussion prompted the suggestion that the outreach ought to invite respondents to describe their practices. That might even be done, it was suggested, by using some sort of drop-down list. But caution was emphasized; we are not seeking votes so much as informative reports on actual practical experience. Trying to quantify responses could backfire.

There was general agreement that broad outreach would be desirable. It would be better to hear things now that might not otherwise come out until the public comment phase if the process goes forward to that point.

Discussion shifted to the general content of the invitation for comment. One question that should be presented is to ask whether respondents have encountered significant problems complying with Rule 26(b)(5)(A). It might even be desirable to try to find out whether respondents regard themselves as handling big or ordinary cases, though inviting a report on the nature of a lawyer’s practice might well suffice for that.

It did not seem useful to circulate the LCJ submission, as the subcommittee is not particularly inclined to do exactly what that submission proposed. On the other hand, the materials for the conference identified some possible rulemaking responses to concerns about privilege logs.

It would likely be useful to include some indication of the sorts of changes under preliminary discussion, but not useful to suggest specific possible rule language. As one participant said, we should not try to get “microscopic” on this outreach effort.

The consensus was the Professor Marcus would try to draft a suitable invitation for comment, and members of the subcommittee could think about additional names of organizations or individuals to be invited to comments.

Sealing Filings

This topic was introduced as involving different challenges for the subcommittee. The sort of outreach for practical experience that the privilege log topic calls for seems not to be useful for this topic.

One possibility might be to ask for library research to determine whether the standards for sealing filed documents differ significantly among the circuits. That was a feature of the Rule 23 Subcommittee's work on the Rule 23(e) amendments that went into effect in 2018. There the goal was to identify a shorter and more manageable list of criteria for evaluating proposed class-action settlements.

It's not clear that there is similar concern here about differences among circuits. With the Rule 23(e) topic, the question was whether different circuits were implementing the rule in divergent ways. On this topic, the underlying consideration is not rule-based, but based on the common law and the First Amendment. It's not clear that the rules process should be trying to affect determinations of that sort.

One reaction was that there may be a concern about representation for the public interest in access in these sorts of situations. As the Fourth Circuit pointed out in *Rushford v. New Yorker*, 846 F.2d 249 (4th Cir. 1988), there is a public interest in addition to the parties' private interests when matters are submitted to a court for its decision. In that case it was a summary judgment motion, but the principle is broader. And from the perspective, for example, of a plaintiff's lawyer, it may seem very inviting to agree to confidentiality and also not to oppose filing under seal. So one might say that sometimes none of the parties before the court will speak up for the public's interest in access.

One reaction might be to propose public notice of some special sort for such filings seeking sealing. One might call that "raising the red flag," and liken it to the idea in the submission from Prof. Volokh that there be special notice of such motions. That might also provide an adversary presentation rather than a one-sided one, on the issue of sealing.

Another member pointed out that individual judges seem to have significantly differing attitudes on requests to seal. Some judges emphasize that, despite the parties' agreement, there is a significant burden on the party seeking filing under seal to justify that treatment. Others may be more willing to accept a joint motion to seal.

A reaction was that this sort of difference of position does not seem to flow particularly from circuit law, and that library research on that law probably will not shed much light on the choices before the subcommittee.

Another view was that there are competing considerations at work here. On the one hand, there may be reason to provide a vehicle for competing presentations on the issue of sealing, perhaps by inviting nonparties to express views. On the other hand, the more litigation one must

endure to get a sealing order the more difficult it will be for counsel trying to meet filing deadlines. Particularly if there is a required delay between the submission of a motion to seal and the earliest date on which the court may rule on it, the difficulty for the lawyer trying to meet the filing deadline can be considerable. On that score, it's worth noting that the proposed rule submitted by Prof. Volokh would forbid decision of the motion to seal for seven days after notice of the motion is given.

A possible response seems to be offered by the D. Minn. local rule, which permits "temporary sealing" pending a ruling on whether filing under seal is to be allowed. A question was raised: How can something be "filed" but only "temporarily"? If the sealing order does not issue, can the party withdraw the document? How does that compare to "lodging," something that was formerly done with items (such as a proposed order) that could not be filed by the parties? These issues seem to present some difficulties in the clerks' offices.

The discussion showed that there are a number of issues to be addressed. It is not clear that a national rule is needed, or would be useful. It does appear that there would be some delicate questions to be addressed were a national rule pursued.

Meanwhile, the discussion introduced in the materials for this conference was focused on some fairly generic recognition that protective orders and sealing orders have different standards, and that there is as yet no consensus on whether there must be a court order before any filing under seal, or (perhaps) on who bears the burden to justify filing under seal, particularly when there is in force a protective order recognizing that the materials in question are entitled to protection on confidentiality grounds.

For the present, the goal will be to develop more thoughts about these issues. Input from the Magistrate Judges' Association and from court clerks would be helpful.

It will likely be necessary for the subcommittee to meet again before the Fall Advisory Committee meeting. That should likely happen after responses have been received about the privilege log issues. Meanwhile, thought can be given to the sealed filing issues.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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Invitation for Comment on Privilege Log Practice

The Judicial Conference Advisory Committee on Civil Rules has received a [suggestion](#) that rule changes be adopted to address difficulties in complying with Rule 26(b)(5)(A) in some cases. Its Discovery Subcommittee is in the early stages of considering possible changes to the rules responsive to these concerns, and now invites comments from the bench and bar about this topic. No decision has been made about whether any rule change should be formally considered, and the eventual conclusion may be that no rule change is needed.

Owing to the schedule of Advisory Committee meetings, it would be most helpful if comments were received by August 1, 2021. Comments should be submitted electronically to RulesCommittee_Secretary@ao.uscourts.gov.

Background

Before 1993, there was no requirement in the rules that any information be provided when materials were withheld on privilege or work product grounds during discovery. In that year, Rule 26(b)(5)(A) was added to the rules. It requires that, when a party withholds otherwise discoverable materials on such grounds, it must “expressly make the claim,” and also describe the materials not produced in a manner that “will enable other parties to assess the claim.” The committee note accompanying this rule change said:

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.

According to submissions received by the Advisory Committee, many courts have insisted on a document-by-document privilege log to satisfy Rule 26(b)(5)(A). With the growing centrality of digital material in discovery, the burdens of preparing such a log reportedly have increased. Furthermore, some say that the resulting logs (perhaps partly prepared by software) are often too

“generic,” or rely on “boilerplate” explanations that do not serve the goals of the rule or enable the parties or court to assess the claim of protection.

The Current Invitation for Comment

The Discovery Subcommittee seeks input that will assist it in determining whether there are significant issues impacting the goals of just, speedy, and inexpensive resolution of litigation with current practice under Rule 26(b)(5)(A), and whether rule changes could have positive effects. In particular, it seeks input on two sorts of subjects:

1. Problems Under the Current Rule

It may be that problems under the current rule occur principally in what might be called “large document” cases, and not in most civil litigation in federal court. The subcommittee is therefore interested in whether those who comment have experienced problems in complying with the rule. If so, are those problems arising in all cases or only in some cases? Have similar difficulties occurred in state-court litigation, and do those state courts have rules similar to Rule 26(b)(5)(A)?

Specific examples of problems encountered (or not encountered) in litigation under the rule would be particularly valuable. Have the parties been able to work out methods of satisfying the rule that are not unduly burdensome? Has judicial involvement in developing those methods been useful? Could solutions of the sort parties and courts have devised in individual cases be usefully required for all cases by a rule revision?

In this connection, it would be helpful if members of the bar who comment can describe the general nature of their practice experience. For example, do they generally represent plaintiffs or defendants? Do they work in large firms, small firms, or in solo practice? Do they generally represent individuals or corporate or other entities in litigation? What areas of law do their cases involve?

2. Possible Rule Changes to Solve Problems

The nature of a rule change to solve a problem would depend upon the nature of the problem to be solved. But it seems useful now to invite comment also on whether those who have encountered problems under the current rule would regard possible rule amendments as potential solutions to the problems they have encountered. In the same vein, would those who have not encountered problems under the current rule expect that amending the rules could cause new problems?

Though this discussion is at a very preliminary point, at least the following possibilities might be considered:

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

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

Additional suggestions about possible rule changes are welcome. With any of these general amendment ideas, concerns include at least: (a) whether making such changes would resolve or reduce the problems that have arisen under the current rule, and (b) whether making any of these revisions would create difficulties or impose burdens in cases in which complying with the current rule has not proven difficult.

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The Discovery Subcommittee has not made any decision about whether any rule amendments should be seriously considered, much less what focus would be best if some amendments seem promising. The possibilities mentioned above are intended only to focus comment. The subcommittee expresses its gratitude to all who comment.

Summary of Comments on Privilege Log Issues

The Discovery Subcommittee invited comments on suggestions to revise Rule 26(b)(5)(A). 103 comments were received. This summary attempts to convey the substance and ideas provided by the commenters.

As requested, most of the commenters indicated the nature of their practices, and an effort will be made to include that information in this summary. The invitation to comment asked about burdens and utility of current practice under the rule (often involving a “privilege log”). It also asked about the possibility of shifting toward using categorical rather than document-by-document descriptions in providing the information required by the rule.

Some recurrent themes emerge from the comments, and the following summary attempts to categorize them as follows:

- (1) General reactions to possible change to rule
- (2) Compliance with current rule
- (3) Burden of preparation of document-by-document logs
- (4) Value of document-by-document method
- (5) Information needed by requesting party
- (6) Consequence of changing to categorical descriptions
- (7) Possibility of changing Rules 26(f) and 16(b) to prompt earlier discussion and court involvement with regard to Rule 26(b)(5)(A) requirements
- (8) National uniformity regarding rule’s requirements

The Rules Office assigned numbers to the comments (*e.g.*, PRIV-0001, PRIV-0002). Since they are all the same except for the last two or three digits, only those numbers will be used in this summary. The entire set of comments should be posted online. Some are lengthy. One attaches a 116-page transcript of a court hearing, for example.

- (1) General reactions to possible change to rule

Ingrid Evans (04) (represents plaintiffs in individual and class action litigation): Leave the rule unchanged. In many of the cases I have litigated, it has performed an important function by protecting against the unjustified assertion of privilege.

Kate Baxter-Kauf (005) (complex litigation; both plaintiff and defense side): Rule 26(b)(5)(A) is relatively straightforward and easy to comply with. In my experience document-by-document privilege logs are essential, for it is nearly impossible to assess a privilege claim without one. The volume of documents involved means there are inevitably mistaken claims

of privilege. A categorical log would only make these problems worse by making the parties first fight over whether a document-by-document log was required.

Mike Moore (06) (solo practitioner rep. plaintiffs in civil rights cases): In civil rights cases, plaintiffs start at a decided disadvantage, and must have access to documents possessed by defendants. The rule does not specify the nature of the information that must be provided in the privilege log, so often plaintiffs must litigate that. There should be no modification of the rule.

Lori Bencoe (09) (small firm mainly litigates claims against healthcare systems): New Mexico has a Review Organization Immunity Act governing the disclosure of documents maintained by hospital review organizations in the process of credentialing. We make claims only when there is a history of multiple prior serious legal actions, and focus on whether the hospital followed the processes set forth in its governing documents. The confidentiality of records bearing on these claims is defined fairly narrowly, and New Mexico's courts require the party seeking to prevent discovery to prove that the data was generated exclusively for peer review and for no other purpose. New Mexico law requires a privilege log that contains sufficient specifics to meet the burden state law imposes. Without a sufficient log, the court cannot determine whether the statutory protection applies. The proposed revisions to the federal rule would make them effectively useless, and give the responding party an immunity to discovery. We have received categorical privilege logs, but in New Mexico that can result in a finding of waiver.

D.J. Young (10) (partner in The Law Firm for Truck Safety LLP): We represent the victims in suits against interstate trucking companies. These companies believe that there is nothing wrong with violating discovery rules and hiding documents, and that the benefits of hiding documents outweigh the risks. We need exponentially more regulation of these trucking companies to protect public safety. I urge you not to make it even easier for corporations to escape accountability.

Samantha Heuring (012) (plaintiff lawyer in employment discrimination cases): In my practice, the defendant has the documents, not the plaintiff. Allowing defendants to avoid a document-by-document description and rely only on a categorical description would give an unfair advantage to defendants. Too often defendants lump discoverable materials into "categories" with privileged materials.

Gene Brooks (015): I write to support the current rule. It is necessary for prevention of non-production of relevant documents. The only way to know what documents are being withheld is a privilege log. With the log, we can tell what objections apply to which documents. Then the court can perform an in camera review when needed.

Lauren Bonds (19) (National Police Accountability Project): Our members litigate thousands of egregious cases of law enforcement abuse. We strongly urge that proposals to change this rule be rejected. The question whether a particular privilege should apply is often nuanced and fact-intensive. Even a party acting in good faith can incorrectly invoke privilege. The opportunity to assess details of each specific document ensures that the requesting party can challenge incorrect claims of privilege. We are deeply concerned that the proposed changes would significantly undercut the ability of civil rights plaintiffs to obtain relief through the federal courts.

Philip Davis (23) and Nicholas Davis (31) (identical submissions from father and son): As plaintiff's civil rights attorneys, we oppose any change. Changes might make sense in commercial litigation, but would profoundly undermine the goal of liberal discovery central to civil rights cases. The question of whether a privilege applies is always fact-specific, and without the ability to assess pertinent information about a particular document the ability to challenge the claim is nil. Moving to categories would make it virtually impossible for civil rights plaintiffs to obtain critical information through discovery. Police defendants often claim privilege to shield internal affairs records, use of force policies, and other information critical to plaintiff's case. Using a categorical approach will rarely illuminate the propriety of such claims.

Ian Bratlie (24): The proposed changes would greatly impact police litigation in a negative way. You should consider the impact of this proposed change on people of color. I hope that, after reflection, you reject this proposal.

Federation of Defense and Corporate Counsel (27): We support reforms because we are familiar with the burdens of the current privilege log requirement. Although the 1993 committee note did not say the rule required strict protocols for listing every document, in practice what has developed in some jurisdictions is a very strict protocol. In some cases, it is not possible to provide a document-by-document protocol. Thus, a task force of the New York State Supreme Court on Commercial litigation stated in 2012 that creation of privilege logs has become a substantial expense, but that the logs often are not reviewed or used in any way by the courts. Accordingly, we support a use of categorical rather than document-by-document listing excluding (a) documents prepared after the date suit was filed; (b) communications between a party and its trial counsel or work product of trial counsel; (c) documents produced with redactions; and also (d) explicitly encouraging cost shifting.

Jeffrey Greenbaum (30) (complex business litigation and class action practice): In both the federal and the state courts in New Jersey, courts believe that document-by-document logs are required. Creating these logs is burdensome, and often leads to fights about privilege designations even when it is clear that the documents involved are not relevant to the case.

Rob Snyder (33) (product liability, personal injury, and whistleblower plaintiffs): I urge the Committee not to change the rule. A detailed document-by-document log is the best way for parties and courts to assess claims of privilege.

Stephanie Walters (39) (plaintiffs in complex litigation): Please leave the rule unchanged. Too often, large companies with in-house attorneys employ these lawyers in a business capacity but claim privilege for communications involving the lawyers. The current rule is necessary to reveal when this has happened.

Seth Carroll & Mark Dix (40) (civil rights plaintiff lawyers): We regularly face claims of "self-evaluative" and "investigative" privileges. Municipal and corporate actors attempt to shield records of harm-causing incidents to conceal information. Permitting them to use broad nondescript categories would further aggravate the imbalance against our plaintiffs in discovery. Specific and detailed logs are essential. The American public demands increased transparency by police, municipalities, and other governmental actors. The proposed changes would move in the wrong direction.

Mike Adkins (41): The vast majority of cases have no privilege issues of a nature that would require a privilege log. When a case does require one, the present rule is not unreasonable or burdensome in my experience. The number of privileged documents is usually not large, and going with categories would actually increase the burden in some cases. Using categories would also allow too much to be hidden.

Demian Oksenendler (44): There is no compelling reason to change the rule. The proposed change is one-sided, and would benefit large corporations. It will also increase the burden on the judiciary. The case management process in every case includes discussion of discovery planning.

Frank Verderame (46) (plaintiffs in all types of litigation): I oppose the proposed rule changes. Too often claims of privilege are made for documents to which they do not apply.

Jory Ruggiero (47) (primarily represents plaintiffs on environmental torts, personal injury, and defective products): This rule is a linchpin component of ensuring a fair discovery process. In one recent case in the Montana state courts, defendant withheld 3,778 responsive documents behind a privilege claim. After much effort, we learned that 99% of those documents were not privileged. Many involved no communications with lawyers at all. Many more were shared with outside third parties. But opposing parties can focus on such issues only with particulars about the withheld documents. Allowing parties to designate entire categories of documents as privileged will facilitate concealment of the most critical documents.

California Lawyers Ass'n, Litigation Section Committee on Federal Courts (49): The Committee circulated a survey of Section members. The respondents come from varied practice specialties. Regarding the effectiveness of current rules regarding privilege logs, about 30% said the rules were effective, while nearly 40% said the rules were not effective. Regarding various possible rule amendments, each possibility was favored by more than 50% but fewer than 60% of respondents.

Robert Fink (50): Allowing use of only categories would be a mistake. Unless each document is addressed, there will be no means to determine the propriety of the claim.

Mark Kosieradzki (51) (plaintiff personal injury attorney): I oppose any attempt to limit the requirement of a privilege log providing the basis for the claimed privilege as to every document. In my experience, allowing a broad designation by category without detail is ripe for abuse.

Jonathan Feigenbaum (52) (plaintiffs in ERISA cases): I oppose the changes. They will bring about more motion practice. Using categories will produce opaque listing.

Susan Craig (57): Defense attorneys are free to disregard rules, and they throw a litany of boilerplate objections at every discovery request. It is essential that we retain the privilege log requirement in the rules. Anything less would facilitate this obstructive behavior.

Peter Kohn (58) (complex case litigator): It is perfectly clear that privilege logging must be more detailed and granular, not less so. This proposal is in the wrong direction entirely. Using categories would be a tempting opportunity to conceal evidence. Even the detailed logs that pass Rule 26(b)(5)(A) muster these days rarely contain sufficiently detailed disclosures. "The problem

of privilege log abuse is bad enough as it is, and if there is a direction Rule 25(b)(5) should go, it is toward disclosure of greater granularity.”

Linda Nussbaum & Peter Moran (60) (plaintiffs in complex class actions): The existing rule provides a clear, workable standard. At a bare minimum, information about a withheld document such as: who sent it, who received it, and the subject matter of the document is absolutely necessary. When defendants instead use boilerplate assertions of privilege, plaintiffs have no alternative but to challenge thousands of entries or risk being denied those documents that really matter. Amending the rule to permit categorical designations would jeopardize plaintiffs’ discovery rights and increase the likelihood defendants would hide harmful documents.

Federal Magistrate Judges Association (61): The main problem with the current rule is that it has been interpreted to require document-by-document logs even though the rule itself does not state any such requirement. Changing the rule to say that document by document or categorical logs are permissible, depending on the circumstances, may be helpful. But another problem that exists now is vague descriptions in privilege logs that fail to give sufficient information to assess the claim of privilege. Actually, both categorical and document by document logs can satisfy the current rule, so an amendment expressly stating that either is acceptable may be helpful. But the rule should not be amended to require the parties to use a categorical approach. If used, the categorical descriptions must provide sufficient information to permit assessment of the claims.

Russ Chorush (62) (plaintiffs in patent, trade secret, and antitrust litigation): The current requirement for detailed privilege logs is an important feature of the rules. In one of my cases, those details facilitated a successful privilege log challenge that resulted in the production of one of the most important liability documents in the case. Amending the rule to provide less information, or to eliminate document by document listing, would undermine the ability of litigants to challenge privilege assertions.

John Radice (63) (plaintiffs in complex litigation): The rule as currently written has been an invaluable component of our practice in ensuring that defendants cannot improperly conceal evidence of their liability. The standard is clear and workable, and when disputes do arise the parties in our experience can generally resolve the issues without court involvement. Changing the rule would allow parties to provide less information and strip plaintiffs of their right to meaningfully challenge privilege claims. Changing the rule would prompt more disputes about privilege.

Steve Shadowen (64) (plaintiffs in antitrust and other complex litigation): It is essential that the rule provides a clear, workable standard for privilege logs. These logs prevent parties from improperly concealing important evidence. Amending the rule to provide less information, and to forgo a document by document analysis, is a recipe for squandering judicial resources.

Sharon Robertson (65) (plaintiffs in complex litigation): Privilege logs are an important tool for evaluating whether documents were properly withheld. The information that the rule currently requires has allowed us to successfully challenge numerous privilege assertions and secure key documents.

Public Justice (66): We strongly oppose jettisoning the current privilege log process. That would harm the evidence-adducing function of discovery and also increase the burden on federal judges. The current provision of names, dates, and subjects on privilege logs provides a mechanism for challenging over-broad or improper privilege claims. Time and again, the ability to examine the details of a privilege log has permitted intelligent meet and confer sessions at which designations were either dropped or a more focused challenge could be presented to the court for review.

Jeffrey Kodroff (67): There has been an increase in use of claims of privilege as a method to avoid production of harmful information. The current rule provides a clear, workable standard. Amending it would provide less information, particularly if broad categories are substituted for the current document by document approach.

Donna Evans (68) (plaintiff antitrust class actions): Absent the minimal information currently required, which is usually discernable from the face of the document, plaintiffs will have virtually no information to assess the propriety of privilege claims. The proposed changes also promote inefficiency.

National Employment Lawyers Association (69): The current rule requires little if any change. The root of the problem with privileged documents does not lie with how the rule is written. Disputes arise when there is insufficient information in the log. But the proposed amendment is to limit the information on the log. Without the information on a current log, determining whether privilege was properly invoked would be impossible.

Lori Fanning (71) (complex litigation plaintiffs): Privilege logs are an important tool intended to prevent improper concealment of relevant evidence. The rule provides a clear, workable standard. Amending the rule to provide less information or to forgo a document by document analysis in favor of broad categories will jeopardize the substantive right of plaintiffs by depriving them of a meaningful opportunity to challenge privilege designations. That would make disputes over privilege broader, not narrower.

Thomas Sobol (72) (complex litigation plaintiffs): We strongly oppose any amendment that would direct courts away from the common practice of requiring the party asserting privilege to provide a document by document log. Given the scale and nature of the cases we litigate, privilege issues are endemic and widespread. The current rule works well.

George Tolley (73) (medical malpractice plaintiffs): There are many distinctive privilege issues in litigation about medical services. But in my cases, there is almost never a need for a formal privilege log. Counsel meet and confer regarding claims of privilege, and almost always the discovery issues are resolved. Accordingly, for the kind of cases I handle, there is no need to change the rule.

Dan Litvin (784): The current rule is necessary to protect against overbroad assertions of privilege. The burden is on the party asserting privilege to support that claim. Shifting to “categories” of documents would permit the responding party to class together documents that are really different, at least in terms of privilege protection. Any burdens of dealing with logging under the current rule are a result of efforts by some parties to evade the rules’ requirements.

Robert Keeling (76) (co-chair of Sidley eDiscovery team): Although a document by document approach may have made sense in 1993, when the current rule was adopted, it does not make sense in the Digital Age. The size, complexity, and cost of a privilege log at present — which can easily reach tens of thousands of log entries and cost more than a million dollars — has rendered this 1990s approach unworkable. In light of this epochal change, the Committee should modernize Rule 26(b)(5)(A) by doing at least the following:

- Adopt a clear rule that document-by-document logs are presumptively unnecessary.
- Adopt a presumption that a withholding party may submit a categorical or metadata privilege log.
- Adopt a clear rule that redacted documents do not need to be included on a privilege log when the document provides sufficient information to the requesting party to assess the privilege claims.
- Adopt a clear rule that if document-by-document logs are required only one log entry is needed for each substantive communication (i.e., threading of email/chat communications is presumptive allowed).

Rather than being preoccupied with the minutiae of the privilege log, the courts should focus only on whether the process of privilege review was handled in a responsible way.

Joseph Fried (78): I have too often seen opposing parties initially claim a privilege and then back off when pushed to provide more details to support the privilege claim. When I push back and insist on a privilege log, counsel often relents and produces the documents that should have been produced to begin with. The shift to categorical privilege logs will foster this sort of behavior.

Frank Bailey (80) (plaintiffs with catastrophic injuries): I have found privilege logs to be critical and seen many efforts to limit their scope and ultimately limit access to evidence. We oppose any limit on the effectiveness of privilege logs.

Leonard Bennett (81) (plaintiffs in large document cases): Clear requirements for privilege logging protect efficiency and fairness, while categorical logging does not conserve resources. Instead, it invites disputes, and permits abuse involving unilateral withholding of relevant information based on questionable claims of privilege.

American Assoc. for Justice (82) (largest plaintiff attorney organization in country): Detailed privilege logs are an essential tool for proper discovery practice. They provide the most reliable way to identify and challenge improper claims of privilege, especially in high-volume document cases. The rule is presently working as it should. If a party claiming privilege were not required by rule to disclose the specifics about the withheld documents, receiving attorneys would have little recourse to challenge such designations. A change to the rule would create new problems. Moreover, the situation is different in cases not involving a large number of documents, but defining in a rule when its requirements apply or are softened due to the volume of material would be impossible.

Kenneth Wexler (83) (plaintiffs in complex litigation): The current rule provides a clear, workable standard. The information required allows plaintiffs to identify the subset of documents that may have been improperly withheld, and thereby narrows the range of potential disputes.

EDRM (Electronic Discovery Reference Model) (84) (volunteer, multidisciplinary organization including plaintiff and defense lawyers, present and former judges, paralegals, e-discovery analysts, privacy, security, information governance, and other professionals): There is a broad consensus among attorneys and judges that current practices for privilege logging are not optimal for many cases. With large productions, traditional preparation of a privilege log is burdensome and frequently not particularly useful to the requesting party. Responding to these concerns, the EDRM Privilege Log Team drafted the attached Privilege Log Protocol. It includes broader use of Fed. R. Evid. 502(d) orders, advance identification of “gray area” issues, removing any need to log certain kinds of documents (including those prepared after the litigation began and any produced in redacted form), and reliance on metadata-generated logs for ESI, with an opportunity for the receiving party to request and obtain additional information about a sample of documents. It also encourages more communication between the parties and the use of special masters to resolve privilege issues if needed. The protocol was presented by a panel of judges during the Georgetown Advanced E-Discovery Conference in November 2020 and received broad buy-in. A subsequent survey received 115 responses from professionals, mostly from the U.S. About 70% of those responding favored amending the rule, but the vast majority believe that a privilege log of some format generally improves accountability. 88% said the parties have usually been willing to negotiate alternatives to traditional document by document logs. Attached to the comments are approximately 60 pages of reports on the survey and examples of protocols.

Katherine Charonko & Brian McAllister (85) (complex mass tort, MDL, antitrust and products liability, plaintiff side): The move to weaken the rule contravenes a fundamental principle of American jurisprudence — privileges must be narrowly construed. We favor access to facts, not privileges to withhold information. The current rule is flexible enough to work in complex litigation and less complex litigation.

Anthony Irpino (86) (plaintiffs in MDL proceedings; often primary plaintiff counsel responsible for handling privilege claims): Document by document listing is privilege logs is necessary. I have direct experience with the “category” approach, and it does not work well. The categorization process itself is too subjective, and often over-inclusive. It can require more work of the parties and the court.

Eric Weisblatt (88) (patent litigation, both plaintiff and defendant): I practiced from 1982 to 2018. I did privilege review in the hard copy days, and again in the Digital Age. The process is very similar, though the quantity of material is different. From the beginning, my mentors taught me that we wanted the court to order detailed privilege logs, for they are critical in patent litigation. We did use “generic” descriptions on occasion. But we urged judges to check these by reviewing a random sample of documents so designated. And if the judge concluded that the reviewed documents were not really privileged, that meant that the privilege was waived as to all documents with that designation on the log. So if categorical listing is authorized under an amended rule, I suggest that patent cases be excluded and remain subject to a document by document logging requirement.

John Whitfield (89) (plaintiffs in personal injury, products liability and bad faith claims): In the last five years, I have seen an increasing effort by defense counsel to shift to “categorical” privilege logs. They usually stress that the rule itself does not require document by document listing. But categories do little for me in terms of assessing the privilege claim. I always object to

this procedure, and find that judges usually side with me. It is critical that the rule continue to require that the log permit the court and the other side to “assess the claim.”

Paul Bird (90) (plaintiff product liability, collision, medical malpractice): We encounter privilege log issues in nearly every case. These seem to arise more frequently in larger cases, but sometimes in smaller cases as well. Any change (such as using categories) that would make it easier for defendants to hide behind privilege designations would unbalance the playing field. When large corporations slap “privilege” on a document without having to provide specifics, that can effectively disguise the document to the point that it may never be found.

Bhavani Raveendran (91) (plaintiffs in personal injury and civil rights claims): Summarizing information into categories would not provide the information the receiving party needs to assess the claim.

Jonathan Orent (92) (plaintiff counsel in MDL personal injury, product liability litigation): The rule should not be amended in a way that would permit defendants to claim privilege without reviewing the actual documents. In MDL 2573, we found that some 150,000 documents that were characterized as within a category exempt from discovery had never been reviewed by the withholding party. The courts have found that vague categorical objections make document by document logs necessary.

Berger Montague (93) (firm represents plaintiffs in a full spectrum of complex litigation): The current rule provides a workable standard. The issues are critical to proper litigation outcomes. Though some describe resolution of privilege claims as “satellite litigation,” these issues are central to litigation. The documents withheld improperly can often go to the heart of the case. Shifting to categories makes no sense. The nature of the document is rarely critical to whether a privilege applies.

Dena Sharp (94) (plaintiff side in complex cases): I have first-hand experience with the importance of document by document identification of withheld materials. The current rule offers far more solutions and empowers the parties to tailor their privilege processes to the particular case. For example, in *In re Restasis* (the same case that yielded the 116-page hearing transcript submitted with comment no. 72), the initial privilege log contained tens of thousands of entries. But our questioning of these claims led to defendant’s withdrawing thousands of the documents from the list and producing them to us. In this case, the court eventually called for preparation of a “Redfern chart,” which identified each document. Eventually, the parties were able to apply the court’s rulings in a largely self-executing process. This is not to suggest that the Redfern process should be adopted widely, but only that in this case there eventually was an effective solution because it was tailored to the issues of the case.

Joseph Meltzer (95) (plaintiff complex litigation): I strongly recommend that the Committee leave the rule unchanged. Privilege logs are an important tool to prevent improper assertions of privilege. They require a baseline amount of information. If the rule were amended to require less information, there would invariably be more challenges to assertions of privilege and more work for the courts.

Lisa Clay, NELA-Illinois (96) (representing employment law plaintiffs): We agree with LCJ that privilege logs frequently fail to assist parties or courts to resolve privilege issues. But we completely disagree about why this is true. The problem is that defendants are not doing a conscientious job in preparing their logs. The rule should not be weakened. Instead, it should be strengthened. The rule is too milquetoast. It should specifically enumerate what is required to be provided about each withheld document.

Manfret Muecke (97) (plaintiff consumer, employment, investor claims): The current rule is paramount to enable plaintiff lawyers to evaluate claims of privilege. If it were revised in a way to permit wholesale categorized claims of privilege, that would be harmful. Already, reliance on AI and discovery software has diluted the value of the log. A rule change could make it worse.

William Rossbach (98): Although there is much in the real world practice of privilege logs that needs improvement, the changes suggested to this Committee would harm, not improve, the practice. The rule as written should be sufficient, because it says the description must of itself show that the privilege applies. But the reality is that counsel often fail to abide by the requirement. The best thing would be to amend the rule to provide greater specificity about what must be included.

Rebekah Bailey (99) (plaintiff side employment, consumer, civil rights and qui tam): Although the rule does not say so explicitly, it is widely interpreted to require document by document privilege claims. These logs are highly valuable to use in litigating our cases. (The letter offers examples for ERISA, FLSA, Qui Tam, and individual employment litigation.)

Robert O'Hare (100) (plaintiff personal injury, wrongful death): There has been a movement to default to categorical logging. But I have personally seen parties using this approach to bury non-privileged materials under broad subject matter headings.

Thomas Henson (101) (plaintiff attorney): I have encountered countless obstructionist tactics by defendant companies. One of the most important things I have in my arsenal is this rule, because it gives me a tool to demand more from recalcitrant defendants. The current language in the rule eventually forces defendants to play fairly. I cannot overstate its importance. Any change that allows defendants to describe "categories" of documents would strike a fatal blow to the rule.

Rachel Feurst (102) (plaintiff attorney): Any attempt to limit the basic requirement of this rule should be rejected. I started out as a defense lawyer and learned then that it was easy to cover up harmful documents by laying down blanket assertions of privilege. I would estimate that more than 65% of all contested document listed on a privilege log are found to be non-privileged by the court. Allowing parties to simply broadly label documents as privileged will likely result in more improperly withheld documents.

Lawyers for Civil Justice (1023): We have revised our proposal, and believe that the revised proposal should be adopted. (The revised proposal is attached, in full, as an appendix to this summary of comments.) The revised proposal reverses the de facto rule presently applied and requiring document by document privilege logging. Instead, it creates a presumption in favor of categorical logging, which the court may alter as needed. It would also "codify" the presumption

that no logging is required for privileged or work product materials created after the complaint is filed.

CLEF (Complex Litigation eDiscovery Forum (104) (plaintiff complex litigation): CLEF is an advocacy organization representing the plaintiff complex litigation bar. (Two members of its Board of Directors submitted comments of their own — Rebekah Bailey (no. 99), and Lea Bays (no. 45).) In this 24-page submission, the group urges that no change be made to the rules. It contests the notion that document by document logs are unduly burdensome, in light of the software now available to assist. And the use of “categories” is inherently unreliable and can breed more disputes and motion practice. It urges that notions of proportionality not be introduced into the privilege logging discussion.

Joseph Neale (105) (plaintiff lawyer): It is my fervent position that the current rules about privilege logs are appropriate and should not be modified. Any change that weakens them will embolden corporate defendants to hide evidence. The rule was added in 1993 because, without it, there was no practical method for parties to test claims of privilege. The rule works when there is a detailed document by document privilege log. Moreover, the burden of logging is not great in most cases. In most cases, there are only a few entries, if a log is produced at all. Moreover, Rule 26(f) requires the parties to develop a discovery plan and also focuses on privilege issues. The alternative of adopting categorical exclusions from the logging requirement will not make litigation more efficient, but will instead impose a new burden on plaintiffs and, at one remove, on the courts called upon to resolve privilege disputes.

Michael Neff (106) (plaintiff lawyer): The rule works. A detailed privilege log that identifies each document withheld is the best way for parties and courts to assess claims of privilege. Claims of burden are overblown. In most cases privilege logs include only a few entries.

Minnesota State Bar Ass’n Court Rules and Administration Committee (this comment does not have a docket number as it was received after the August 1 deadline): We believe that the rule should be strengthened as follows in Rule 26(b)(5)(A)(ii) and that a new (iii) should be added:

- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the claims. Describing the nature of the documents, communications, or tangible things not produced or disclosed by category shall not be sufficient. The withholding party must describe each document, communication, or tangible thing, and identify the claim to privilege or protection; and
- (iii) Upon the request of the receiving party, iteratively meet and confer as soon as practicable whereat the receiving party may request further information about specifically identified withheld documents, communications, or tangible things, and the withholding party must provide sufficient information to allow the other party to review the claim of privilege or protection.

(2) Compliance with current rule

Brandon Peak (014): I routinely handle large, document-intensive cases. I regularly see parties attempt to evade legitimate discovery by claiming privilege or protection for documents that are not protected. Requiring parties to log the documents they contend are privileged many times facially reveals that the documents are clearly not privileged. Changing the rule will cause more discovery obfuscation. Please do not change the rule.

Robert Cobbs (017) (Cohen Milstein): In large document cases, like the antitrust cases I litigate regularly, defense counsel routinely assert claims of privilege over documents even though these claims are indefensible. Defense side privilege reviews are typically performed by contract attorneys operating on short-term contracts with loose oversight. Reviewing attorneys are encouraged to over-designate.

Narne Mkrchyan (22): As a civil rights attorney, I vehemently oppose this proposal to change to categories. In most cases, the city withholds many documents on grounds of privileges that are normally overruled. But if the city could avoid specifying the documents withheld and provide only a generic description, we would never learn what records exist, and the city could suppress material records. I have had this experience when the city provided only a generic description of records that prevented the assigned magistrate from deciding how to rule on our requests. The result was that we did not get records we needed.

Nicole Andersen (26) (wrongful death and personal injury): In product liability cases, it is rare that defendants provide a privilege log to accompany privilege objections on the first go-round. And when produced, the logs rarely comply with the rule's requirements. Instead, they are usually merely categorical claims of privilege to justify boilerplate objections. The result is lengthy meet and confer sessions, followed by expensive motion practice, leading often a compromise "split the baby" judicial response.

Howard Friedman (32) (civil rights plaintiffs): Defendants frequently respond with boilerplate objections. They also frequently claim privileges, sometimes without even providing a privilege log. I have had to file motions to compel privilege logs.

Matthew Sims (34) (plaintiffs in catastrophic injury and other complex matters): Defendants routinely assert claims of privilege and confidentiality as a reason to withhold information. Invariably, when we pursue and succeed on a challenge to privilege, we find damning documents of the highest order were improperly withheld. Under the current rule, a cat-and-mouse game exists, with great efforts expended trying to conceal the most relevant documents.

F. Inge Johnstone (36) (personal injury plaintiffs, insurance policyholders, and small businesses): The biggest problem is the over-claiming of privilege and the failure to provide sufficient information in a privilege log to permit me to make a determination as to whether something is privileged. Relaxing the rule would worsen matters.

Frederick Longer (37) (plaintiffs in pharmaceutical, medical device, and product liability MDL proceedings): Many lawyers misunderstand or misapply the privilege, and sometimes the outright abuse it. Examples abound where counsel have attempted to attribute to a relevant and discoverable document attorney client privilege status through false or improperly applied criteria.

The only means to hold that in check is to require fundamental information in a detailed privilege log. For example, in the Vioxx MDL, there was a privilege log listing 30,000 documents. The court did an in camera inspection and found that only 491 of the 30,000 documents were actually privileged.

Stephanie Walters (39) (plaintiffs in complex litigation): Large corporations often direct employees to copy corporate counsel on every communication, and then use this technique to avoid discovery of internal business communications. Only document-by-document listing permits us to ferret out this sort of thing.

Altom Maglio (42) (product liability plaintiffs): Many corporations have attorneys working in all aspects of the business. They try to shield documents involving only business decisions and no legal advice by having these in-house lawyers involved.

David Arbogast (43) (plaintiff side antitrust, banking lending and business torts): Commonly, key documents are withheld and buried in a privilege log. Most of the key documents in complex cases are rarely produced without a motion to compel. Using categorical logs would facilitate this sort of behavior. Invariably, defense counsel attempt to bury the most critical of “hot” documents in a pile of purportedly privileged materials. Far too often, defense attempt to withhold documents as privileged is revealed to be baseless.

Timothy Lange (53) (plaintiffs in catastrophic injury cases, usually involving commercial motor carriers): Privilege logs have been used consistently to abuse the litigation process and keep potentially damaging discoverable information from litigation opponents. For example, work product is routinely claimed as to photographs, video, statements, obtained by the defense during the active investigation of the case. I have even had evidence belonging to my client stolen from the scene of a crash, sent to a defense expert, and kept from me in litigation, only later to find that it was discussed by the defense expert in emails that appeared on the privilege log. Logs should require more information, not less.

Carma Henson (55) (medical malpractice and nursing home plaintiffs): Categorical logging will promote the practice of evasive responses and delay the completion of discovery. In 95% of the nursing home abuse cases I handle, defendants fail to produce relevant documents while making categorical statements that the material is privileged. In almost every case, they fail to produce a privilege log or provide specific information necessary to allow me to verify the claim. When I press the point, defendants invariably withdraw many of their privilege claims and produce relevant documents.

W. Ellis Boyle (56) (personal injury and medical malpractice plaintiffs): Corporate defendants and insurance companies rarely produce a privilege log when initially responding to discovery requests. Instead, they make a pro forma blanket objection based on privilege and produce no qualifying or descriptive information to support the privilege claim. Our experience is that the courts do not find that this behavior waives all privileges. Instead, we must press the defense to give us more information. Without eventually getting a privilege log, we would have to file a motion every time a defendant claims privilege.

Ashley Billiam (59) (plaintiff personal injury and medical malpractice): In the rare cases in which defendants actually provide a privilege log, they rarely comply with the requirements of the rule. They are merely categorical claims of privilege to justify boilerplate objections. “The result of the current rule, and how it is followed in practice, is lengthy meet and confer scenarios, often followed by expensive and time-consuming motion practice.”

Public Justice (66): Organizations have become savvier about routing communications through attorneys, or including attorneys on them, to provide cover for a privilege log.

Bart Cohen (70) (plaintiff class actions and other complex litigation): Privilege disclosures are exceptionally important. Defendants routinely seek legal advice regarding antitrust and patent issues. That justifies some assertions of privilege. But they routinely over-designate in virtually every case, and frequently to an alarming degree.

Frank Bailey (80) (catastrophic injuries): We have found the use of boilerplate objections to be very common, and that efforts to protect crucial information under the guise of privilege are to be expected in most cases.

Leonard Bennett (81) (plaintiffs in large document cases): A recent case is illustrative of problems we encounter. In litigation involving Apple Corp., Apple sought to claw back three documents it claimed were privileged. In each case, the email was copied to an in-house Apple attorney, which Apple claimed made the email privileged. The court rejected the claim, noting that some of the emails presented “a clear example of businesspeople including a lawyer in an email chain in the incorrect belief that doing so makes the email privileged.”

American Assoc. for Justice (82) (largest plaintiff attorney organization in country): “AAJ members have almost universally shared one main issue that arises in such situations: when a General Counsel or other legal counsel is improperly added to an email or part of a discussion for the sole purpose of attempting to protect items that are not otherwise privileged.”

William Rossbach (98): The rule’s standard, while well meaning, is too vague. Many of us are accustomed to receiving blanket, boilerplate privilege claims with little more information than they date of the document and descriptions no more revealing than “work product.” One of my colleagues described a case in which over 100,000 documents were withheld as privileged. Yet opposing counsel admitted at oral argument that they never actually reviewed these documents.

Thomas Henson (101) (plaintiff attorney): Here is my normal experience today. I serve a document request. Responses are served, replete with baseless objections and assertions of privilege. No privilege log is provided. I must then request such a log multiple times, in writing with threats of motions to compel. Eventually, I get a privilege log, but the vast majority of those logs do not provide the necessary information. So I have to file a motion to compel anyway. On the day before the hearing of that motion, the defense will provide a more detailed log. Then we can review that log with care, and identify scores of documents that should not have been withheld. And then these scores of documents are finally produced.

(3) Burden of preparation of document-by-document logs

Sharon Markowitz (02) (litigation partner): Preparing privilege logs is a lot of work. I can electronically generate the metadata of each withheld document, including To/From/CC info, the date, and the document title in minutes. But to prepare a narrative for each document like “communicating legal advice regarding X,” but the X has no impact on whether the document is privileged. If it’s legal advice, it’s privileged. The solution would be to authorize parties to produce privilege logs with metadata only, and allow opposing counsel to follow up about specific documents. It is also desirable to leave redacted documents off the log if the metadata appear on the redacted document. (Attaches a protocol for a privilege log in a case)

Kate Baxter-Kauf (005) (complex litigation; both plaintiff and defense side): Corporate defendants have produced privilege logs created entirely by computers with no attorney oversight. These boilerplate attempts almost never work to permit the opposing party to assess the claim of privilege. They contain generic coded verbiage. But categorical logs are often worse, and lead to endless meet and confer sessions.

Mike Moore (06) (solo practitioner rep. plaintiffs in civil rights cases): It cannot be an undue burden to prepare a proper privilege log. Defense counsel must go through each document, exercising due diligence, to determine whether it is indeed privileged.

Austen Zeuge (13) (intellectual property litigation for both plaintiffs and defendants): In my experience, preparation of a document-by-document log has not presented any major difficulties. It seems to me that discovery disputes are generated partly by lawyers who make money off them. Extra-large businesses complain about discovery burdens that are a function of their size. But this is akin to “coming to the nuisance.” Businesses that choose to become very large should recognize that some difficulties can result from that size. The FRCP should not give them preferential treatment based on their choice to become and remain large.

Tab Turner (25): Concerns about the costs of creating privilege logs are self-serving and simply inaccurate.

Roberta Liebenberg (28) (Fine Kaplan & Black) (antitrust, class actions, complex commercial litigation): The burden of preparing privilege logs is often self-imposed. Multiple mechanisms are already available to reduce the burden and cost of doing so. Experienced counsel frequently agree in advance to a privilege log protocol.

Rob Snyder (33) (product liability, personal injury, and whistleblower plaintiffs): Claims of burden are overblown. Our firm frequently handles cases in which defendants produce millions of pages of material. Not once in my experience has any defendant contended that providing a document-by-document log was excessively burdensome.

Matthew Sims (34) (plaintiffs in catastrophic injury and other complex matters): Claims of privilege are qualitative, meaning that a trained attorney should have looked at a document and made a subjective call on whether it may be withheld. If a document must go through this process for the assertion of privilege to occur, then the minimal amount of time savings from permitting using categories rather than a document-by-document listing is not worth introducing the

temptation to hide documents not eligible for privilege protection behind privilege. I strongly oppose any rule change that will eliminate the need for a document-by-document listing.

Stephanie Walters (39) (plaintiffs in complex litigation): In fact the assertion of privilege and associated logging of documents is not a “burden,” but a responsibility associated with withholding documents from discovery. Parties who complain of “burden” tend to wildly over-designate documents as privileged. Most of the time, when there are detailed logs, a secondary review causes the other side to de-designate a large percentage of logged documents. If withholding parties are concerned about the time spent creating privilege logs, they should institute a stricter privilege review system. There is software that will enable them to minimize the burden of both review and log creation.

Altom Maglio (42) (product liability plaintiffs): Most document review and production platforms today make generating and producing privilege logs incredibly quick and efficient, done at the touch of a button. With the use of metadata for document sets coupled with essential document review, most of the necessary information for the privilege log is already there, and system simply uses it to generate the logs.

Lea Malani Bays (45) (Robbins Geller) (complex class action plaintiff side litigation): If done properly, document-by-document privilege logs are not actually burdensome to prepare. The process is no longer manual. Since ESI has become the ordinary form for production, it has become common practice for the parties to come to an agreement on fields to be included in the privilege log that can be auto-populated with corresponding metadata extracted from the document. The only fields that typically require “manual” input are (1) privilege asserted, and (2) privilege description. Those fields should not be burdensome to prepare either.

New York State Bar Ass’n Commercial and Federal Litigation Section (54) (cross-section of practitioners): A common complaint is that document-by-document privilege logs may involve hundreds of thousands of documents. Preparing them is time consuming and expensive, and they are a frequent subject of discovery disputes. In run-of-the-mill cases, such logs may impose little burden to prepare. In many states, including New York, local rules address these burdens. But in complex litigation the total cost of producing a document-by-document log can dwarf its value to the recipient. Even when advanced technologies are used, the reality is that — absent party agreement on purely metadata-driven logging — the output of those technologies invariably requires extensive review, cleanup, and supplementation, largely offsetting any cost savings technology might promise.

National Employment Lawyers Association (69): Many ESI platforms specifically include the efficient and easy creation of privilege logs. This is a selling point for the marketers of platforms. It is also a reason to doubt that preparing the log is necessarily a great burden.

Thomas Sobol (72) (complex litigation plaintiffs): Modern ESI methods, used by both sides, allow for most of the contents of a log to be populated with ease. This discovery is virtually always done electronically. With a few keystrokes, the software will generate a spreadsheet listing potentially privileged documents and associated metadata, which ordinarily includes the date, the title of the document, the document type, the sender, all recipients, subject line, and attachments.

Bryce Gell (75) (plaintiff attorney): We find that those who complain most about burden are also the parties who make the most improper designations. The burden is not really great. In large document cases, the parties use document review platforms such as Relativity or Everlaw. These platforms enable quick redactions and also make it easy to create privilege logs. In smaller cases where document review platforms are not necessary, there are far fewer privileged documents.

Morgan Adams (79) (plaintiff lawyer representing catastrophically injured): In my experience, the rule is ignored more than it is followed. This tendency places the burden on the courts to determine privilege claims because no proper log was provided.

Leonard Bennett (81) (plaintiffs in large document cases): Modern electronic discovery tools and vendor applications greatly reduce the difficulties of logging privileged documents. Documents can be electronically culled and segregated, and logs created by software permit detailed descriptions to be added with minimal effort. Such programs are commonplace if not ubiquitous.

Katherine Charonko & Brian McAllister (85) (complex mass tort, MDL, antitrust and products liability, plaintiff side): E-Discovery platforms allow parties to prepare privilege logs more efficiently than ever before. We manage cases with libraries that house millions of documents. Our eDiscovery software allows us to analyze conversation strings concurrently and to organize privilege reviews in an effective and cost-conscious manner. As a consequence, we can complete a privilege review and also prepare to provide a log. E-discovery platforms render the disclosure of withheld materials easier, by permitting parties to generate reports capturing key metadata upon which privilege claims depend.

Adam Levitt, David Straite, Bruce Bernstein, Amy Keller & James Ulwick (87) (plaintiff side in class actions, mass torts, data breach and cybersecurity litigation): The burden of privilege review does not depend on the method of privilege logging if the review is done properly. It must be a multi-faceted review to allow the responding attorney to attest that any assertions of privilege are meaningfully reviewable by opposing parties. In cases involving ESI, litigants and their counsel who are sufficiently technologically savvy have begun using software or cloud-based systems to quickly and efficiently identify responsive and relevant documents. These systems also allow the parties on both sides to negotiate ESI protocols that allow the universe of documents to be confined to a mutually agreed scope.

John Whitfield (89) (plaintiffs in personal injury, products liability and bad faith claims): I have found that defense claims of undue burden fall on deaf judicial ears due to the advent of technology in the modern litigator's arsenal which provides the ability to organize huge amounts of data (and metadata) efficiently and easily.

Jonathan Orent (92) (plaintiff counsel in MDL personal injury, product liability litigation): A majority of the information on privilege logs is derived from metadata, so the task of gathering this information is not burdensome. But merely looking to the metadata is not sufficient; a review of the actual document must be conducted to determine whether the privilege actually applies.

Berger Montague (93) (firm represents plaintiffs in a full spectrum of complex litigation): Modern litigation technology has relieved much of the burden of preparing a privilege log. The content of most of the things needed on the log can be extracted from metadata.

Rebekah Bailey (99) (plaintiff side employment, consumer, civil rights and qui tam): Although it is true that the proliferation of ESI has expanded the sheer quantity of discoverable information, document management tools and analytics have also greatly improved to meet this challenge. Now most parties extract metadata from document review platforms into Excel or other sorts of fields to be further populated for a privilege review. The metadata provide the reader with critical information, and in our experience produces fewer disputes than occurred in the past.

(4) Value of document-by-document method

Ingrid Evans (04) (represents plaintiffs in individual and class action litigation): A detailed privilege log is indispensable to discovery. In consumer insurance cases I have handled, the carrier defendants were forced by the rule to provide the information I needed. Without that information, I would not have been able to compel disclosure. “I cannot overstate the importance of the Rule. * * * A single document may be critical to a plaintiff’s case, so a document-by-document disclosure of the purported privilege grounds is critical.”

Austen Zeuge (13) (intellectual property litigation for both plaintiffs and defendants): Rather than opting for “categories,” a better revision would be some explicit statement that a document-by-document log is normally required, but that the parties and the court can relax that requirement.

Robert Cobbs (017) (Cohen Milstein): Plaintiffs must rely on the descriptions of the documents to assess whether a claim of privilege is legitimate. Grouping privilege claims into categories eliminates plaintiffs’ ability to assess the claim.

Lauren Bonds (19) (National Police Accountability Project): The question whether a particular privilege should apply is often nuanced and fact-intensive. Even a party acting in good faith can incorrectly invoke privilege. The opportunity to assess details of each specific document ensures that the requesting party can challenge incorrect claims of privilege. The rule also empowers a party to quickly identify and challenge bad faith invocations of privilege.

Lori Andrus (20) (handles broad range of complex cases): The importance of a detailed privilege log cannot be understated. In complex cases, where defendants produce millions of pages of documents, corporations inevitably withhold thousands, or even tens of thousands, of documents based on assertions of privilege. Once plaintiffs scrutinize the privilege log, scores of documents that were improperly withheld get produced. For example, in one recent MDL proceeding the privilege log grew to more than 100,000 documents. But more than 3,500 of them had third parties as recipients, on nearly 6,000 the attorney was merely “cc’d”, and another 5,700 had no attorney involvement at all.

Maria Diamond (21) (represents plaintiffs in product liability, medical negligence): In complex products cases, defendants often produce many thousands and even millions of pages of documents, invariably withholding a substantial number based on privilege claims. Once

plaintiff's counsel carefully reviews the privilege logs and challenges improper privilege claims, many documents that were improperly withheld get produced.

Tab Turner (25): Document productions have grown exponentially over the years. A document-by-document listing of allegedly privileged materials has become the norm. We need the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including author, addressees, custodian, and any other recipient, and, where not obvious, the relationship of the various participants to each other. Having this information serves efficiency and fairness.

Howard Friedman (32) (civil rights plaintiffs): Privilege logs are an important tool to promote transparency and ethical discovery practice in civil rights cases. I have received proper logs that contain enough information to assure me that the withheld information is indeed privileged. I have also received logs that show information being improperly withheld. Most of the time, I can resolve issues by having a conversation with defense counsel. Without a proper privilege log, I would not know enough to begin a conversation.

Altom Maglio (42) (product liability plaintiffs): Privilege logs have played an increasingly crucial role in obtaining essential discovery. Some large corporate defendants have become increasingly brazen about evading production of problematic documents. But a privilege log will often provide a clue to the existence of the needed documents. Although they are not perfect, the logs are very important. They often lead to "smoking gun" documents.

Robert Keeling (76) (co-chair of Sidley eDiscovery team): Despite often costing a huge amount of money, a document-by-document privilege log of tens or hundreds of thousands of entries is not really useful to the requesting party. The majority of individual privilege log entries are never reviewed by the receiving party or its attorneys. It simply is not possible for them to review so many entries.

Morgan Adams (79) (plaintiff lawyer representing catastrophically injured): Privilege logs are critical to my practice because insurance company "Rapid Reaction Response Teams" are often at the wreck scene before my clients can be taken to the hospital. They thus get irreplaceable evidence. I often have to pierce work product to obtain photographs, measurements, and other facts that the defendants' agents obtained while the police were still present. Having an adequate log helps me determine if the privilege requirements have been met. An inadequate log requires that the whole matter be thrust onto the court.

(5) Information needed by requesting party

Kate Baxter-Kauf (005) (complex litigation; both plaintiff and defense side): Lots of courts provide specifics on information that should be included on a log — such as Bates number, author, recipients, cc recipients, date, subject, title, attorney status, file name, type of communication, basis for privilege claim. Changes to the rule might codify those requirements.

Douglas McNamara (38) (Cohen Milstein): The District of Maryland practice guidelines set out what a log should contain:

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

Morgan Adams (79) (plaintiff lawyer representing catastrophically injured): The repeated lack of a privilege log has prompted me to refine my Rule 34 request, to insist that if anything is withheld on grounds of privilege the following information should be provided:

- (a) The Title of the Document
- (b) The author(s), all recipients, and to whom the document was shown
- (c) The Authors and recipients' capacities/roles/positions
- (d) The document's date
- (e) The purpose/subject matter of the document
- (f) The nature of the privilege asserted, and why the particular document is believed to be privileged
- (g) The question (number) to which the document is responsive

Leonard Bennett (81) (plaintiffs in large document cases): In the E.D. Va., where I practice, a document-by-document approach is demanded. Some districts have local rules setting out these requirements. The District of Maryland requires (i) the type of document; (ii) the general subject matter of the document; (iii) the date; (iv) other information sufficient to identify the document, including the identity of the author and each recipient.

- (6) Consequence of changing to categorical descriptions

Nora Graziano (01) (Florida paralegal): Though using categories might be quicker, it would not be a suitable format and might prompt more discovery. It is better to narrow down with information on the date, the to/from information and subject.

Sharon Markowitz (02) (litigation partner): I do not think categorical privilege logs are the answer. Categorical logs would require me to do all the work of identifying the subject matter of the documents (irrelevant to whether the document is privileged) and do not communicate to the opposing party who was part of the communication (highly relevant).

Mike Moore (06) (solo practitioner rep. plaintiffs in civil rights cases): Any change in the rule to permit simple "categories" to suffice will dramatically impact the plaintiff lawyer's ability to intelligently argue that the privilege does not apply.

Thomas Beck (07): I would not be pleased to get a privilege log from the defense that allows generic descriptions. I have been litigating police misconduct cases for 42 years, and my experience is that the defense does not use privilege logs or does not use them routinely. To allow a generic "personnel record" description to satisfy the rule would defeat its purpose, because some such records are unimportant, but others contain essential information. As a solo plaintiff lawyer, I find that I seldom withhold anything sought in discovery on grounds of privilege.

Frances Carpenter (11): As a seasoned litigator, I have seen firsthand email that would have been discoverable lumped into a category and then I might ask the court to do an in camera inspection. I believe it is important to list each document with great specificity and clarity so that the courts are not burdened, and so that the outcome is consistent with truth and transparency.

Austen Zeuge (13) (intellectual property litigation for both plaintiffs and defendants): I have never had anyone try to use this “categorical” approach. I think there would be too much incentive to “hide” something in a broad category that does not really belong there. On the other hand, there may be a reason to exempt from logging post-commencement communications. There is often a large number of such communications related to the litigation but they often have little legal value to the other side. It seems impossible at a practical level to enumerate appropriate categories. And vague and generic descriptions invite abuse of the rule.

Brandon Peak (014): I routinely handle large, document-intensive cases. The job of making privilege determinations usually falls on young lawyers or contract lawyers with little experience or knowledge of the case. If the junior lawyers are permitted to designate documents as falling into a “category” there will never be an occasion for a senior lawyer to review the initially designated materials.

Jasper Abbott (16): Simply listing “categories” would not provide any useful information to challenge a privilege claim. It would instead increase the likelihood of motion practice. I attach an example of a “categorical” privilege log I received in a case in Georgia state court. The result was multiple hearings with the court, which forced the court to do an in camera review of the documents. A document-by-document log would have avoided these costs.

Robert Cobbs (017) (Cohen Milstein): Allowing reviewers and their supervisors to advert to a preapproved list of descriptions encourages them to mischaracterize documents to fit into approved safe harbor categories.

Sean Domnick (018) (representing victims of catastrophic injury): A privilege log gives the other side sufficient information to make a determination whether to challenge the claim of privilege. Allowing for categories of information will frustrate that purpose. It will allow wrongdoers to be more able to hide relevant, damaging materials. In my experience, when the other side has responded with categorical rather than document-by-document reports, that has led to motion practice leading to a more specific response that showed that many of the withheld documents were not properly withheld.

Lauren Bonds (19) (National Police Accountability Project): Allowing use of “categories” instead of a document-by-document listing will make it much more difficult for litigants in general, and particularly for civil rights litigants, to obtain information they need to support their cases. In civil rights litigation, a detailed privilege log is necessary to engage in case-specific and fact-specific balancing of interests. Claims of privilege are persistent features of civil rights litigation. Often there are claims of internal affairs privileges, executive privilege, and confidential informer privilege. The propriety of each of these privilege claims would rarely be obvious from a categorical description. Without the benefit of a document-by-document description, plaintiffs have no way to know which of privilege are improper.

Lori Andrus (20) (handles broad range of complex cases): Categorical logs tend to obscure rather than illuminate the nature of the materials withheld. To be useful, such a log must include sufficient detail, including dates, recipients, sources and a detailed description of the reasoning underlying the supposed application of the claimed privilege. Formally recognizing categorical logs in the rule would encourage those desiring a minimalist approach (whether for economic reasons or to avoid scrutiny) and make it harder for improper claims of privilege to be identified.

Maria Diamond (21) (represents plaintiffs in product liability, medical negligence): Changing the rule to allow categorical privilege logs will exacerbate the challenge plaintiffs already face when defendants seek to hide harmful documents under the guise of privilege. What happens is that documents are discovered and produced due to the logging requirement would have to be sought through increased motions practice if a categorical approach were used.

Nicole Andersen (26) (wrongful death and personal injury): Using a categorical approach will only result in more meet and confer sessions. In my practice, manufacturer defendants will take unfair advantage of such a rule and routinely lists such categories as “financial documents applicable to the model fuel pump.” Such categories are incredibly vague.

Roberta Liebenberg (280 (Fine Kaplan & Black) (antitrust, class actions, complex commercial litigation): Shifting to a categorical approach would invariably lead to more satellite litigation because the requesting party would not have sufficient information to validate the claims of privilege. Over-designation for privilege is a significant problem, and document-by-document logs are the only way to root out improper claims of privilege. Privilege logs using a categorical approach are incapable of providing the needed level of specificity.

Drew Ashby (29) (plaintiffs in serious injury cases): My experience with a categorical approach is limited to one matter, but it was a bad experience for everyone involved. As a result of this approach, we wasted months of the discovery window. I had to file a motion to compel with virtually no knowledge of what was withheld. We won the privilege fight on over 98% of the challenges that we made. Explicitly allowing categorical listing will create additional incentives to try to hide harmful information.

Jeffrey Greenbaum (30) (complex business litigation and class action practice): The NY State Court Commercial Division has established a preference for categorical privilege logs. It also provides possible cost shifting when one party insists on document-by-document logging. The New York City Bar prepared a guidance document regarding categorical logs, attempting to provide guidance on what a court might deem adequate in such a log. Local Rule 26.2 of the SDNY and EDNY provides somewhat the same thing. For example, the suggestion is that a categorical log may be preferred when the privilege designations are voluminous (e.g. 3,000 documents are not unduly burdensome).

Howard Friedman (32) (civil rights plaintiffs): If defendants could merely describe “categories” of documents, I would not be able to tell if the documents were improperly withheld. Vague descriptions could mean that judges would have to do more in camera review to determine whether documents are privileged.

Rob Snyder (33) (product liability, personal injury, and whistleblower plaintiffs): It is not my experience that parties request a log listing communications with outside counsel or listing outside counsel's work product related to the case. "My own firm's instructions for discovery requests expressly state that the receiving party need not log communications with outside counsel or any work-product related to the case."

Raeann Warner (35) (asbestos, employment, civil rights, and personal injury plaintiffs): Shifting to a categorical approach would increase the need for judicial intervention because parties would be more likely to ask the judge for in camera review.

Douglas McNamara (38) (Cohen Milstein): I have been involved in litigation in which categorical logging was used, and have found it inefficient and ineffective. In one MDL proceeding, the parties met and conferred on categorical logging for months, unable to agree on the scope and descriptions of the categories. Special Master John Facciola eventually recommended proceeding with traditional logging. Eventually defendant produced some 13,000 "de-privileged" documents. These important documents would probably never have seen the light of day in the litigation had only a categorical approach been used. The belated production pushed privilege fights to the end of the discovery period, which is counter-productive.

Stephanie Walters (39) (plaintiffs in complex litigation): I often see a push from defense counsel to shift to "categorical" privilege logs. Defense counsel tries to use broad categories but that undermine the objectives of the rule. Relying on "categories" permits corporations to avoid producing case-critical non-privileged documents by sweeping them into withheld categories.

Lea Malani Bays (45) (Robbins Geller) (complex class action plaintiff side litigation): Changing the rule to require only categorical logging would likely result in costly re-dos and unnecessary disputes. Though the submission favoring this approach speaks of "burdens," it does not describe how exactly categorical logs resolve this presupposed problem. A document-by-document log is often the most efficient way to provide the needed information. Categorical logs do not provide adequate information for the opposing party or the court to assess the claim of privilege. And preparing such logs would require a largely manual process, while mining metadata enables a largely "automatic" preparation of a log.

Ilyas Sayeg (48) (medical device and pharmaceutical claims for plaintiffs): Generally categorical designation obfuscates fact-finding because it hinders rather than enables assessment of the privilege claim. Any rule that would standardize this hindrance invites injustice. Already the committee note makes clear that a document-by-document designation may not be called for in every circumstance. But privilege logs already suffer from boilerplate designations. Ultimately, the solution to these problems must come from the parties themselves, and emerging technologies should help.

New York State Bar Ass'n Commercial and Federal Litigation Section (54) (cross-section of practitioners): The Section recommends clarifying the Federal Rules to say that there is no presumption that document-by-document logs must be used. The rule should instead allow for flexibility, including attention to the relative resources of the parties, the amount in controversy, and proportionality. The committee note to the 1993 amendment had it right. Our position conforms to a portion of the New York Commercial Division Rules. Similarly, the local rules of

the SDNY and the EDNY say that “efficient means of providing information regarding claims of privilege are encouraged, and parties are encouraged to agree upon measures that further this end.”

Federal Magistrate Judges Association (61): Actually, both categorical and document by document logs can satisfy the current rule, so an amendment expressly stating that either is acceptable may be helpful. But the rule should not be amended to require the parties to use a categorical approach. If used, the categorical descriptions must provide sufficient information to permit assessment of the claims. Examples of possibly excluded categories include (a) emails involving outside counsel after the commencement of the litigation; (b) emails involving in-house counsel when they are providing legal advice rather than business advice; emails involving a governmental agency for which a government privilege is asserted; (d) emails regarding internal investigations. Other categories could be based on date restrictions. Producing metadata logs containing certain information about withheld documents may alleviate burden problems. At least in some very complex cases document by document privilege logs may be cost prohibitive.

Thomas Sobol (72) (complex litigation plaintiffs): The biggest time drags for judges occur when a party creates privilege logs by having reviewers pick from a pre-programmed drop-down menu of a few static choices. Without the information about who created the document, when, to whom it was sent, and the subject matter of the communication, the plaintiffs cannot focus the dispute on key documents;. In these circumstances, judicial intervention on a larger scale may be required due to the “categorical” designations. For example, in one recent MDL (116 page hearing transcript from EDNY attached), defense counsel explained that they relied on plaintiff counsel to point them toward the privilege designations they should review with care. Defense counsel should not rely on plaintiff counsel to satisfy their own review obligations. In this litigation, the parties spent almost year disputing the sufficiency of the privilege logs. These sorts of problems would increase tenfold if the rule were changed to permit “categorical” designations to suffice.

Frank Bailey (80) (catastrophic injuries): Amending the rule to permit use of categories will invite abuse. We have found that broad categorization of withheld documents often leads to packaged forms of protection that include improper designation of privilege for essential evidence. This is especially true for emails and internal documents, which are usually improperly grouped into the category of “attorney communications” or claimed to be “work product in anticipation of litigation.”

American Assoc. for Justice (82) (largest plaintiff attorney organization in country): Categorical logging does not allow the parties to address the issues of whether a document is truly protected. And requiring less information in the log will make it easier for a party to hid key documents. AAJ heard anecdotally from members that a case in which categorical logging was attempted resulted in months of disagreement about how those categories should be defined, only to lead at the end of this effort to traditional document by document listing. Moreover, any attempt in a rule to describe categories that are not to be logged is not likely to work. The Committee will likely get bogged down in trying to provide the details of those categories, but those details are critical to a fair rule.

Katherine Charonko & Brian McAllister (85) (complex mass tort, MDL, antitrust and products liability, plaintiff side): Changing to a categorical reporting method will not make the task easier. Human review is, without question, the most burdensome aspect. It will necessarily

occur if the proposed shift to “categorical” reporting is adopted. Producing privilege logs by summary classifications will not obviate the need for document by document human review.

Adam Levitt, David Straite, Bruce Bernstein, Amy Keller & James Ulwick (87) (plaintiff side in class actions mass torts, data breach and cybersecurity litigation): Uniform adoption of categorical logs will not work. A minority of defendants try to extend “categorical” claims to an extreme extent, without meaningful negotiation with opposing counsel. In one major litigation on which we worked, partly due to suggestions from the special master, we tried to adhere to the Facciola-Redgrave Framework. But we could not negotiate appropriate categories. Defendants insisted on proposing categories that were facially overbroad and inconsistent. Eventually, the special master told the parties that if he had known that categorical logs would cause so many problems he would never have suggested them. The eventual “resolution” was to do a document by document privilege log.

Jonathan Orent (92) (plaintiff counsel in MDL personal injury, product liability litigation): The federal courts have frequently had to address the obfuscation that results from categorical privilege logs. For example, In *In re Aenergy*, 451 F.Supp.3d 319, 326 (S.D.N.Y. 2020), the court concluded that the categorical log provided “did little to communicate the potential basis for its privilege assessments.” Increasing the use of categorical logging will naturally result in the expansion of deficient privilege logging.

- (7) Possibility of changing Rules 26(f) and 16(b) to prompt earlier discussion and court involvement with regard to Rule 26(b)(5)(A) requirements

Kate Baxter-Kauf (005) (complex litigation; both plaintiff and defense side): To the extent rule changes would be helpful, I think the D. Minn. has a good approach. The judges routinely include privilege logs in their Rule 16 conferences, including requirements to meet and confer about the logs, deadlines for log production, dates to cabin privilege claims after a complaint was filed. This practice allows the parties to set themselves up in advance to understand where a dispute might lie.

Dennis Murray (08): I have been litigating for 58 years, and I oppose the constant addition of required mechanics to present cases. These added burdens will reduce or eliminate counsel from small firms. We need to stop adding complicated “dance steps” or else very few will be left to represent the extremely large proportions of citizens that from time to time need legal representation.

Austen Zeuge (13) (intellectual property litigation for both plaintiffs and defendants): I am opposed to such a rule change. The problem is inappropriate privilege claims. A better revision would be some explicit statement that a document-by-document log is normally required, but that the parties may relax that.

Sean Domnick (018) (representing victims of catastrophic injury): Having the parties discuss compliance with the rule seems an odd requirement when the existing rule is clear on its face as to objections.

Lori Andrus (20) (handles broad range of complex cases): Having written extensively on privilege logs, I would not support any significant change to the rule. I would, however, support

the addition of a requirement that the parties negotiate the scope, format, and timing of the exchange of privilege logs as part of the requirements of Rule 26(f)(3)(D). It is incumbent on the parties to come to an agreement early in every case on the scope, timing, and format of privilege logs. Without such negotiation, costly disputes will arise later. Privilege logs should be produced early, and on a rolling basis.

Federation of Defense and Corporate Counsel (27): We support requiring Rule 26(f) discussion about the entry of privilege non-waiver orders as well as the timing of privilege logs.

Roberta Liebenberg (280 (Fine Kaplan & Black) (antitrust, class actions, complex commercial litigation): Experienced counsel frequently agree in advance to a privilege log protocol. For example, in *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, MDL No. 2724 (E.D. Pa.), the protocol gave defendants the option to either (i) log every lesser-included email in a chain, or (ii) log a single entry for the entire chain and produce a redacted version of the entire email chain. Not one of the forty defendants elected to use option (ii), even that would have enabled them to avoid having to log every email.

Jeffrey Greenbaum (30) (complex business litigation and class action practice): The guidance notes for the new approach to privilege claims in the NY State Court Commercial Division state that parties are required to discuss the scope of privilege review and details of the log in a meet and confer session at the outset of the case. But that may be too early for a productive discussion. It may be that the parties can identify categories of documents that can be excluded from the log altogether. For example, communications with litigation counsel both before and after the commencement of litigation could be left off the log. Similarly, redacted documents might be left off.

Rob Snyder (33) (product liability, personal injury, and whistleblower plaintiffs): The rules already provide several ways for the parties to reach agreement to minimize the burdens of privilege review and logs. For example, Rule 26(f)(3)(D) already calls for discussion of any issues regarding claims of privilege. Failing agreement, the court can resolve disputes about privilege logs before discovery starts. “Recently, reaching agreement about the format of privilege logs has become part of our discussion of ESI protocols in our initial planning conferences.” The meet and confer process in federal court is sufficient to permit parties to explore the possibility of using a categorical approach to the log. It is not my experience that parties request a log listing communications with outside counsel or listing outside counsel’s work product related to the case. “My own firm’s instructions for discovery requests expressly state that the receiving party need not log communications with outside counsel or any work-product related to the case.”

Raeann Warner (35) (asbestos, employment, civil rights, and personal injury plaintiffs): “In my experience parties have been able to resolve issues themselves and judicial involvement is not necessary.”

Lea Malani Bays (45) (Robbins Geller) (complex class action plaintiff side litigation): Only one of the three possible rule changes identified in the Invitation for Comment may have a positive impact. Although it is already a common practice in large-scale litigation, it is often beneficial to have early discussions with opposing counsel regarding privilege logs. If the Committee concludes that revisions to Rule 26(f)(3)(D) could encourage this practice, this would be a welcome change.

In the “large document” cases on which I work, the parties frequently address issues regarding privilege early in the case. These discussions often occur during negotiation of an ESI protocol. Often an agreement includes both the substance and format of the privilege log. Based on a review of some of the recent ESI Protocols my firm has entered into, here are some of the recurrent provisions about logs:

- Categories of documents that do not need to be logged at all (e.g., communications with trial counsel that post-date the filing of the complaint; internal communications in a law firm or exclusively within a legal department that post-date the filing of the complaint; communications and work product from related litigation.
- The specific fields that should be included in a privilege log (most of which correlate to metadata fields that the party is already collecting and producing in the regular document production, which can be automatically extracted from the document metadata and put into a log.
- The manner in which “family documents” should be logged.
- The timing of production of privilege logs.
- The manner in which email chains should be logged.
- The file type in which the privilege log should be produced (e.g., Excel).
- How counsel should be identified in the log (e.g., list of names, use of asterisk).
- Whether or not redaction logs should be provided.
- Whether and what types of documents may be logged categorically.

New York State Bar Ass’n Commercial and Federal Litigation Section (54) (cross-section of practitioners): At the outset, parties should meet and confer in a meaningful way about the scope of any privilege review, the manner in which privilege claims will be asserted, and what information should be included in the privilege log. The form and content should be a topic of the parties’ discussion when formulating their discovery plan under Rule 26(f)(3)(D). An amendment to Rule 16(b)(3) would be helpful as well. Specifically, we favor the following amendments:

- Rule 26(b)(5)(A)(ii): “describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner proportional to the needs of the case and that, without revealing information itself privileged or protected, will enable other parties to assess the claims.
- Rule 26(f)(3)(D): any issues about claims of privilege or of protection as trial-preparation materials including the scope of privilege review, the nature and amount of information to be included in the privilege log, and applicability of cost-effective privilege log variations, and — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.
- Rule 16(b)(3)(B): add a new (iv) saying define the scope of privilege review, the nature and amount of information to be included in any privilege log, and any cost-effective methodology to be used in any privilege log; and, in addition, add the following to current (iv) (redesignated as (v)): or that define the format of any privilege logs.

Federal Magistrate Judges Association (61): The committee members agreed that continued discussion should focus on a potential revision to Rule 26(f)(3)(D) to include, as part of the duty to meet and confer, the topic of how privilege logs should be drafted based on the needs in a particular case under Rule 26(b)(5)(A). If a rolling production of documents is anticipated, the discussion should also address the need to update the privilege logs within one or two weeks of each production. The results of that discussion could be incorporated into the court's scheduling order under Rule 16.

Sharon Robertson (65) (plaintiffs in complex litigation): The current rule has allowed the parties to successfully resolve disputes without court intervention. The parties meet and confer before and after privilege logs are produced, and can challenge assertions of privilege where necessary.

Public Justice (66): The rule affords parties and courts the ability to tailor compliance with the needs of each case. The rule allows the parties and the court to do their jobs.

National Employment Lawyers Association (69): To the extent the Committee wishes to modify the rule, NELA endorses the idea of adding a requirement that litigants discuss privilege logs during the 26(f) conference, as well as identifying it as a topic to be addressed by the court during a Rule 16(b) scheduling conference. Such an approach is an efficient and tailored way to allow parties to raise concerns and questions prior to the start of discovery. At a minimum, it could permit the court to design methods to resolve any disputes that later develop.

Thomas Sobol (72) (complex litigation plaintiffs): The current rule works well. In practice, the parties meet and confer before and after privilege logs are produced. The receiving party homes in on the key documents it believes may have been improperly withheld. The parties resolve most, if not all, of their differences. When logs are done well, and negotiations are meaningful, any dispute landing before a judge has been pruned back. In complex cases, the structure, contents, and exemptions for privilege logs are carefully negotiated. The parties work through, up front, the timing for producing logs. These agreements are often embodied in a privilege log protocol approved by the court. "The ground rules are clear from jump street." Under the current rule, the parties have unconstrained latitude to negotiate specific issues in each case that may warrant approaching a privilege log differently. This enables the parties to use their experience and expertise to craft a process that works for the case.

Lawrence Anderson (77) (represents people against institutional opponents): This proposal represents yet another example of imposition of informal conferences and loosened standards. Rather than resolve conflicts, these rules merely prolong conflicts and end up shifting the burden from those who seek to avoid discovery to those who seek to enforce discovery,

Leonard Bennett (81) (plaintiffs in large document cases): I find stipulations useful to limit difficulties in logging documents. In my cases, we regularly agree with opponents that no discovery requests should be interpreted as seeking attorney-client communications since the attorney was retained in the litigation. Then those do not need to be logged.

American Assoc. for Justice (82) (largest plaintiff attorney organization in country): The problems cited to justify changing the rule are all of a type that can be (and often are) easily worked out by the parties.

Kenneth Wexler (83) (plaintiffs in complex litigation): The parties now meet and confer before and after privilege logs are produced. They are able to resolve most disputes most of the time, in part because the rule requires the responding party to provide needed specifics. Amending the rule to provide less information in favor of broad categories will jeopardize plaintiffs' discovery rights.

Anthony Irpino (86) (plaintiffs in MDL proceedings; often primary plaintiff counsel responsible for handling privilege claims): This possible amendment is a good idea. "It is particularly helpful for parties to discuss early in the litigation the method for complying with Rule 26(b)(5)(A)."

Adam Levitt, David Straite, Bruce Bernstein, Amy Keller & James Ulwick (87) (plaintiff side in class actions mass torts, data breach and cybersecurity litigation): We are experienced litigators, and frequently negotiate the scope, frequency, method, and form of ESI and document discovery before, during, and after litigation. We find that most defendants are willing to negotiate a discovery protocol that allows for certain categories of documents to be presumptively protected by a privilege categorization. These arrangements allow defendants to save time and money by limiting the review necessary to smaller universes of documents than they otherwise would have to review. It also assists plaintiffs, as it is far less likely that the defendants will just "dump" every possible document on the plaintiffs and expect the plaintiffs to sort it out.

Eric Weisblatt (88) (patent litigation, both plaintiff and defendant): The parties ought to discuss whether a log is necessary during the preparation of the discovery plan. Indeed, in patent litigation privilege logs should be mandatory.

John Whitfield (89) (plaintiffs in personal injury, products liability and bad faith claims): I am supportive of dealing with compliance with the rule in discovery plans and including a discussion in a Rule 16 conference if necessary. In fact, I have made it a point to insist in any document plan that categorical descriptions of documents claimed to be privileged not be used, which in many instances is agreed to by the other side. I have also found that courts are very receptive to managing a plan to obtain the necessary information for the privilege log to permit me to assess the privilege claim.

Paul Bird (90) (plaintiff product liability, collision, medical malpractice): We have had some modicum of success resolving some minor issues with privilege logs amongst counsel, but we often must seek court intervention. Requiring the parties to discuss compliance with the rule when preparing their discovery plan and potentially including a discussion in a Rule 16 conference would seem to encourage transparency and prevent some abusive uses of privilege logs.

Berger Montague (93) (firm represents plaintiffs in a full spectrum of complex litigation): The parties should meet and confer as early as practicable to reach agreement on how privilege assertions will be handled. The rule recognizes that there is no one-size-fits-all approach that works for every case. Our firm has utilized different combinations of techniques depending on the case

to lessen the burden of privilege logging. This has, on occasion, included categorical logging for certain types of documents. Parties should be encouraged to work through these issues through meet and confer sessions to come up with a tailored approach. If the parties do this in good faith, the court will not need to be burdened with these issues later. On occasion, a protective order is a good solution to problems in this area.

Dena Sharp (94) (plaintiff side in complex cases): If rule changes are pursued, the right way to do it would be to focus on frontloading. Revising Rule 26(f)(3)(D) to expressly require the parties to discuss their methods for complying with the privilege log requirement when preparing their discovery plan, and a companion revision to Rule 16 to invite the court to address privilege log issues early in the litigation could help alleviate privilege-associated burden. It could require the parties to get on the same page about logging early on, thus heading off delay and expense later on due to multiple rounds of “do-overs.” The parties may also agree to production of privilege logs on a rolling basis. These arrangements might even include some categorical logging provisions. For example, the Northern District of California Model Stipulated Order re ESI discovery includes this possibility.

Lisa Clay, NELA-Illinois (96) (representing employment law plaintiffs): We do not believe that requiring discussion does much to further underlying compliance in the absence of more concrete guidance in the rule on what is required. Discussion about the existing rule will do little to address the concerns of this organization. We need specific requirements in the rule itself.

William Rossbach (98): It could be helpful to require the parties to discuss compliance with the rule when they are preparing their discovery plan and potentially add that issue also to the Rule 16 conference. However, more is needed to improve compliance.

CLEF (Complex Litigation eDiscovery Forum (104) (plaintiff complex litigation): In the complex cases CLEF members handle, it is already standard practice to engage in discussions up front about privilege log (and a lot of other) discovery issues. The specifics of agreements emerging from such discussions vary greatly for various cases, and are highly case-specific. They may include tailored exclusions from logging obligations, but those are not appropriate in every case and must be designed to suit the unique elements of the pending case. They also often address the timing of privilege log production, and the content and form of the privilege log. It is not true, for example, that metadata logs are appropriate in all cases. Most privilege logs also set forth a procedure for privilege challenges, calling for both informal discussions and formal in-court action when necessary.

(8) National uniformity regarding rule’s requirements

Austen Zeuge (13) (intellectual property litigation for both plaintiffs and defendants): There are some problems under the rule, including different standards applied by different district courts. The requirements for privilege logs vary too much from district to district. Problems arise when counsel overlook unusual local requirements. Some district-to-district variations have to do with ESI, particularly how to designate natively or near-natively produced ESI on a privilege log versus those produced on paper or in PDF format, or how attachments should be treated. “If the rule addressed minimum (and perhaps maximum) privilege log requirement in a way that was nationally uniform that would seem to promote justice.”

Federation of Defense and Corporate Counsel (27): Presently there are many unwritten protocols that vary from district to district. As a result, there is confusion among the federal courts as to what is required under the rule. We encourage reforms to ensure that the rule is complied with uniformly across all federal courts.

W. Ellis Boyle (56) (personal injury and medical malpractice plaintiffs): One thing that would be helpful would be uniform guidance about the minimum requirements for a privilege log. I think a log should include, at least: (1) who created the document; (2) when it was created; (3) the format of the document; (4) every person to whom it has been sent; (5) a brief, typically generic description of the document; and (6) the type of privilege claimed.

Federal Magistrate Judges Association (61): A nationwide rule would allay the current problem lawyers face in trying to comply with varying rules among the federal district courts.

Thomas Sobol (72) (complex litigation plaintiffs): There are few guidelines for categorical privilege logs. As a result, federal district courts have all adopted different standards, creating a lack of uniformity, inevitably leading to more judicial intervention and involvement to provide guidance.

Robert Keeling (76) (co-chair of Sidley eDiscovery team): Local rules create inconsistency among the standards governing the adequacy of privilege logs across federal practice.

Morgan Adams (79) (plaintiff lawyer representing catastrophically injured): I think that the court should have a form privilege log for uniformity. Currently the requirements depend on case law and must be researched jurisdiction by jurisdiction.

Frank Bailey (80) (catastrophic injuries): We have found that clear, detailed, concise, and enforceable guidelines for privilege logs are a method for combatting malicious attempts to hide evidence.

Revised Rule Proposal from LCJ
(included with submission 102)

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must identify and describe the information not produced and the basis for withholding the information, except as the parties agree or the court orders that the identification and description of that information is not required or the information is excluded from this requirement by subdivision (D) of this rule.

(B) *Identification and Description of Information Withheld by Category.* A party withholding items shall identify and describe the items withheld by category, as the categories are defined by agreement of the parties or court order, that:

(i) describes the type or subject matter of the documents, communications, or tangible things not produced and the basis for withholding based on categories such as types of communications and/or subject matter of the items—and do so in a manner that will enable other parties to assess the claim; and

(ii) may include the identification, by number or otherwise, of each item withheld.

(C) *Identification of Information Withheld by Item.* The parties may agree, or a party may move the court, to require individual item identification of withheld information on the grounds of substantial need, undue hardship, or prejudice. If a motion is brought, the court shall consider whether an identification by item is proportional to the needs of the case as set forth in subdivision 26(b)(1) of this Rule and, if the motion is granted, may order that the additional costs of describing each item be shared by the parties or allocated in full to the moving party.

(D) *Information Withheld Excluded from [Not Subject to] Identification.* Absent a showing of substantial need, undue hardship, or prejudice, a party withholding privileged or trial-preparation materials is not required to identify categories of items or each item withheld that are created or dated after the filing of the first complaint in the action. If the court orders identification of such items, the court may order that the additional costs of describing each item be shared by the parties or allocated in full to the moving party.

(E) *Use of Technology for Identification of Withheld Materials.* A party may use search terms or other technologies to identify potentially privileged and trial-preparation materials and rely upon those search terms or technologies for withholding as privileged or protected as trial-preparation materials. Upon a showing of substantial need, undue hardship, or prejudice by any other party, the court may order that search terms or technologies be modified or another procedure for identification such materials be employed. If the court orders a modification or other procedure, the court may order that the additional costs of describing each item be shared by the parties or allocated in full to the moving party.

(F) *Motions to Compel Production of Withheld Items.* If a party moves under Rule 37(a) to compel the production of items withheld on the grounds privilege or protected as trial-preparation material, the procedures shall require:

(i) if the motion is to compel production of a category or categories of items:

(a) the responding party shall provide a description of a reasonable sample of the items setting forth the basis of the claim and sufficient to permit the court to assess the claim;

(b) the court may order the responding party to provide a description of each item in the category as set forth in subdivision (C) of this rule; and

(c) the court shall order the production of items only upon determining that each item to be produced is not subject to withholding on the basis of privilege or as trial-preparation materials.

(ii) items shall not be submitted to the court for in camera review except where the court has determined that the basis for withholding cannot be assessed by the description provided by the responding party and that such review is necessary for the court to adjudicate the issue; and

(iii) a party may move for an order to compel another party to provide descriptions of categories or items which comply with subdivisions (B) or (C) of this rule. An order to compel descriptions of categories or items shall require only the withholding party provide descriptions in compliance with this rule and, where good cause is shown, award reasonable fees and costs to the moving party.

(G) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material,

the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; shall take reasonable steps to retrieve the information if the party disclosed it before being notified and provide the identity of the person(s) or entity(ies) to whom the information was disclosed; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved. If the parties have entered an agreement regarding the handling of information subject to a claim or privilege or of protection as trial preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.