

The Sedona Conference WG1

Draft Commentary on Privilege Logs

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THE SEDONA CONFERENCE **WORKING GROUP 1– DRAFTING TEAM – PRIVILEGE LOGS**

CHARTER MANDATE

The drafting team is tasked with developing a Sedona Conference commentary that: (i) identifies the goals of Federal Rule of Civil Procedure 26(b)(5) and what parties are currently doing to meet the requirements, and where they are falling short; (ii) identifies and exemplifies the principal issues with privilege logs in the modern era under the current rules and standard practices (*i.e.*, time, expense, and failure to meet the court’s and parties’ needs); (iii) recommends a framework for logging in a defensible and useful manner, including practical approaches and methodologies for mitigating common privilege log issues; (iv) addresses appropriate and reasonable methods for challenging log entries and remedying improper log designations and challenges; and (v) recommends ways to move the law forward in a reasoned and just way to ensure privilege log procedures are aligned with Federal Rules of Civil Procedure 1 and 26(b)(5), while at the same time ensuring that parties have the ability to obtain discoverable evidence necessary to reasonably litigate cases. The team is not tasked with addressing the process for or burden of privilege review by the responding party—how to determine whether a document is, in fact, privileged.

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EXECUTIVE SUMMARY

When a party withholds otherwise relevant documents in discovery based on the attorney-client privilege, work product doctrine, or some other protection¹, it must satisfy the requirements of the relevant jurisdiction for explaining the bases for withholding production. This *Commentary* focuses on cases in federal courts and, therefore, the Federal Rules of Civil Procedure. The operative rule for withholding otherwise discoverable information based on privilege is Rule 26(b)(5)(A).

This Rule provides two primary requirements for a party withholding information—it must (1) “expressly” identify the claim or basis for not producing it; and (2) describe the information in such a way that it allows the opposing party to assess the claim. This Rule, however, does not specify how a party must satisfy this burden.

Historically, perhaps the most common tool parties have used to satisfy their burden under Rule 26(b)(5) is a traditional privilege log—a table listing the following data about each withheld document: Privilege Log ID Number; Bates Number (if partially produced); Date; Author (for documents) or From/Sender (for communications like email); Recipients (To/CC/BCC); Privilege Asserted; Privilege Narrative/Description; and possibly Filename or Email Subject. This “traditional” privilege log type arguably is the most thorough and, therefore, defensible means of “expressly describing” the bases for withholding documents based on privilege.²

When there is a large set of documents to log, preparing a traditional log presents burdens and challenges for the responding party.³ With the proliferation of electronically stored

¹ Unless stated otherwise herein, references to “privilege” are intended to include the attorney-client privilege, work product doctrine, common interest doctrine, and any other potential privilege, doctrine, or protection a party may assert as a basis for withholding relevant documents in discovery.

² *See generally*, *In re Imperial Corp. of Am. v. Shields*, 174 F.R.D. 475, 478 (S.D. Cal. 1997) (“That format has been, undoubtedly will, and should remain, the traditional format. However, that paradigm is not rigid and inflexible.”); *Apple Inc. v. Samsung Elecs. Co.*, 306 F.R.D. 234, 237 (N.D. Cal. 2015) (“In the Ninth Circuit, a privilege log must identify (a) the attorney and client involved, (b) the nature of the document, (c) all persons or entities shown on the document to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e) the date the document was generated, prepared, or dated.” (internal citation and quotes omitted)); *Benson v. Rosenthal*, No. CV 15-782 Section “H” (2), 2016 WL 1046126, at *9 (E.D. La. Mar. 16, 2016) (requiring “basic information, including the author, recipient, date and general nature of the document”); *First Horizon Nat’l Corp. v. Certain Underwriters at Lloyd’s*, No. 2:11-CV-02608-SHM-DKV, 2013 WL 11090763, at *7 (W.D. Tenn. Feb. 27, 2013) (quoting FED. R. CIV. P. 26 advisory committee’s notes to the 1993 amendment: “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.”).

³ *Unitedhealth Grp. Inc. v. Columbia Cas. Co.*, No. CV 05-1289 (PJS/SRN), 2010 WL 11537514, at *26 (D. Minn. Aug. 10, 2010) (“Because many of the documents requests at issue in this motion specifically call for privileged or work product protected discovery, and because of the sheer breadth of the requests and estimated volume of responsive documents, the cost and burden of a document-by-document privilege log would be staggering.”).

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information (“ESI”), a large document case may require the logging of hundreds, if not thousands, of privileged documents. This makes document-by-document narratives, required with traditional logs, even more burdensome because of the additional time (and cost) it takes to form descriptive sentences for each entry.⁴ But all discovery is burdensome and this alone does not justify the party who is withholding information on the basis of privilege from failing to satisfy the requirements of Rule 26(b)(5). To get relief from these requirements, typically a responding party must demonstrate an “undue” burden.⁵ This *Commentary* does not define what rises to the level of constituting an undue burden; it acknowledges that burdens exist and then illustrates ways to improve the process.

The privilege logging process can also raise issues for the requesting party, which typically relate to the amount and nature of information on the log and when it is received. For example, with respect to timing, a responding party may declare that it will only produce its privilege log after a series of productions done on a “rolling basis”⁶ are complete. This delay may prohibit a responding party’s ability to perform a timely contextual analysis of the claims asserted in the log.

Not surprisingly, the competing interests of requesting and responding parties in discovery can lead to disputes about the how, what, and when of producing privilege logs. This *Commentary* outlines the privilege logging burdens that exist, explains what they are, and presents tools and strategies to mitigate them. In some cases, the burdens may very well rise to a level where courts will provide relief to the responding party. Even in these situations, one size does not fit all. Parties and courts have addressed the challenges posed by privilege logs in a multitude of ways.

⁴ See *Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J.*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) (quoting Committee Note to Local Rule 26.2: “With the advent of electronic discovery and the proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative to opposing counsel and the Court.”)

⁵ *EPAC Techs., Inc. v. Harpercollins Christian Publ'g, Inc.*, No. 3:12-CV-00463, 2018 WL 3628890, at *1 (M.D. Tenn. Mar. 29, 2018) (citing Fed. R. Civ. P. 26 advisory committee’s note to 1993 amendment that document-by-document log may be unduly burdensome when voluminous documents are claimed to be protected); see also *First Horizon Nat’l Corp. v. Houston Cas. Co.*, No. 2:15-cv-2235, 2016 WL 5867268, at *6 (W.D. Tenn. Oct. 5, 2016) (must establish undue burden with specificity and articulate explicitly why production of an itemized and descriptive privilege log is unduly burdensome); *Mfrs. Collection Co., LLC v. Precision Airmotive, LLC*, No. 3:12-CV-853-L, 2014 WL 2558888, at *3 (N.D. Tex. June 6, 2014); *Patriot Rail Corp. v. Sierra R.R.*, No. 2:09-CV-0009 TLN AC, 2016 WL 1213015, at *2 (E.D. Cal. Mar. 29, 2016); *Tyco Healthcare Group LP v. Mut. Pharm. Co.*, No. 07-1299 (SRC)(MAS), 2012 WL 1585335, at *4 (D.N.J. May 4, 2012).

⁶ The term “rolling basis” typically means that instead of producing all documents by a single date certain (e.g., thirty days after the request for production is received), it will produce portions of documents in tranches over time. See, e.g., *O'Donnell/Salvatori Inc. v. Microsoft Corp.*, 339 F.R.D. 275, 276 (W.D. Wash. 2021) (“Microsoft produced documents to ODS on a rolling basis, per the Court’s order, making productions on May 17, July 2, August 9, and August 19, 2021.”); *Gugino v. City of Buffalo*, No. 21-CV-283V(F), 2021 WL 5239901, at *3 (W.D.N.Y. Nov. 10, 2021); *Urban Air Initiative, Inc. v. Env’t Prot. Agency*, 442 F. Supp. 3d 301, 312 (D.D.C. 2020).

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Consistent with Fed. R. Civ. P. 1, which encourages parties “to secure the just, speedy, and inexpensive determination of every action,”⁷ as well as The Sedona Conference, *Cooperation Proclamation*,⁸ which encourages parties to work together to resolve discovery issues, this *Commentary* outlines how parties and, if necessary, the courts can cooperatively address privilege log burdens. The primary conclusions and recommendations in this *Commentary* are:

- (1) Because all cases are not the same, the methods by which a responding party may satisfy its burdens under Rule 26(b)(5) are not one size fits all,⁹ and so parties should address privilege log format, timing, and anticipated issues early in their case to help reduce costly discovery disputes later, as well as contemplate procedures for seeking court assistance in resolving those disputes.
- (2) Rule revisions under consideration by the Advisory Committee on Civil Rules to Rules 26(f) and 16(b) are welcome changes. These changes would add language requiring that a 26(f) discovery plan include addressing a party’s views on how to comply with Rule 26(b)(5)(A). Similarly, the rule changes would add language specifically noting the method to comply with Rule 26(b)(5)(A) can be included in a Rule 16(b) scheduling order. This *Commentary* supports rule revision requiring parties to address their views on how to comply with Rule 26(b)(5)(A) in order to help ensure early communication.
- (3) Excluding certain categories of documents from logging requirements, like communications between a client and outside counsel about litigation after a complaint has been filed, is often an effective and appropriate way to mitigate a privilege logging burden.
- (4) Instead of a traditional privilege log, an alternative logging format like the preferred “metadata plus topic log” is more effective in most cases in striking an acceptable balance between satisfying the requirements of Rule 26(b)(5) and mitigating burdens.
- (5) Acknowledging that burdens exist in the privilege logging process does not mean that the responding party’s burden of supporting its privilege claims should shift to the requesting party—the onus is on the responding party to satisfy the requirements of Rule 26(b)(5) and not on the requesting party to justify why those requirements should be met.

⁷ FED. R. CIV. P. 1.

⁸ The Sedona Conference. *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary*, 3d ed. (June 2020).

⁹ See *Oracle USA, Inc. v. Rimini St., Inc.*, No. 2:10-CV-00106-LRH-VCF, 2020 WL 5750850, at *4 (D. Nev. Sept. 25, 2020) (a traditional document-by-document log is not mandated by Rule 26(b)(5) and privilege logs in general are simply one of the ways a party may satisfy its burden).

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- (6) The 2015 Amendments to the Federal Rules of Civil Procedure brought the concept of proportionality in discovery to the fore, which has sparked discussion about its applicability to privilege logs—although there is not enough case law to draw a conclusion either way, practitioners should be aware of it as a potential tool in particular jurisdictions, and the judiciary is encouraged to provide additional guidance via standing orders and/or more explicit orders regarding whether and to what extent proportionality factors are applied to privilege logs.

I. APPLICABLE RULES, PUBLICATIONS, AND INITIATIVES

A. The Requirements and Goals of Rule 26(b)(5).

Rule 26(b)(5) governs how a party must make a privilege assertion, stating:

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

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.¹⁰

The Committee Notes provide more detail on the goals of Rule 26(b)(5), noting that the Rule “provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute.”¹¹

The Federal Rules of Civil Procedure do not explicitly require the creation and exchange of a privilege log. As the Committee Notes indicate, “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.”¹² Although the Rule is silent regarding format, privilege logs have regularly been used as the mechanism by which parties comply with Federal Rules of Civil Procedure 26(b)(5)(A) (and Rule 45(e)(2)(A)).¹³ Practically speaking, the format of a privilege log allows

¹⁰ FED. R. CIV. P. 26(b)(5).

¹¹ FED. R. CIV. P. 26 advisory committee’s note to 2006 amendment.

¹² FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment.

¹³ *Caudle v. Dist. of Columbia*, 263 F.R.D. 29, 35 (D.D.C. 2009) (“A privilege log has become an almost universal method of asserting privilege under the Federal Rules.”); *see also* *Courtland Co., Inc. v. Union Carbide Corp.*, No.

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a party to “expressly make a claim” of privilege or protection in a way that “describes the nature” of the withheld document “in a manner that, without revealing information itself privileged or protected” allows “other parties to assess the claim.”¹⁴

A privilege log, however, is not the only option.¹⁵ Nor is there a “monolithic form of privilege logs.”¹⁶ Simply put, expressly claiming the privilege in a format different from the traditional privilege log (described in the Executive Summary and attached as Exemplar A) is permissible so long as the party’s underlying responsibility to provide particularized and adequate information is satisfied. In evaluating whether the creation of a privilege log in a certain manner would be unduly burdensome, courts look to the scope of a request and its relevancy.¹⁷ Courts reject conclusory, unparticularized statements regarding the burden of producing a privilege log and require some showing related to “the injurious consequences of insisting upon compliance”.¹⁸

From a responding party’s perspective, the goal of a log is typically to provide sufficient information about the withheld responsive privileged content without waiving privilege over protected information or disclosing privileged content. From a requesting party’s perspective, the log must allow for analysis of whether there are any relevant documents that may have been withheld inappropriately. Historically, parties may disagree about what is required in a log, and while courts have differed, many of the fields in Exemplar A are often provided in a traditional privilege log to meet the requirements of Rule 26(b)(5)(A).¹⁹

B. Other Relevant Rules.

1. Rule 45(e)(2)(A) – Non-Party privilege assertions.

2:19-CV-00894, 2021 WL 665532, at *1 (S.D.W. Va. Feb. 12, 2021); *Ho v. Ernst & Young, LLP*, No. C05-04867 JF HRL, 2008 WL 205595, at *1 (N.D. Cal. Jan. 24, 2008).

¹⁴ See FED. R. CIV. P. 26(b)(5).

¹⁵ See, e.g., *Oracle USA, Inc. v. Rimini St., Inc.*, No. 2:10-CV-00106-LRH-VCF, 2020 WL 5750850, at *5 (D. Nev. Sept. 25, 2020) (privilege log not needed because discussion of category and volume of documents at hearing, along with declarations, was sufficient); *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 29 F. Supp. 3d 142, 150-51 (E.D.N.Y. 2014) (finding no abuse of discretion where the court allowed Plaintiffs to use a declaration to satisfy FED. R. CIV. P. 26(b)(5)(A)); *Genesco, Inc. v. Visa U.S.A., Inc.*, 296 F.R.D. 559, 582 (M.D. Tenn. 2014) (plaintiff’s counsel submitted affidavits and other documents in lieu of log).

¹⁶ *Securitypoint Holdings, Inc. v. United States*, No. 11-268C, 2019 WL 1751194, at *2 (Fed. Cl. Apr. 16, 2019) (citing *Deseret Mgmt. Corp. v. United States*, 76 Fed. Cl. 88, 91 (2007)); *Patriot Rail Corp. v. Sierra R.R.*, No. 2:09-CV-0009 TLN AC, 2016 WL 1213015, at *2 (E.D. Cal. Mar. 29, 2016) (refraining to opine on log format as long as it permits court and parties to assess the claim of privilege).

¹⁷ *Food Delivery Holding 12 S.a.r.l. v. DeWitty and Associates CHTD*, 538 F. Supp. 3d 21, 31 (D.D.C. 2021).

¹⁸ *Garcia v. E.J. Amusements of N.H., Inc.*, 89 F. Supp.3d 211, 216 (D. Mass. 2015), citing *New England Compounding Pharm., Inc. Prod. Liab. Litig.*, 2013 WL 2058483, at *6 (D. Mass. Nov. 13, 2013); see also *Food Delivery Holding 12 S.a.r.l.*, 538 F. Supp. 3d at 31 (“The Court will not simply assume that creation of a privilege log would be unduly burdensome absent evidence from DeWitty on the issue.”).

¹⁹ For an example of a traditional document-by-document log, see Exemplar A.

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Substantially the same as Rule 26(b)(5), Rule 45(e)(2) governs obligations that a non-party subpoena recipient has when asserting privilege, stating:

(2) Claiming Privilege or Protection.

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

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

Although a non-party is required to satisfy its burden under Rule 45(e)(2)(A), some courts have permitted non-parties to substantiate their assertions of privilege through other, less burdensome means than a traditional privilege log.²⁰

2. Rule 26(b)(1) – Proportionality.

Historically, and prior to the 2015 amendments to the Federal Rules of Civil Procedure, courts singularly used an undue burden analysis to determine appropriate privilege logging efforts.²¹ In 2015, the Rules were amended to highlight the concept of “proportionality” with respect to the scope of discovery under Rule 26(b)(1).²² Specifically, the rule now states that “the scope of discovery” includes “any nonprivileged matter that is relevant to any party’s claim or defense and *proportional* to the needs of the case” (emphasis added).²³ The Rule further provides factors to determine proportionality:

[C]onsidering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.²⁴

²⁰ See *infra* Section III.B.

²¹ *Infra* Section III.C.

²² FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment; see also John G. Roberts, Jr., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY, 6 (Dec. 31, 2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> (“Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality. . . .”).

²³ FED. R. CIV. P. 26(b)(1) (emphasis added).

²⁴ FED. R. CIV. P. 26(b)(1).

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Following the 2015 Amendments, few courts have discussed directly the application of these factors to privilege logs. It is unclear whether this is a result of the issue not arising frequently or because such issues are often addressed without a written opinion. Either way, application of proportionality to the privilege logging process raises questions and concerns, including the relationship between Rule 26(b)(1) and Rule 26(b)(5)(A) and the parties' obligations and burdens when privilege log disputes arise. Depending on the jurisdiction and particular facts of a case, proportionality may present a tool for parties to use in assessing purported privilege log burdens. These and other issues are address below, in Section III.C.

3. Rule 26(g) – Reasonable inquiry.

Federal Rule of Civil Procedure 26(g) requires an attorney's signature that a "reasonable inquiry" has been conducted in issuing or responding to a discovery demand. Parties and attorneys have been sanctioned under 26(g) for failing to conduct this "reasonable inquiry" in accordance with the Rules.²⁵

It is unclear whether Rule 26(g) applies, or should apply, to the production of privilege logs. Are the production of privilege logs akin to discovery disclosures that require signature under Rule 26(g)? Should one attorney ultimately be responsible for the entire content of the log (including logs that include thousands of documents that could take massive team efforts to compile), or, alternatively, should an attorney's signature suggest a "reasonable inquiry" was made into the privilege log making process, if not each and every privilege assertion? Certifications have been required in some cases where a categorical logging was used, but not explicitly under Rule 26(g).²⁶

4. Other Federal Rules that may be implicated – Federal Rules of Civil Procedure 1 and 29, and Federal Rule of Evidence 502.

a. Federal Rule of Civil Procedure 1- just, speedy, efficient.

Rule 1 emphasizes the overarching Scope and Purpose of the Rules is to govern civil procedure in federal courts and states the rules "should be construed, administered, and employed by the court and the parties to secure the *just, speedy, and inexpensive* determination of every action and proceeding."²⁷

As discussed in this *Commentary*, the time, expense and effort to create privilege logs in the traditional document-by-document manner has increased dramatically with the advent of ESI

²⁵ See, e.g., *DR Distribs., LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 952-54 (N.D. Ill. 2021) (sanctioning defendants and their attorney when the party failed to properly issue litigation holds and preserve relevant information, citing, Rule 26(g) (among other reasons) as justification for sanctions against the attorney when the court found he failed to conduct a reasonable inquiry before signing disclosures).

²⁶ See *infra* Section IV.C.1.

²⁷ FED. R. CIV. P. 1 (emphasis added).

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and the exponential increase in the size of discoverable information. Further, many courts and commentators question whether the information provided by many parties in privilege logs is useful.²⁸

Courts have used Rule 1 in other discovery matters to justify decisions that they believe secure just, speedy, and inexpensive determinations.²⁹ With the burdens, expenses, challenges, and delays privilege log efforts and disputes can cause, Rule 1 should be a guidepost for the courts to address and resolve these issues.

b. Federal Rule of Civil Procedure 29 – party stipulation.

Many of this *Commentary*'s proposals are subject to party negotiation. Regardless of whether a jurisdiction has model rules or robust case law regarding what is needed for privilege logs, the parties are free to stipulate as to what they are willing to accept in connection with privilege logging, including whether to have one, the content, and format. Rule 29 states that “[u]nless a court orders otherwise, the parties may stipulate that . . . other procedures governing or limiting discovery be modified.”³⁰ This means that the parties are free to devise the privilege log approach that is best for their instant case, and the court should abide by the terms of that agreement.

c. Federal Rule of Evidence 502.

Federal Rule of Evidence 502 clarifies privilege waiver rules in federal court and sets out mechanisms whereby parties can obtain further protections against the waiver of attorney-client privileged information and information protected as work product.³¹ Waiver rules may be

²⁸ See, e.g., *Chevron Corp. v. Weinberg Grp.*, 286 F.R.D. 95, 99 (D.D.C. 2012) (“For entry after entry, one part of the description for a particular category is exactly the same. This raises the term ‘boilerplate’ to an art form, resulting in the modern privilege log being as expensive to produce as it is useless.”); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008) (“In actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or *in camera* review of the documents themselves.”). See also The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 155 (2016) (“[T]he current method used by most parties for identifying privileged documents and for creating privilege logs appears to be a broken process.”); Report of the Special Committee on Discovery and Case Management in Federal Litigation of the New York State Bar Association, June 23, 2012, at 73, <https://nysba.org/app/uploads/2020/02/Discovery-and-Case-Management-Final-Report.pdf> (“Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive case, especially one with many e-mails and e-mail strings.”).

²⁹ See, e.g., *Duffy v. Lawrence Mem'l Hosp.*, No. 2:14-CV-2256-SAC-TJJ, 2017 WL 1277808, at *3 (D. Kan. Mar. 31, 2017) (finding Rule 1 supports Defendant’s request for a protective order to randomly sample over 15,000 records, rather than manually review them, to comply with the court’s discovery order).

³⁰ FED. R. CIV. P. 29.

³¹ FED. R. EVID. 502. See also The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 103-04 (2016); The Sedona Conference, *Commentary on the Effective Use of Federal Rule*

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implicated when parties conduct privilege reviews, assert various privileges using privilege logs, and defend against any claims of waiver included, or not included on a log.

Rule 502 is comprised of several sections. Rule 502(a) governs intentional waiver. Rule 502(b) governs inadvertent waivers when no other rule is implicated.³² Rule 502(d) permits a protection against waiver that is stronger than 502(b) because, for example, parties can change the standard of care required for review (without resorting to a finding of inadvertent production) or the scope of any potential waiver.³³ Rule 502(e) permits agreement against waiver, as limited only to the parties in that agreement, unless incorporated in another court order under 502(d).

The use of a 502(d) or 502(e) Order can help reduce the burden of privilege review and privilege logging by ensuring that the producing party has the ability to claw back a privileged document without fear of waiver.³⁴ Knowing that privilege waiver is off the table, parties should consider whether this protection may enable a privilege review that is less intense and time-consuming. In at least one case, a court has even suggested that an appropriately crafted 502(d) order would obviate the need for a privilege log at all.³⁵ Parties should be familiar with Rule 502 and consider how it may be used to help address privilege logging burdens.

5. Federal District and State Local Rules, Standing Orders.

In the absence of more specific direction in the federal rules, some federal jurisdictions have adopted local rules to address privilege logs.³⁶

For example, the local rules for the United States District Court for the Southern District of New York and Eastern District of New York, “[W]hen asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information

of Evidence 502(d) Orders, THE SEDONA CONFERENCE (August 2021 Final Post-Public-Comment Version), <https://thesedonaconference.org/download-publication?fid=5890>.

³² The Sedona Conference, *Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders*.

³³ The Sedona Conference, 17 SEDONA CONF. J. at 103-04.

³⁴ *Id.* at 104 (“In sum, courts may enter orders that provide greater protection than is provided in subsections (a) and (b) of Rule 502. By reducing the risk of waiver, such an order provides parties and their counsel with a blank canvas to design and implement creative mechanisms to limit the risk of waiver for the disclosure of privileged information and reduce the tremendous cost of identifying and logging privileged documents.”).

³⁵ See *Goldstein v. FDIC*, 494 B.R. 82, 88 (D.D.C. 2013) (“If the parties are able to agree on a 502(d) order, they may submit it for my approval, and no privilege log is necessary.”); see also *HCC Ins. Holdings, Inc. v. Day*, No. 8:21VC147, 2021 WL 2290800, at *2 (D. Neb. May 25, 2021) (where the Court directed the parties to discuss whether entry of a Rule 502(d) order would eliminate or curtail the need to create a privilege log at all).

³⁶ See, e.g., Lawyers for Civil Justice, *Privilege and Burden: The Need to Amend Rules 26(b)(5)(A) and 45(e)(2) to Replace “Document-By-Document” Privilege Logs with More Effective and Proportional Alternatives*, 1, 7-10 (Aug. 4, 2020), available at <https://www.lfcj.com/modernize-privilege-log-requirements.html> (providing a survey of various local rules for privilege logs).

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required by this rule by group or category.”³⁷ As another example, the United States District Court for the District of Connecticut Rule 26(e) explicitly states that parties need not log “written or electronic communications between a party and its trial counsel after commencement of the action and the work product material created after commencement of the action.”³⁸

Some states have also enacted their own rules governing privilege logging. Recently, New York State adopted revised Uniform Rules for the New York Supreme Court and County Court that requires “meet and confer at the outset of the case” and affirmatively includes the use of categorical logs in the privilege log discussions.³⁹ These changes to the State Courts Uniform Rules were adopted and influenced from similar rules in the New York State Supreme Court’s Commercial Division.⁴⁰

Some judges are providing standing orders on the issue of what they expect by way of privilege logs, or what may be excluded from privilege logs. As one example, Judge Carr in the N.D. Ohio states, “Where the [discovery] dispute involves claims of attorney-client privilege or attorney work product, it is not necessary, unless I order otherwise, to prepare and submit a privilege log.”⁴¹

Even where not mandated, e-discovery committees in jurisdictions may provide model orders to encourage the use of alternative logging procedures. For example, the United States Court of Appeals for the Seventh Circuit’s Electronic Discovery Committee has a model privilege log order that encourages metadata-only logging, with the option for categorical logging for certain categories a party deems burdensome to provide on a metadata-only log.⁴² The United States District Court for the Southern District of New York’s Pilot Program for Complex Civil Cases made an explicit recognition that communications with party counsel and work product created after the commencement of an action did not need to be logged.⁴³

³⁷ S.D.N.Y. Civ. R. 26.2(c). *See generally*, Assured Guar. Mun. Corp. v. UBS Real Estate Secs. Inc., No. 12 CIV. 1579 (HB) (JCF), No. 12 CIV. 7322 (HB) (JCF), 2013 WL 1195545, at *9 (S.D.N.Y. Mar. 25, 2013).

³⁸ D. CONN. R. 26(e).

³⁹ N.Y. Comp. Codes R. & Regs. Tit. 22 § 202.20-a.

⁴⁰ David Ferstendig, *Significant Amendments to Uniform rules*, NYSBA (Feb. 8, 2021), available at <https://nysba.org/significant-amendments-to-uniform-rules/>; David Ferstendig, *Amendments to Uniform Rules*, NYSBA (Mar. 23, 2021), available at <https://nysba.org/amendments-to-uniform-rules/>.

⁴¹ Judge Carr Civil Cases - Case Management Preferences, <https://www.ohnd.uscourts.gov/judge-carr-civil-cases-case-management-preferences> (last accessed Sep. 7, 2021).

⁴² Seventh Circuit Council on eDiscovery and Digital Information, *Model Discovery Plan and Privilege Order*, eDiscovery Council.com (available at <https://www.ediscoverycouncil.com/content/model-discovery-plan-and-privilege-order>).

⁴³ Judicial Improvements Committee. Report of the Judicial Improvements Committee: Pilot Project Regarding Case Management Techniques for Complex Civil Cases, at 6 (October 2011), https://www.nysd.uscourts.gov/sites/default/files/pdf/Complex_Civil_Rules_Pilot_14.11.14.pdf.

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C. Previous Sedona Publications.

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

- The Sedona Conference, *The Sedona Conference Cooperation Proclamation* (2008) (discussing how cooperation is consistent with zealous advocacy and Rule 1, this proclamation encourages parties to work together to resolve discovery issues and its principles are equally applicable to privilege logs).
- The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF J. 95, 154-67, 172, 188-89 (2016) (discussing the history of privilege logging and logging practices, while addressing privileges and protection issues, including recommending processes, tools and technologies to reduce the cost and burden of logging). The recommendations included: (1) cooperation among parties to reduce burdens and costs; (2) exclusion of certain custodians from the logging process; (3) exclusion of documents generated after the date the litigation commenced; (4) foregoing logging of documents with privilege redactions; (5) agreeing to a hierarchical privilege or staged review of privileged ESI; (6) agreeing to a quick peek procedure; and (7) technology-assisted review.
- The Sedona Principles, Third Edition: *Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF J. 1, 45, 67, 80-83, 156, 158-60, 168 (2018) (discussing updates to Sedona Principles, including recommendations when considering logging procedures, as well as recommending parties discuss privilege logging issues early and consider alternative logging approaches when necessary). Comment 2.b. states that proportionality “should be considered and applied by the courts and parties to all aspects of the discovery and production of ESI including . . . preparation of privilege logs”
- The Sedona Conference, *Commentary on Rule 45 Subpoenas to Non-Parties*, Second Edition, 22 SEDONA CONF J. 1, 60, 82 (2021) (providing an overview of Rule 45 subpoenas to non-parties, the Commentary also discusses the requirement to provide a privilege log to comply, and notes that logging can be a factor in the burden to non-parties and in shifting expenses).
- The Sedona Conference, *Commentary on the Effective Use of Federal Rules of Evidence 502(d)*, SEDONA CONF J. (August 2021 Final Post-Public-Comment Version), <https://thesedonaconference.org/download-publication?fid=5890>.⁴⁴

⁴⁴ Although not a Sedona publication, the Facciola-Redgrave framework has long been cited by Sedona as one publication that proposed alternative paths for logging and strongly encouraged cooperation and judicial involvement. Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in*

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D. Changes to Federal Rules Proposed by Other Groups.

Various groups and organizations have spent considerable time evaluating potential solutions for the modern day predicaments caused by the burden of preparing or assessing privilege logs with the explosion of electronic discovery and variation in jurisdictional expectations.⁴⁵ In August 2020 and August 2021, the Lawyers for Civil Justice identified the patchwork of efforts advanced by different courts across the country to embrace flexibility in the privilege logging process and submitted suggestions for rule changes to the Advisory Committee on Civil Rules.⁴⁶

The Judicial Conference Advisory Committee for Civil Rules has discussed and received comment regarding whether a federal rule change will have a positive effect on the practice of preparing and receiving privilege logs.⁴⁷ The Federal Practice Task Force of the ABA Section of Litigation was also involved in collecting comments from practitioners on the use of privilege logs in federal court litigation, to advise the Advisory Committee as it evaluates potential rule changes. The Advisory Committee issued a report after its October 5, 2021 meeting (hereinafter,

Modern Litigation: The Facciola-Redgrave Framework, 2009 Fed. Ct. L. Rev. 19 (2010). The publication encourages parties to use categorical indices of privileged documents, leveraging principles of proportionality and making determinations through incremental cooperation between the parties. *See id.* for full discussion of application of the framework, including the potential for parties to request affidavits to support the evidentiary context for each withheld category of documents.

⁴⁵ The Electronic Discovery Reference Model (EDRM) has prepared a draft Streamlined Privilege Log Protocol, promoting it as an alternative to traditional privilege logging. <https://edrm.net/wiki/edrm-streamlined-privilege-log-protocol/>. The University of Colorado's Institute for the Advancement of the American Legal System launched a project to establish set discovery protocols to address a wave of anticipated insurance cases as a result of the COVID-19 pandemic, including a proposal for less burdensome logging requirements, including categorical logs. *See* Brittany K. T. Kauffman & Brooke H. Meyer, *New Pandemic Discovery Protocols for Business Interruption Insurance Litigation*, 50 COLO. LAWYER 51, 54-55 (2021), available at <https://cl.cobar.org/features/new-pandemic-discovery-protocols-for-business-interruption-insurance-litigation/>.

⁴⁶ Lawyers for Civil Justice, *Suggestion for Rulemaking to the Advisory Committee on Civil Rules*, 1, 7-10 (August 4, 2020), https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_rule_suggestion_-_privilege_logs.pdf; Lawyers for Civil Justice, *Comment to the Discovery Subcommittee of the Advisory Committee on Civil Rules: An Updated Proposal for Improving Privilege Log Process* (August 1, 2021), https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_response_to_invitation_to_comment_on_privilege_log_practice.pdf

⁴⁷ Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Report of the Advisory Committee on Civil Rules*, 1, 16-19 (Dec. 14, 2021), <https://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-civil-rules-december-2021>. *See also* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Invitation for Comment on Privilege Log Practice*, https://www.uscourts.gov/sites/default/files/invitation_for_comment_on_privilege_log_practice_0.pdf; *Comments on Privilege Logging Practice*, https://www.uscourts.gov/sites/default/files/comments_on_privilege_log_practice.pdf. Of note, the vast majority of these comments were submitted by plaintiff's counsel opposing changes to Rule 26(b)(5).

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“Advisory Committee Report”), which identified the different views regarding privilege logging practices.⁴⁸

Specifically, the Advisory Committee Report noted the “recurrent and stark divide” between Plaintiff and Defense bars regarding the issue.⁴⁹ The Discovery Subcommittee identified the differing views on document-by-document logging and categorical logging, discussing several possible rule changes and noting that they were the subject of ongoing study. The following proposals were discussed: (a) revising Rule 16(b) and Rule 26(f) to identify that issues regarding logging and complying with Rule 26(b)(5)(A) should be addressed in the 26(f) conference and 16(b) scheduling order (this could include agreement or an order permitting categorical logging); and (b) potential direct changes to Rule 26(b)(5)(A), including various alternatives that allow, for example, categorical logging.⁵⁰

The drafters of this *Commentary* did not reach consensus regarding the appropriate privilege log or method to comply with Rule 26(b)(5)(A) for every case, which is understandable because each case is unique, and there is no one-size-fits-all approach. However, the drafters did reach consensus that revisions to Rule 16(b) and 26(f) as proposed by the Advisory Committee Report would be welcome changes. Such revisions would require the parties to address their views on how to comply with Rule 26(b)(5)(A), encouraging early discussion among parties and promote negotiation and agreement where possible, or early court invention where agreement is not possible. These changes are consistent with Sedona principles.

II. BURDENS AND CHALLENGES WITH PRIVILEGE LOGS

This section of the *Commentary* identifies and discusses specific burdens often implicated by the process of preparing a privilege log. Section III provides various mitigation factors to consider to address these burdens.

A. Requirements of Rule 26(b)(5)(A) and Concerns of Waiver.

As discussed above, Rule 26(b)(5)(A) does not define what is required to “expressly make the claim” or how specific and detailed of a description is needed to “enable other parties to assess the claim.” One of the possible repercussions for not satisfying the requirements, however, is waiver. Thus, parties may be reluctant to diverge from a traditional document-by-document log out of concern that, if a court finds the associated description insufficient, the privilege will be lost for all materials withheld in a certain grouping.⁵¹ A more common result,

⁴⁸ Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, at 16-19.

⁴⁹ *Id.* at 17.

⁵⁰ *Id.* at 19 n.16. The Report noted concerns raised regarding “overbroad categories” when implementing a categorical log.

⁵¹ See, e.g., *Meade v. Gen. Motors, LLC*, 250 F. Supp. 3d 1387, 1396 (N.D. Ga. 2017) (finding claims of privilege waived where multiple iterations of the privilege log were found inadequate); *Neelon v. Krueger*, No. 12-CV-11198-IT, 2015 WL 1037992, at *4 (D. Mass. Mar. 10, 2015) (affirming magistrate judge's ruling that categorical

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however, is that a court will require the responding party to provide more detailed information for that grouping akin to a document-by-document log.⁵²

When waiver is found, it generally is imposed as a sanction for bad faith, abusive, or recalcitrant behavior with respect to production of an insufficient log.⁵³

The requirements of Rule 26(b)(5)(A), and a healthy fear of inadvertently waiving privilege protection if those requirements are not satisfied, have led parties to come up with various approaches, including a traditional document-by-document privilege log, which generally includes for each document: (1) a privilege log ID number; (2) Bates number; (2) date; (3) author/sender; (4) recipients; (5) privilege and/or doctrine being claimed as the basis to withhold the document; (6) whether it is being withheld in its entirety or redacted; and (7)

privilege log provided inadequate detail and waived privileges and protections as to specific group of documents); In re Rivastigmine Patent Litig., 237 F.R.D. 69, 87 (S.D.N.Y. 2006) (finding the vast majority of the categorical justifications provided by the plaintiffs were inadequate, and all corresponding documents must be produced in their entirety); McNamee v. Clemens, No. 09 CV 1647(SJ), 2013 WL 6572899, at *3 (E.D.N.Y. Sept. 18, 2013) (finding the “exceedingly unhelpful” document descriptions resulted in an inadequate privilege log and holding the producing party had waived his claims of privilege by failing to timely produce an adequate log).

⁵² See, e.g., Johnson v. Ford Motor Co., 309 F.R.D. 226, 234–35 (S.D.W. Va. 2015) (“When a party provides an inadequate or untimely privilege log, the Court may choose between four remedies: (1) give the party another chance to submit a more detailed log; (2) deem the inadequate log a waiver of the privilege; (3) inspect in camera all of the withheld documents; and (4) inspect in camera a sample of the withheld documents.” (quoting Nationwide Mut. Fire Ins. Co. v. Kelt, Inc., No. 6:14-cv-749-Orl-41TBS, 2015 WL 1470971, at *9 (M.D. Fla. Mar. 31, 2015))); Coventry Cap. US LLC v. EEA Life Settlements Inc., Civ. A. No. 17 Civ. 7417 (VM) (SLC), 2020 WL 7383940, at *8 (S.D.N.Y. Dec. 16, 2020) (ordering responding party to provide names of attorneys involved in any of the categorical logged communications), *objections overruled*, 2021 WL 961750 (S.D.N.Y. Mar. 15, 2021); EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., Case No. 3:12-cv-00463, 2018 WL 3628890, at *1 (M.D. Tenn. Mar. 29, 2018) (finding categorical log insufficient because of party’s failure to provide metadata for each document included within a category and ordering party to amend it).

⁵³ See, e.g., Evergreen Trading, LLC v. United States, 80 Fed. Cl. 122, 126 n.2 (2007) (“While an inadequate privilege log may be the basis for disallowing a privilege, such a finding is in the nature of a sanction and, at least in the first instance, should be weighed in terms of the intent of the party producing the defective log and against the harm caused by disclosure of what might otherwise be privileged documents.” (citations omitted)); Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Mont., 408 F.3d 1142, 1149 (9th Cir. 2005) (rejecting a per se waiver rule, but finding waiver when a sophisticated litigant produced a log five months after the expiration of the Rule 34 time limit); Muro v. Target Corp., 250 F.R.D. 350, 360 (N.D. Ill. 2007) (“[B]lanket waiver is not a favored remedy for technical inadequacies in a privilege log.” (citing Am. Nat’l Bank & Trust Co. of Chi. v. Equitable Life Assurance Soc’y of U.S., 406 F.3d 867, 879 (7th Cir. 2005) (holding that Magistrate Judge abused his discretion by finding that defects in privilege log merited a sanction of blanket waiver, absent a finding of bad faith))); E.B. v. N.Y. City Bd. of Educ., No. CV 2002-5118 (CPS)(MDG), 2007 WL 2874862 (E.D.N.Y. Sept. 27, 2007) (holding waiver not an appropriate sanction after delay in producing privilege log).

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description.⁵⁴ Elements 1-4 can be generated fairly easily assuming metadata⁵⁵ exists for the document by exporting relevant fields into a spreadsheet. Elements 5-7 require analysis for each document and, depending on the complexity of the document, can take time to address carefully and then describe with a defensible custom description. These are elements that raise challenges beyond the identification of the privilege and can increase the burden associated with traditional logging. This *Commentary* provides methods for mitigating those challenges.

1. The descriptive narrative.

Perhaps the most time consuming part of preparing a document-by-document privilege log is the creation of the descriptive sentence, or “the Narrative.” Rule 26(b)(5)(A) requires that the withholding party describe the nature of the material withheld in a manner that will enable other parties to assess the merit of the claimed privilege or protection. For documents withheld for attorney-client communication privilege, this has typically been presented as a narrative sentence describing the type of document, identities of the communicants, the fact of legal advice sought or rendered, the confidential nature of the communication, and the general subject matter of the legal advice. For example, a log line may read “Email communication from client to attorney requesting legal advice regarding investigation into alleged harassment complaint,” or “Email chain between clients and attorney requesting and providing legal advice regarding amendment to company terms of service policy.” For logs without independent fields identifying the specific names of communicants, those narrative sentences may require including the specific names of the clients or attorneys (or third party agents) involved in the communications.

⁵⁴ “[T]he customary contents of a privilege log’ include ‘a description of the type of document[,] . . . its topic, date, the writer and recipient, and an explanation as to why the matter is deemed to be privileged (which privilege was being invoked and on what grounds).” 3d Eye Surveillance, LLC v. United States, 155 Fed.Cl. 355, 361 (Fed. Cl. Aug. 27, 2021) (alterations in original) (quoting *Yankee Atomic Elec. Co. v. United States*, 54 Fed. C. 306, 309 (2002)); see *Trudeau v. N.Y. State Consumer Prot. Bd.*, 237 F.R.D. 325, 335 (N.D.N.Y. 2006) (requiring log to contain: “(1) the identity of each person listed as author and their role in preparing the documents; (2) the identity of each recipient, the role in which they received the documents and whether they are a party or non-party; (3) a more elaborate description of the specific document, or specific portion of the document, which is claimed to be protected by any privilege, without revealing the substance of the privileged communication; (4) identify any bates stamp number or any other identifiable notation; and, (5) identify the type of privilege being asserted (i.e., attorney-client privilege, work product, deliberative process, executive privilege).”).

⁵⁵ Metadata is ancillary information about an electronic document that describes “the characteristics, origins, usage, structure, alteration, and validity of other electronically stored information.” United States District Court for the District of Maryland, *Principles for the Discovery of Electronically Stored Information in Civil Cases*, <https://www.mdd.uscourts.gov/sites/mdd/files/ESI-Principles.pdf>. Most commercially available document review platforms permit users to export a variety of metadata fields about an electronically stored document, including fields that are useful in privilege logging. For example, for email communications, relevant metadata may include Sender, Recipients, Date Sent, and Subject Line. Metadata fields may be available to indicate whether a document is a parent or an attachment, or that index and identify email messages within the same email discussion thread. For word processing documents, spreadsheets, and presentations, relevant metadata may include the file owner or author, the filename, and the dates created and last modified. Metadata can also include information applied by attorneys, such as Bates numbers or other identifiers, redaction flags, or work product tagging that can be used to record the privilege assertion or parts of the privilege log narrative description.

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For documents withheld for work product protection, the narrative sentence will describe the type of document, the identities of the preparer and recipient(s) of the document, and the nexus to anticipated or pending litigation. For example, “Summary chart prepared by outside counsel and shared with clients providing attorney mental impressions and revealing strategy pertaining to pending litigation with Opponent Company.”

The creation of each such narrative sentence is tedious. It requires thought, and thus time, to create a sentence that accurately describes:

- The document type—is it an email chain, memorandum, summary, or report?
- The affiliation of each communication participant—is he/she an attorney, client, or representative?
- The directional flow of the communication—is it seeking legal advice, providing legal advice, memorializing a conversation with counsel, or providing information to enable the rendering of legal advice?
- The subject matter of the communication—how descriptive can you make the topic referenced without disclosing the actual advice sought/provided?

Several of these descriptive elements can be prepopulated as single or multi-choice fields in a review platform, which can be exported and concatenated into a string sentence in an Excel workbook. However, such effort requires additional time to think about and select each element that best ties to the logged document. Absent unique circumstances, the additional effort required to string together a descriptive sentence to provide information beyond what is identifiable from the document’s metadata is not worth the time and cost.

Unlike a binary field choice in document review (Responsive or Not Responsive), or a tertiary choice (Not Privileged, Redact for Privilege, Withhold for Privilege), privilege log coding typically requires separate fields for each of the descriptive elements listed above. Each field then requires multiple menu choices in order to accommodate the variety of privileged communications that may be responsive in a complex discovery matter. Responding parties may wish to provide reviewers limited menu choices for each field to reduce decision making time and inconsistent coding across a large team of reviewers. However, limiting choices for each field may result in a lengthy log with many documents that have similar entries, which in turn may prompt a challenge that the log is not sufficiently detailed.

Although no comprehensive studies have been done on the amount of time required to create the narrative descriptions for privilege logs, it is axiomatic that making six or more field selections or “clicks” for a privileged document will take longer than making only two (*e.g.*, Responsive and Withhold for Privilege). Further, lengthy lists of menu choices under each field to string together a descriptive sentence makes privilege log coding similar in complexity to issue coding, and providing multiple ways for reasonable minds to differ about a choice when compared to a binary choice. Additional layers of complexity also increase the efforts required to

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quality control those varying decision points for consistency. The burden of privilege log coding increases as the number of privileged documents in the otherwise producible population in a matter increases.

Some advocates are successful in streamlining reviews and reducing costs by asking document reviewers to code for responsiveness, privilege, privilege log fields, and even issue coding at the same time, reasoning that one set of eyes on the document is more efficient than multiple reviews of a document for different purposes. Those reviewers are being asked to switch between multiple cognitive tasks in the space of a few minutes, which may lead to higher error rates.⁵⁶ Errors in privilege coding can then lead to log challenges—for example, a reviewer may inadvertently omit the name of an attorney in the description, giving rise to a challenge that no attorney participated in the communication. Accordingly, a single pass review that covers multiple objectives may require more extensive quality control or second-pass review to reduce error. Setting up a privilege review for a matter with a large volume of documents involves multiple considerations for which there is no straightforward “best” answer.

Further, as to a large percentage of log entries, the additional words contained in the descriptive sentence rarely provide significantly more insight than the metadata of the document itself would provide. Often, the metadata maintained in the to/from/cc, document type, and email subject/filename fields will provide information synonymous with much of what is contained in the final narrative description. Additionally, these metadata fields, on their own, often provide enough information about the nature of the privileged document to allow the receiving party to assess quickly the claim of privilege. From that point, challenges to the log are often focused on entries without reference to an attorney, inclusion of a non-control group communicant, or where the topic matter appears to be business-focused, rather than legal in nature.

Anecdotal, and in the experience of the drafters of this *Commentary*, an experienced (and thus more expensive) reviewer can create traditional privilege log descriptive entries at a pace of about 20-25 documents per hour. Further, this is usually done after the first level review has already occurred and, because privilege determinations can prove to be thorny, is usually conducted by the more expensive, seasoned attorney. Given the limited additional benefit these narrative descriptions provide for a great majority of documents typically on a privilege log, the additional time required to create a descriptive sentence, beyond the decision to withhold and deciding which privilege applies, is an inefficient expenditure of time and money.

Furthermore, this descriptive narrative can be understood to be a combination of multiple points of information—the involved communicants, the privilege claim, and the subject matter—

⁵⁶ See Robert Keeling, *Document Review: You’re Doing it Wrong Cognitive Psychology and the Attorney’s Mental Plate*, 42 U. ARK. LITTLE ROCK L. REV. 257, 270, 277 (2020) (observing that “an individual can handle only so much information on his or her mental plate, and that these limitations have very real implications for document review” and finding a correlation between a higher number of issue tags document reviewers were required to choose from and a higher overturn rate.); see also American Psychological Association, *Multitasking: Switching Costs*, March 20, 2006, <https://www.apa.org/research/action/multitask> (summarizing research on the impact to productivity when humans switch between complex tasks).

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that, independently, serve just as well to “enable other parties to assess the claim” of privilege. Each of these data points can be independently provided on a log leveraging metadata, which should be sufficient to establish the privilege basis for many withheld documents. However, even these data points bring their own sets of potential challenges.

2. Identifying privileged parties.

For corporate or institutional parties, there may be questions as to who is included within the definition of the “party” within the ambit of privilege and who is a third party.⁵⁷ This is one issue where providing metadata fields of to/from/cc can prove more helpful than traditional logging, because the metadata fields, while not clean to behold, may contain email domain information, providing the reader the necessary affiliation reference. Additionally, there may be a request to provide positions for individuals listed on the log. Although it may be relatively straightforward for a corporate party to generate a list of names and job titles of the individuals listed on the log, this task becomes far more complex if the documents on the log span a great range of time. It requires consulting multiple company HR databases or sources to determine what Ms. X’s title was in June of 2003, etc. The wiser course of action is to negotiate providing this information for specific individuals upon request, or to list only the current titles for individuals.

Parties typically identify attorneys and other privileged parties on the log, either by designating attorneys with an asterisk or “Esq.,” or by providing a privileged parties list.⁵⁸ In-house attorneys representing corporations or institutions may wear multiple hats. Asserting privilege based on an in-house attorney may give rise to a question of whether they are providing business or legal advice in the communication, and parties should be prepared to engage in the provision of additional substantiation for certain documents where the in-house attorney is the only legal personnel identified.

There may also be communications on the log for which no attorney is listed, and so additional facts about that communication may have to be gathered in order to determine the privilege status and to provide sufficient information on the log. For example, an email communication between non-attorneys may reference a conversation with unnamed legal counsel, memorializing the advice given by that attorney. While a document reviewer would be reasonable to withhold that communication under a claim of privilege, additional investigation may be necessary to identify the undisclosed attorney, if possible, to substantiate that claim to opposing counsel. Although courts recognize that a document may be privileged even if an attorney is not a direct sender or recipient of a piece of correspondence, without some other indicia on the log indicating these documents were prepared for the purpose of obtaining legal

⁵⁷ Litigants who are companies with in-house counsel may face an additional challenge of determining whether the communication between an employee and in-house counsel is one about the litigation or solely for a business purpose.

⁵⁸ *In re Haynes*, 577 B.R. 711, 737 (Bankr. E.D. Tenn. 2017).

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advice or in anticipation of litigation, there is a question as to why they should be considered privileged, which can lead to unnecessary disputes.⁵⁹

3. Basis of privilege.

Responding parties typically identify the type of privilege(s) under which a document or category of documents is being withheld, *i.e.*, attorney-client, work product, or other privileges/doctrines. However, merely identifying the nature of the claimed privilege(s) does not fulfill the requirement in every instance to provide information needed to assess the claimed privilege.⁶⁰ For example, it may be necessary to add information to log entries to substantiate claims of work product protection or the common interest doctrine.⁶¹

4. Subject matter.

Responding parties often include some information about the subject matter of the documents as to which privilege is claimed within the narrative sentence. The extent to which courts require subject matter descriptions and the level of specificity required varies, although the touchstone appears to be whether the details provided are useful to assess the claim of privilege.⁶² For example, the Second Circuit and Third Circuit have held “cursory” descriptions,

⁵⁹ See, *e.g.*, *United States v. Davita, Inc.*, 301 F.R.D. 676, 682 (N.D. Ga. 2014) (“Thus, the lack of attorneys on either side of an otherwise confidential corporate communication is not fatal to a claim of privilege. The Court, rather, must examine the claims of privilege individually to ascertain whether the documents are entitled to attorney-client protection.”); *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28, 43 (E.D.N.Y. 2013); *Norton v. Town of Islip*, CV 04-3079 (PKC) (SIL), 2017 WL 943927 (E.D.N.Y. Mar. 9, 2017). Other privileges do not necessitate attorneys – deliberative process, executive privilege, legislative privilege, etc. The absence of an attorney from the log entry provided for such entries does not give rise to a justified privilege challenge.

⁶⁰ *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 664 (S.D. Ind. 1991) (requiring that the log list, for each separate document, the authors and their capacities, the recipients and their capacities, the subject matter of the document, the purpose for its production, and a detailed, specific explanation of why the document is privileged or immune from discovery); *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 641-642 (S.D. N.Y. 1991) (finding an index including date, addressor, addressee, document type, and grounds for nondisclosure insufficient).

⁶¹ See, *e.g.*, *Pritchard v. Dow Agro Scis.*, 263 F.R.D. 277, 293 (W.D. Pa. 2009) (requiring that log specify whether the claim is one for factual versus opinion work product); *Companion Prop. & Casualty Ins. Co.*, Civ. A. No. 3:15-cv-01300-JMC, 2016 WL 6539344, *3 (D.S.C. Nov. 3, 2016) (ordering party to provide additional information regarding specific anticipated litigation(s) for the documents withheld on the basis of work product protection for categorical log); *3d Eye Surveillance, LLC v. United States*, 155 Fed. Cl. 355, 362-363 (Fed. Cl. Aug. 27, 2021) (requiring description of the common interests shared among participants to communications claimed to fall within common interest privilege).

⁶² See, *e.g.*, *Johnson v. Ford Motor Co.*, 309 F.R.D. 226, 233 (S.D. W.Va. 2016) (noting that “courts have not been entirely consistent about the level of detail that is necessary to comply with Rule 26(b)(5)(A)”; *Spilker v. Medtronic, Inc.*, No. 4:13-CV-76-H, 2015 WL 1643258, at *6 (E.D.N.C. Apr. 13, 2015) (““When a party relies on a privilege log to assert these privileges [i.e., attorney-client privilege and work product protection], the log must as to each document ... set [] forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed.”” (quoting *Rohlik v. I-Flow Corp.*, No. 7:10-CV-173-FL, 2012 WL 1596732, at *4

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such as “Fax Re: DOL Findings,” “Fax: Whistleblower article,” “daily log entries,” or “notes/correspondence,” are insufficient.⁶³ By contrast, logs that specifically state that the document includes communications of legal advice on an issue have passed muster.⁶⁴ And, for purposes of a claim based on the common interest doctrine, it may be sufficient to identify the parties to the communication on the theory that the fact that the documents are discoverable material is enough to show that the subject matter is relevant to the parties’ claims and defenses to support application of the common interest doctrine.⁶⁵

As responding parties have moved towards automating drafts of privilege logs from document review databases, some have included metadata filenames, email subject, document titles, and file paths in the logs. This information can be useful, and in some cases provides more than enough information to illustrate the “general subject matter” sought by the 1993 Advisory Committee Notes. Other times, however, generic subject lines or titles will not be sufficient to substitute for information needed to assess the basis for the claim of privilege, particularly where the filenames are vague, cryptic, or technical and cannot be explained even by the author/witness.⁶⁶

Additionally, individual documents, such as those in some long email strings, may implicate multiple protections in different portions of the document, but the only metadata that can be automatically extracted by a typical document review platform is for the top (latest) email in the string. Because this metadata only pertains to the top email, it may not provide sufficient information to support the privilege claims for emails elsewhere in the string. In these instances, if challenged, the responding party can, for example, draft custom descriptions to account for the

(E.D.N.C. May 7, 2012)); *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust*, 230 F.R.D. 398, 406 n. 14 (D. Md. 2005); *Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 662 (D. Colo. 2000).

⁶³ See *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473-74 (2d Cir. 1996); *R.J. Reynolds Tobacco v. Philip Morris, Inc.*, 29 F. App’x 880, 882 (3d Cir. 2002); see also *In re Gen. Instrument Corp. Sec. Litig.*, 190 F.R.D. 527, 530 (N.D. Ill. 2000) (finding descriptions such as “Explanation re: Primestar Relationship,” “NLC Employee Stock Options,” and “Filing with SEC,” were not “even marginally specific” to allow assessment of claims of privilege); *Norton v. Town of Islip*, CV 04-3079 (PKC) (SIL), 2017 WL 943927, *4 (E.D.N.Y. Mar. 9, 2017) (finding descriptions insufficient where they were largely limited to unadorned phrases such as “Norton Litigation,” “Law Enforcement,” and “Litigation”).

⁶⁴ See, e.g., *Spilker v. Medtronic, Inc.*, No. 4:13-CV-76-H, 2015 WL 1643258, at *6 (E.D.N.C. Apr. 13, 2015) (finding log sufficient where it provided descriptions such as “Memo made at direction of counsel and sent to counsel for purpose of seeing legal advice regarding medical procedure”, “Email requesting advice of counsel regarding FDA request,” and “Email requesting advice of counsel regarding FDA request”); *Vaughan v. Celanese Americas Corp.*, No. 3:06CV104-W, 2006 WL 3592538, at *3 (W.D.N.C. Dec. 11, 2006).

⁶⁵ See, e.g., *Elat v. Ngoubene*, Civ. Case No. PG-11-2931, 2013 WL 4478190 (D. Md. Aug. 16, 2013) (“It is immaterial that Defendants did not state the documents’ general subject matter because, as discoverable material in this case is necessarily ‘relevant to a[] party’s claim or defense,’ these communications also must be ‘relevant to a[] party’s claim or defense,’ i.e., communications that would be covered by the common interest rule, if it applies.” (alterations in original)).

⁶⁶ *Johnson v. Ford Motor Co.*, 309 F.R.D. 226, 233-34 (S.D. W.Va. 2016) (finding log insufficient when it included “enigmatic file names” that the author of the document could not understand, such as “DI_UA.xls,” “Appendix 1 Ford.pdf,” “Appendix 14 Toyota.pdf,” and “Charts.xls”).

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separate privileges and subject matters within a document.⁶⁷ The parties can also meet and confer so that the responding party can provide additional information about particular documents implicating multiple and distinct privileges.

In these scenarios, the custom descriptions may become extensive, which further underscores the importance of consulting with adversaries about privilege log format. Thus, when using a traditional document-by-document log approach, it can take several minutes to determine whether some or all of a single document is protected, to analyze whether that protection is based on privilege, work product, or something else, and then to draft a custom description adequately stating all of the information needed to support the elements of each privilege/doctrine claimed. For privilege populations involving thousands of documents, the time can add up quickly.

B. Exponential Volume.

Since 1993, there has been a dramatic rise in the volume of email and other electronic forms of communications. The sheer volume of data at issue can make privilege logging expensive and time-consuming for the responding party, particularly when custom descriptions are required.⁶⁸ While privilege logs of a few hundred documents may be prepared within a week's time, cases involving tens (or hundreds) of thousands of documents identified under a claim of privilege can take months to prepare.

The opinion in *Hopson v. Mayor & City Council of Baltimore* aptly describes this challenge with the increased volume of electronic information subject to privilege claims and implores the need for flexible solutions to combat the problem:

[W]hat is painfully apparent in a world where almost all writings are generated and stored electronically, and far more widely disseminated than in the days of “paper documents”—technological advances have made it increasingly difficult to protect against all involuntary disclosures. If, indeed, the common law of privilege is not frozen in antiquity, but rather is flexible and adaptable to changing circumstances, then it must be elastic enough to permit reasonable measures to facilitate production of voluminous electronically stored information during discovery without imposing on the parties unreasonable burdens on their human and fiscal resources. The unavoidable truth is that it is no longer remarkable that electronic document discovery may encompass hundreds of thousands, if not millions, of electronic records that are potentially discoverable under Rule 26(b)(1). In this environment, to insist in every case upon “old world” record-by-

⁶⁷ As referenced elsewhere, additional communicants involved in the lower string should also be disclosed in some manner.

⁶⁸ SOUTHERN DISTRICT OF NEW YORK COMMITTEE NOTE TO LOCAL CIVIL RULE 26.2. (“[W]ith the advent of electronic discovery and the proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative to opposing counsel and the Court.”).

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record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation, and mark a dramatic retreat from the commendable efforts since the adoption of Rule 26(b)(2) to tailor the methods and costs of discovery to fit the case at hand. And, of equal importance, a failure to adapt to current “real world” discovery realities will unacceptably lengthen pretrial discovery, because courts cannot insist upon such painstaking and costly review unless they are willing to allow enough time to do so reasonably. It is unlikely that courts are going to embrace the notion of years-long timetables to allow parties to assemble and review voluminous electronic information prior to production during discovery.⁶⁹

A reviewer can only analyze a finite number of documents with an acceptable level of accuracy in a single day. The process of reviewing documents for privilege is time-consuming. Once the number of documents that need to undergo privilege review is identified, estimates can be made about the length of time it will take to complete the review and logging task based on an assumed document per hour review rate, and therefore the anticipated cost of paying those reviewers for their time.⁷⁰ The more complicated the review coding layout to effect the privilege log entry, the more time consuming the process for the reviewers. Sedona has acknowledged previously that preparation of a privilege log in a complex matter can cost hundreds of thousands of dollars, or more.⁷¹

Exponentially increasing volumes of ESI have led many litigants to look for solutions to streamline responsiveness review.⁷² Responsiveness review burdens have been addressed, and alleviated somewhat, in recent years through Technology Assisted Review (“TAR”) and other artificial intelligence (“AI”) tools. TAR uses algorithms to identify potentially responsive documents, reducing the volume of documents needing document-by-document human review. However, the application of TAR and other AI technologies to privilege review has proved to be a more vexing problem. This is in part because the privilege analysis is often more complex than

⁶⁹ *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 243–44 (D. Md. 2005).

⁷⁰ “[A]ttorneys then must review the documents to [among other reasons] determine the documents that will be produced and those that will be withheld on privilege or work product grounds. The review process itself is time-consuming. The average rate of review is about 40-60 documents per hour, though the rate of review can vary considerably based on the complexity of the documents and the experience of the reviewers. Assuming a case involves review of 100,000 documents, it would take 2000 hours for an attorney to review these documents for production if reviewing them at a rate of 50 documents per hour. . . . And, depending on the hourly rates for the review team, the review process in [this] hypothetical case . . . involving 100,000 documents could cost \$500,000 or more.” *Brown v. Barnes & Noble, Inc.*, 474 F. Supp. 3d 637, 645 (S.D.N.Y. 2019) (footnotes omitted) (citing *Blackrock Allocation Target Shares: Series S Portfolio v. Bank of New York Mellon*, 2018 WL 2215510 (S.D.N.Y. May 15, 2018) (recognizing special challenges of ESI discovery, including voluminous data)).

⁷¹ The Sedona Conference, *Commentary on the Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 103 (2016),

⁷² *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 191-92 (S.D.N.Y. Feb. 24, 2012) (analyzing the limitations of keyword searches to identify responsive documents, and approving computer-assisted review).

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a simple responsiveness binary choice.⁷³ Further, although Sedona has previously suggested the use of TAR to generate “generate categorical logs which include more detail regarding what and why documents are withheld,”⁷⁴ the authors are not aware of any available commercial tools that generate narrative privilege log descriptions using TAR or AI.

The expanding volume of ESI also led Congress to amend Federal Rule of Civil Procedure 26(f) in 2006 to instruct the parties to address clawback agreements in the Rule 26(f) conference. As Congress explained: “The volume of such [ESI], and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming.”⁷⁵ The same concerns that prompted Congress to require parties to consider clawback agreements bear on the obligation to log increasing volumes of electronically stored privileged communications. In the absence of a Federal Rules of Civil Procedure amendment to address concerns about privilege logging in a world of ever-increasing volumes of ESI, parties and courts need to be willing to consider alternatives to document-by-document logs for high-volume ESI cases.

C. Timing Pressures.

Because preparing a privilege log can be time consuming and expensive, some responding parties may prefer to delay the effort in the hope that the matter will be resolved. This is a risky strategy because, if the case does not settle, the responding party will be under pressure to create the log in a compressed time frame or, worse, may be facing a waiver claim. Other parties may choose to turn to privilege logging after the substantive review and production process has been completed or is winding down. This approach can raise problems, particularly if not agreed to in advance by the parties or the court because unreasonable delay in the production of an adequate privilege log may prompt the court to consider a waiver as a result.⁷⁶ And, if there are contentious privilege issues, putting off the logging process risks having the “tail wag the dog,” as well as delaying depositions that may facilitate resolution of the matter itself. Responding parties also should consider whether creating a privilege log after review and production of documents will be less efficient or potentially problematic, because of the need to go back to look at context for documents withheld for privilege or less than full information

⁷³ See, e.g., Ellen Murphy, et al., *Lessons From ‘Michael Cohen v. United States’: Criminal Defendants Should Not Be at the Mercy of Technology for Privilege Review*, N.Y. L.J., Jan. 14, 2019 (noting that TAR is “almost unheard of as the sole tool for privilege review”). See also Nicholas Pace and Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (2012), <https://www.rand.org/pubs/monographs/MG1208.html>, (stating that 73% of the cost of producing electronically stored information was allocated to human review for responsiveness and privilege, and that while responsiveness could be addressed by emerging tools, privilege review likely could not.)

⁷⁴ Sedona Conference, *Commentary on the Protection of Privileged ESI*, *supra* at 172.

⁷⁵ FED. R. CIV. P. 26 advisory committee’s note to 2006 amendment.

⁷⁶ See, e.g., *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005).

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about the full scope of privileged communications, projects, work streams, or other work product.

In cases with sizeable “rolling” productions, protocols are sometimes agreed to or ordered so that privilege logs are also “rolling” sequentially with the productions – in other words, X days after production of a tranche of documents, the responding party provides a log of documents from the produced tranche that were withheld as privileged. Although the drafters of this *Commentary* do not see this employed often, potential benefits of this approach are that it can facilitate earlier identification and resolution of concerns over the format, level of specificity, and substance of the privilege claims. Parties may want to resolve privilege log disputes prior to taking key depositions or filing or responding to critical motions, in the event that the privilege log challenge results in the production of additional documents. Some courts may even express an expectation of rolling privilege logs.⁷⁷ A drawback to this approach is that it forces the responding party to address potentially complex privilege issues, involving numerous email threads and strings, across an entire universe of documents early in the process, before the full scope of potentially privileged documents has been assessed. A privilege decision early in the document review may need to be changed based on information learned later in the review. This potential increases the likelihood that privileged documents will need to be clawed back, which may encourage parties to push final review of all potentially privileged documents to the very end. In other words, rolling privilege logs may have the opposite effect of delaying hard privilege calls until the final log.

D. Burdens Facing the Requesting Party.

The burdens associated with privilege logs do not fall exclusively on the party responding to discovery. A requesting party may face burdens arising from an inadequate level of detail in the log. Privilege descriptions may be too generic to identify clearly whether the communication in a given log entry concerns legal, as opposed to business, advice. Entries also may contain insufficient information to identify the roles of the authors/senders and recipients. This can arise, for example, when name normalization is used,⁷⁸ listservs are present, or the privilege log contains a large number of individuals. Insufficient details in a log place the burden on the requesting party either to spend a lot of time trying to discern the basis for the claims of privilege—e.g., whether individuals listed in a log are “outsiders” or lower-level employees

⁷⁷ “This Court does not condone waiting on the production of a privilege log until the end of a rolling ESI production. Producing parties should provide a log with each production tranche and/or on a rolling basis. This allows the receiving party to timely raise issues about withheld documents. It also allows for the review of smaller subsets of documents and smaller in camera reviews (if necessary), allowing for early clarification of privilege issues. Such a process is fairer to the requesting party, more efficient, and less costly. Additionally, Rule 26 contemplates the supplementation of privilege logs throughout discovery.” *Brown v. Barnes & Noble, Inc.*, 474 F. Supp. 3d 637, 647 (S.D.N.Y. 2019), *recons. denied*, No. 1:16-cv-07333 (RA) (KHP), 2020 WL 5037573 (S.D.N.Y. Aug. 26, 2020), and *aff’d*, No. 1:16-cv-07333 (MKV) (KHP), 2020 WL 5037573 (S.D.N.Y. Aug. 26, 2020).

⁷⁸ A name normalization tool converts various iterations of email addresses into a single (normalized) name format, rather than require a global “find and replace” for the myriad of ways an email name presents. For example, jsmith@abccorp.com; joe.smith@abccorp.com; joe@abccorp.com; jmith@gmail.com all normalize on the privilege log to “Smith, Joe.”

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whose access to or involvement in the communication may preclude a claim of privilege or give rise to waiver. Lack of detail also places the burden on the requesting party to initiate a discovery conference and motion practice to get the information they need.

A requesting party also may face burdens based on the mechanics and timing of logs. For example, logs produced in a non-manipulatable manner, such as PDF instead of Excel, make it more difficult to sort the data to group and analyze trends or examine similarly situated entries (*e.g.*, timeframe, participation of outside parties, subject matter) in an efficient manner.

The timing of logs also can increase the burden on the requesting party. Even with properly prepared and detailed logs, issues related to privilege logs often take significant time and effort to identify, work through, and present to the court (if unable to resolve without intervention). This is especially true when logs produced at the very end of discovery are facially deficient or where logging counsel is not inclined to collaborate.

Another mechanics issue arises when documents in the same electronic “family” (*e.g.*, emails and attachments) are logged in separate, disjointed entries. Again, this can increase the burden on the requesting party to assess the claim of privilege, such as when a memo that is logged in one entry may appear privileged, but the separately logged email to which the memo was attached would support an argument that any privilege was waived. For example, if the memo appears to have been disclosed to individuals outside the privilege or in circumstances that give rise to a crime/fraud or other exception. Identifying the relationship between the parent and child documents in some manner in the log would allow for better assessment of the documents in relation to one another.

The use of email thread identification and suppression (“email threading”) can be both a benefit and a burden. The use of email threading allows parties to identify and group all of the emails in a given population that belong in the same email thread and also identify all-inclusive email messages, including the “last-in-thread” message. Email threading typically is used to reduce volume, increase speed of review, and organize a review population. Email threading also is used to streamline the privilege log by logging a description only for the inclusive emails in a thread, or propagating the description to all of the non-inclusive emails in the thread, if that description can apply to all of the withheld emails in the thread. The use of email threading reduces the volume that the responding party must review and log, and reduces the need for the receiving party to assess duplicative entries.

However, when the objective information in the log is populated only from top-level email metadata, the potential remains that responsive communications will be withheld on the basis of privilege without being disclosed on the log. The direct involvement of an attorney in a suppressed email may not be reflected if metadata is used to generate and populate the privilege log.⁷⁹ This creates an unnecessary burden on the requesting party, who is left wondering whether

⁷⁹ Consider a privileged email between an attorney and her non-attorney client, which is then forwarded by the client to a non-attorney company employee. The metadata on the log would reflect only the communication between the

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any attorney was involved at all. Practitioners also should be aware that courts have not been consistent on whether each message in the thread must be logged or if one entry will suffice.⁸⁰ A few courts, despite acknowledging the increased burden, have required parties to log each message in the thread, even if the metadata of the earlier in time email is not available because the message was not separately collected and would need to be populated manually with the date and email participant information.⁸¹

This Commentary discusses strategies for addressing several of these issues in sections below. But a few immediate mitigation measures may include:

- Consider early agreements or court guidance regarding the level of detail expected and negotiate protocols that require parties to provide a list of all the individuals identified in the log, with information such as titles/roles and company affiliations.⁸²
- Include in agreements or orders a mandate to produce logs using common spreadsheet or sortable table formats to streamline the requesting party's review.
- Consider whether rolling privilege logs with rolling productions will facilitate early identification of concerns with the logs themselves (format, detail, mechanics), as well as over the scope of the applicable privilege or waiver—potentially informing later productions/logs on similar issues.
- Consider agreeing that depositions do not start until privilege log issues are resolved (by the parties or the court), or alternatively, that witnesses may be

non-attorney client and employee. The original communication with the attorney may be suppressed from production, but not accounted for on the log.

⁸⁰ Compare, e.g., *United States v. Davita, Inc.*, 301 F.R.D. 676, 684-85 (N.D. Ga. 2014) (collecting cases where threading was prohibited), recons. in part, 1:07-CV-2509-CAP-JSA, 2014 WL 11531065 (N.D. Ga. May 21, 2014); *In re Universal Serv. Fund Tel. Billing Pracs. Litig.*, 232 F.R.D. 669, 674 (D. Kan. 2005) (concluding parties should log each email within a thread individually), with *Muro v. Target Corp.*, 250 F.R.D. 350, 362-63 (N.D. Ill. 2007) (“A party can therefore legitimately withhold an entire e-mail forwarding prior materials to counsel” so long as the underlying not privileged portions are separately produced), aff’d, 580 F.3d 485 (7th Cir. 2009). See also *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am. (Rhoads I)*, 254 F.R.D. 216, 222 (E.D. Pa. 2008); *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am. (Rhoads II)*, 254 F.R.D. 238 (E.D. Pa. 2008) (clarifying the scope of Judge Baylson’s earlier order regarding which e-mails were privileged).

⁸¹ E.g., *Universal Serv. Fund*, 2323 F.R.D. at 674 (requiring each email in thread to be logged while acknowledging that “requiring each e-mail within a strand to be listed separately on a privilege log is a laborious, time-intensive task for counsel”); *Hillsdale Env’t Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, No. CIV.A. 10-2008-CM, 2011 WL 1102868, at *4 (D. Kan. Mar. 23, 2011) (requiring each e-mail in a thread or strand be listed on the privilege log and explaining that “[t]o hold otherwise ‘would [permit] stealth claims of privilege which, by their very nature, could never be the subject of a meaningful challenge by opposing counsel or actual scrutiny by a judge; this, in turn would render Fed.R.Civ.P. 26(b)(5) a nullity.’”); *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 503 (4th Cir. 2011) (remanding for district court to assess privilege with respect to each email in the string).

⁸² But see *supra* II.A.2, identifying challenges with preparing a key of such information.

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recalled for an additional deposition for questioning regarding later de-designated documents.

- Consider including a metadata field such as “FamilyID” in a privilege log so that the requesting party can more easily identify which documents are related and how.
- Where email threading is being used, consider providing metadata such as EmailThreadID.
- Consider agreeing that the log for inclusive emails specify the name of each attorney in the thread that is claimed to be privileged if an email lower in the thread has different sender/recipients than the top email in the thread, which may require manual entry of such name in a separate log field.⁸³

E. Burdens Facing Non-Parties.

Rule 45(e)(2) obligates non-parties who are subpoenaed for documents to expressly make a claim of privilege for withheld documents.

Additionally, Rule 45(d)(3)(A)(iii) requires the court to quash a subpoena, “on timely motion,” where it “requires disclosure of privileged or other protected matter, if no exception or waiver applies” Courts generally hold non-parties to the same standards that apply to parties under Rule 26(b)(5) for substantiating assertions of privilege; failure to do so may result in waiver.⁸⁴ Courts require non-parties to substantiate their assertions of privilege despite claims of burden.⁸⁵ Similarly, courts have held that a non-party seeking to quash a subpoena because it

⁸³ Note the responding party would need to provide these accommodations only for withheld documents where non-inclusive emails are suppressed. As discussed in III.A and IV.A., documents produced in redacted form should already reflect the metadata associated with non-inclusive portions of the email thread on the face of the redacted document, so there should be no need to provide additional metadata for suppressed content on a separate log.

⁸⁴ See, e.g., *In re Grand Jury Subpoena*, 274 F.3d 563, 575-76 (1st Cir. 2001) (“[A]lthough [Rule 45] does not spell out the sufficiency requirement in detail, courts [consistently] have held that the rule requires a party resisting disclosure to produce a document index or privilege log...[or be] deemed to waive the underlying privilege claim.”) (internal citations omitted); *Schaeffer v. City of Chicago*, 19 C 7711, 2020 WL 7395217, at *3 (N.D. Ill. Dec. 15, 2020); *Mosley v. City of Chicago*, 252 F.R.D. 445, 449 (N.D.Ill. 2008); *Williamson v. Recovery Ltd. P’ship*, 2:06-cv-292, 2016 WL 4920773, at *2 (S.D. Ohio Sept. 15, 2016).

⁸⁵ See, e.g., *Ensminger v. Credit L. Ctr., LLC*, 19-2147-JWL, 2019 WL 6327421, at *4 (D. Kan. Nov. 26, 2019) (rejecting a non-party’s argument that he need not comply with a subpoena because it would be burdensome to create a privilege log: “While the court recognizes there are resources involved in creating and evaluating a privilege log, the court does not find it so burdensome as to constitute good cause for granting a protective order”); *Meyer v. Bank of Am., N.A.*, No. 2:18-CV-218, 2018 WL 6436268, at *6 (S.D. Ohio Dec. 7, 2018) (finding universe of 2,700 potentially privileged communications not unduly burdensome, given “(1) the amount in controversy in this case, (2) the importance of the issues at stake, and (3) the fact that the discovery Plaintiffs requested here is, at least, of ‘moderate relevance’ to their claims and defenses”) (internal citations omitted); *but see Dell Inc. v. DeCosta*, 233 F. Supp. 3d 1, 3 (D.D.C. 2017) (quashing a subpoena, in part, served on the party’s former counsel because it

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requires disclosure of privileged materials must, in general, substantiate its assertion of privilege.⁸⁶

Thus, a non-party with a tangential relationship to a case may be faced with responding to a subpoena, including the expenditure of significant time and effort generating a privilege log. As a result, some courts have permitted non-parties to substantiate their assertions of privilege through other, less burdensome means.⁸⁷ Consistent with Sedona principles, the party and non-party should meet and confer about potential means of reducing the burden on the non-party associated with preparing a privilege log.⁸⁸ If a non-party attempts to substantiate its assertion of privilege through an alternative to a traditional privilege log, it must be mindful that it still carries the burden to provide sufficient information to the requesting party to substantiate the privilege assertions.⁸⁹

F. Motions Practice.

As shown above, there is no clear standard on how specific a log must be apart from the general requirement that the withholding party must provide enough information to “enable other parties to assess the claim” of privilege. This can raise concerns for both requesting parties, who

“would impose an undue and disproportionate burden on [former counsel] to prepare a privilege log [for] thousands of documents”).

⁸⁶ See, e.g., *Brown v. Tax Ease Lien Servicing, LLC*, No. 3:15-CV-208-CRS, 2017 WL 6940735, at *4 (W.D. Ky. Aug. 21, 2017) (“Because [the non-party] makes merely a blanket assertion of the privilege without providing a privilege log or other means of identifying the affected documents, this ground in support of its motion to quash is unpersuasive.”) (internal citations omitted); *Dong Gun Shin v. Infinity Ins. Co.*, No. 1:18-cv-1954-SCJ, 2018 WL 8951202, at *2 (N.D. Ga. Oct. 1, 2018) (declining to quash a subpoena where, *inter alia*, the non-party and related party had not submitted a privilege log such that the court could not “determine whether the contents of the file sought by [the requesting party] are protected by the attorney-client privilege”); *In re Kidd*, No. 3:20-cv-00800 (KAD), 2020 WL 5594122, at *13 (D. Conn. Sept. 18, 2020) (affirming denial of motion to quash due to absence of privilege log).

⁸⁷ See, e.g., *Lake as Tr. of Richard D. Lake Revocable Living Tr. Dated Aug. 24, 2011 v. Charlotte Cty. Bd. of Cty. Commissioners*, Case No. 2:20-cv-809-JLB-NPM, 2021 WL 2351178, at *2 (M.D. Fla. June 9, 2021) (“[R]ather than require [the non-parties] to produce privilege logs of withheld or redacted materials, they may categorically withhold or redact privileged communications, and must provide a certification by both the subpoenaed party and [the plaintiff] that none of the withheld or redacted documents were distributed to or reviewed by anyone other than [the plaintiff], [plaintiff]’s counsel, [the non-parties], or their respective staffs.”).

⁸⁸ See The Sedona Conference, *Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition*, 22 SEDONA CONF. J. 1, 82 (2021) (“The party issuing a subpoena should seek to minimize the burden of privilege claims on the non-party. For example, the issuing party and the non-party may agree to exclude some potentially privileged and protected information from the subpoena based upon dates, general topics, or subjects. To minimize the burden on the non-party, the subpoenaing party should consider alternatives to the traditional privilege log.”).

⁸⁹ See, e.g., *Swasey v. W. Valley City*, No. 2:13-CV-768 DN, 2016 WL 6947022, at *2 (D. Utah Jan. 15, 2016) (ordering a non-party to “provide more specificity” regarding roughly 200 emails over a roughly four year period that the non-party grouped into a single category on its privilege log); *In re Motion for Protective Ord. for Subpoena Issued Stein L. Firm*, No. CV 03-9354 JSL (VBK), 2006 WL 8444493, at *5 (D.N.M. Feb. 10, 2006) (finding waiver where, *inter alia*, “[t]he privilege log that the [non-party] produced listed fourteen categories of documents in summary fashion without the detail that [Rule 45] requires.”).

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may have to expend time and resources pressing for more details when presented with a conclusory log, and responding parties, who may have to expend time and resources responding to knee-jerk demands for more specific logs.

Because there is no clear standard on how much specificity is required, this creates a tension between parties and can result in disputes about the sufficiency of a privilege log. If parties are unable or unwilling to resolve these disputes, such disputes can lead to costly motions practice.

III. METHODOLOGIES TO MITIGATE BURDENS

A. Privilege Log Exclusions for Categories Requiring Less/No Substantiation.

There are certain categories of documents for which an entry on a traditional document-by-document privilege log does not materially add to the threshold of substantiation needed for a receiving party to assess a claim of privilege. Identifying and listing reasonable privilege log exclusions can greatly reduce the burdens associated with privilege logs for parties (both the issuing and receiving parties). This *Commentary* recommends that in the average litigation, such categories need not be logged.

For example, communication between a party and its counsel after the date the litigation commenced, about issues related to the litigation, can reasonably be construed as a communication between a client and attorney in connection with the request for or provision of legal advice related to the pending litigation. In most circumstances, reasonable minds would agree such communications are protected by the attorney client communication privilege, and perhaps also the work product doctrine, and may be withheld from production. These are not the documents generally subject to dispute as to the validity of the privilege claim, though they may represent a large percentage of the documents claimed by the party as privileged. The robust presence of those documents on a privilege log may then be scrutinized by a receiving party, often as to whether the log line provides sufficient specificity.

Because communications with counsel after the date litigation commences are reasonably understood to be protected and are unlikely to be challenged by the receiving party, in most cases it would benefit both parties to exclude such communications from privilege logging. Not only will the exclusion of this category of documents enable the responding party to minimize the time and expense required to prepare log entries for such documents, it will also minimize the number of log entries the receiving party has to assess.

Another example of where the privilege log entry may not materially add to the substantiation needed to withhold information is for redacted text. Where specific or single lines of text in an email chain are redacted, and the redaction box specifies the type of privilege claimed (“Attorney Client Privilege”, “Work Product”, etc.), but the email sender, recipient, date and subject lines remain viewable, the produced image of the document reflects much of the information already required to substantiate the claim of privilege—the “details concerning time,

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persons, and general subject matter,” as suggested by the 1993 Advisory Committee Notes to Rule 26 as the appropriate information to provide. The email sent date provides the “time,” the sender and recipient fields provide the “persons,” and the subject line and surrounding unredacted text provide the “general subject matter.” The same is true for redacted portions of a non-email attachment documents such as a Word document or PowerPoint presentation – the produced transmittal email will present the time and persons details, and the non-redacted portions of the attachment document will provide the context of the subject matter. Produced metadata will reflect the author and filename of the attachment document.

If the “detail” information is already provided by way of the produced image, then as a threshold matter, the withholding party has “stated” the claim of privilege. Any information that would be put into a traditional privilege log entry is already reflected in the produced document, so the time it takes to create a log line entry is effort that does not substantially add to the receiving party’s ability to properly assess the claim. Perhaps if the type of protection (*e.g.*, privilege versus work product) being asserted is not evident from the face of the document, the requesting party may seek clarification. Also, there may be situations in which additional information may be requested by the receiving party regarding the subject matter of those documents, particularly where attorney names are not reflected as involved communicants, or new forms of communication or certain file types may present unique challenges, but in the interest of minimizing burdens, that supplementation can be agreed to as to specific documents identified by the receiving party rather than an additional log line for each redacted document.

Because the drafters of this *Commentary* believe additional substantiation is not necessary to state the claim of privilege for such documents, this *Commentary* recommends exclusion from logging requirements for three categories of documents:

- Date – Parties can negotiate and limit the date range for documents on a privilege log. Similar to defining the relevant period for document productions, parties can limit the privilege log to exclude post-complaint privileged communications⁹⁰ or certain temporal periods where a party had frequent privileged communications.
- Participant / Content – Parties can exclude categories of documents from the privilege log based on content (*e.g.*, litigation related) or the source of legal advice (*e.g.*, outside counsel). For example, parties can exclude communications exclusively between outside counsel and the client. Parties can also exclude communications related to the underlying litigation (*e.g.*, draft pleadings, litigation strategy memos). Courts have also routinely found that, for example,

⁹⁰ See, *e.g.*, *Colibri Heart Valve LLC v. Medtronic CoreValve LLC*, No. 820CV00847DOCJDEX, 2021 WL 6882375, at *3 (C.D. Cal. Dec. 6, 2021) (“Courts in this circuit routinely deny a motion to compel a privilege log of attorney-client communications or work product dated after commencement of litigation.”).

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post-litigation communications with counsel⁹¹ and billing entries⁹² do not need to be logged.

- Redacted Documents – Parties can agree to leave redacted documents off the privilege log when the bibliographic information provided on a privilege log is available on the face of the redacted document and there is adequate context to understand the subject matter of the document in order to assess the privilege claim. The responding party may need to list the privilege asserted in the text of the redaction box OR provide a bates / assertion log only (e.g., an Excel with the Bates numbers for redacted documents and the basis for redaction—work product (WP), attorney-client privilege (ACP), or other protection). The party should also include a Redacted field in the accompanying load file to allow for identification of all redacted documents in the production. There is precedent for this type of exclusion.⁹³

Agreeing initially to exclude such documents from logging minimizes the time required to prepare a privilege log, minimizes the cost of preparing the privilege log, and minimizes the number of entries the receiving party then needs to assess in evaluating particular claims of privilege.

As explored in Section II.D, *infra*, agreeing to exclude these documents from logging in the first instance not only minimizes privilege log disputes to the entries that are more likely to be the subject of a true dispute, but it reduces the time and cost necessary to create the privilege log in the first instance. This helps both parties reduce burdens. Furthermore, agreeing to exclude certain categories of documents from privilege logging does not waive the requesting party's ability to request additional substantiation later should the situation warrant. Whether it is appropriate to agree to any or all of these exclusions should be evaluated based on the nature of the case and the documents reasonably sought in discovery. But agreeing to the concept of such exclusions, and negotiating the parameters of them, at the outset will engender a degree of good will in cooperation between the parties.

⁹¹ See, e.g., *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 139 n.22 (3d Cir. 2009) (declining to require preparation of a privilege log for all post-complaint privileged communications because doing so “would have a chilling effect on the attorney-client relationship”); *Aetna Inc. v. Mednax, Inc.*, No. 18-CV-02217-WB, 2019 WL 6250850, at *7 (E.D. Pa. Nov. 22, 2019) (holding that a privilege log did not need to be prepared for communications between a party's attorneys, experts, and consultants retained in anticipation of litigation because burden of laborious privilege review “would far exceed any likely benefit” of finding relevant documents); *Quincy Mutual Fire Ins. Co. v. Atlantic Specialty Ins. Co.*, 2019 WL 3409980, at *7 (D. Mass. July 29, 2019).

⁹² *ResCap Liquidating Tr. v. Primary Residential Mortg., Inc.*, No. 016CV4070SRNHB, 2020 WL 5988494, at *2 (D. Minn. Oct. 9, 2020) (“The Court finds that the burden of providing a privilege log for 175 pages of billing entries outweighs the potential benefit. . . . However, the Court is willing to conduct a limited in camera audit of a subset of the billing entries.”).

⁹³ *Mid-State Auto. v. Harco Nat'l Ins. Co.*, No. 2:19-cv-00407, 2020 WL 1488741, at *4 (S.D. W.Va. Mar. 25, 2020) (holding that the privilege logs—which omitted any notes on redactions—were sufficient because the requesting party could still ascertain all the necessary information from the document itself).

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B. Alternative Construction of Logs.

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

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

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. ***Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.*** A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity

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of the client, may itself be privileged; the rule provides that such information need not be disclosed.⁹⁴

The emphasized portion of the Note above—suggesting description by categories—led to the creation of “categorical logs” as a means to help reduce the burden of having to draft bespoke descriptions for each document.⁹⁵

1. Categorical logs.

A categorical log is a table of withheld documents, where documents are grouped based on similar characteristics, and may share a single common description providing information to substantiate the claim of privilege. Typically, to generate a categorical log the responding party will categorize the nature of the document (by a topic category) during privilege review. Once identified by category, the documents will be organized by similar sender/recipient groups. The log will reflect the date range applicable to that type of category and sender/recipient group as a separate log line. Often, the log will also reflect the number of documents withheld pursuant to that category. *See* Exemplar B.

Some jurisdictions, such as the Southern District of New York, have implemented local rules that say categorical logs are presumptively proper.⁹⁶ In addition, some states affirmatively require parties to discuss if using categories is more efficient (NY state courts).⁹⁷ The Supreme Court of New York adopted Rule 11-b of Section 202.70(g), which establishes a preference for categorical privilege logs.⁹⁸ Even in states where traditional document-by-document specific logs are required, there may be some exception for categorical logs for some portion of the privileged population.⁹⁹ There are several cases authorizing categorical logs as a less

⁹⁴ The Note also acknowledges that a responding party objecting to an overbroad requests would not have to log withheld privileged documents that fall outside the scope of how the party responds to the discovery request.

⁹⁵ An often cited basis for the use of categorical logs is an Advisory Committee Note to the 1993 Amendments to FRCP 26. For example, in *Shufeldt v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.*, No. 3:17-CV-01078, 2020 WL 1532323 (M.D. Tenn. Mar. 31, 2020), the court said that “[w]here a document-by-document privilege log would be unduly burdensome, courts have permitted a categorical log” and then cited the following Advisory Committee Note: “Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.” *Shufeldt*, 2020 WL 1532323, *5 (M.D. Tenn. Mar. 31, 2020).

⁹⁶ *See, e.g.*, NY R USDCTS&ED CIV. RULE 26.2. *See* https://nysd.uscourts.gov/sites/default/files/local_rules/rules-2018-10-29.pdf. *See* *Auto Club of New York, Inc. v Port Authority of New York and New Jersey*, 297 F.R.D. 55, 59 (S.D.N.Y. 2013) (Per Local Rule 26, 2, “a categorical privilege log is adequate if it provides information about the nature of the withheld documents sufficient to enable the receiving party to make an intelligent determination about the validity of the assertion of the privilege.”).

⁹⁷ N.Y. COMP. CODES R. & REGS. TIT. 22 § 202.20-a.

⁹⁸ <https://www2.nycbar.org/pdf/report/uploads/20072891-GuidanceandaModelforCategoricalPrivilegeLogs.pdf>.

⁹⁹ Delaware Chancery practice guidelines, p 24 (<https://courts.delaware.gov/forms/download.aspx?id=99468>) (“Categories of documents that might warrant such treatment include internal communications between lawyer and client regarding drafts of an agreement, or internal communications solely among in-house counsel about a

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burdensome means of asserting privilege.¹⁰⁰ There are also cases confirming that parties are making affirmative use of this option.¹⁰¹

Courts have differed on what showing, if any, is needed to create a categorical log in lieu of a traditional log. Many courts require a showing of burden.¹⁰² One of the initial cases to evaluate use of a categorical log on a showing of burden was *SEC v. Thrasher*.¹⁰³ In that case, counsel had already represented that the privileged documents reflected communications between defense attorneys and that all of these documents had been kept in confidence, so the court only then required as additional privilege substantiation: “(1) an identification of the time period encompassed by the withheld documents; (2) a listing of the individuals who were authors or addressees or were copied on the documents; [and] (3) a representation by counsel as to whether all of the documents either (a) were prepared to assist in anticipated or pending litigation or (b) contain information reflecting communications between (i) counsel or counsel’s representatives and (ii) the client or the client’s representatives, for the purpose of facilitating the

transaction at issue. These kinds of documents are often privileged and, in many cases, logging them on a document-by-document basis is unlikely to be beneficial.”).

¹⁰⁰ *United States v. Magnesium Corp. of America*, No. 01-00040, 2006 WL 1699608 (D. Utah June 14, 2006) (ordering a categorical log for documents generated after institution of action, with (1) time period, (2) list of authors, recipients, copy recipients, (3) representation by counsel that the documents were privileged; and did not require a subject matter or topic be disclosed for the documents identified on the categorical log); *Auto. Club of NY., Inc. v. Port Auth. of NY & NJ*, 297 FRD 55 (SDNY 2013) (holding categorical logs are adequate if they provide information about the nature of the withheld documents sufficient to enable the requesting party to make an intelligent determination about the validity of the assertion of the privilege); *Orbit One Commc’ns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 109 (S.D.N.Y. 2008) (“[Attorney representing plaintiff who is challenging the subpoena] may provide a categorical privilege log rather than a traditional, itemized privilege log . . .”).

¹⁰¹ *See, e.g., Mfrs. Coll. Co. v. Precision Airmotive LLC*, No. 3:12-cv-853-L (N.D. Tex. June 6, 2014) (Party providing categorical log had to identify authors and recipients of all documents, provide subcategories for each type of privilege claimed, and subdivide a litigation category into three subcategories designated by the court); *CC-Aventura, Inc. v. Weitz Co., LLC*, No. 06-21598-CIV, 2008 WL 828117 (S.D. Fla. March 27, 2008) (requiring defendants “identify the date on which each of the insurance companies assumed the defense of this litigation”); *In re Imperial Corp. of America*, 174 F.R.D. 475 (S.D. Cal. 1997) (Plaintiffs ordered to provide a log with an “aggregate listing of the numbers of withheld documents,” “an identification of the time periods encompassed by the withheld documents,” and an affidavit representing that the withheld documents were trial preparation materials or contained information reflecting confidential communications between counsel and plaintiff.).

¹⁰² *Tyco HealthCare Grp. LP v. Mut. Pharm. Co.*, No. 07-1299 (D.N.J. May 2, 2012) (party required to produce a document-by-document post-complaint privilege log, because the party did not establish that logging potentially less than 3000 documents would be unduly burdensome); *Sprint Communs. Co. L.P. v. Big River Tel. Co., LLC*, No. 08-2046-JWL, 2009 WL 2878446 (D. Kan. Sept. 2, 2009) (court ordered a party who logged approximately 1000 documents in one category to either provide a supplemental log with more specific subcategories or move for a protective order relieving it of the obligation to log, accompanied by evidence showing burden); *Bethea v. Merchants Comm. Bank*, Civil Action No. 11-51, 2012 WL 5359536 (D.V.I. Oct. 31, 2012).

¹⁰³ *S.E.C. v. Thrasher*, No. 92 CIV. 6987 (JFK), 1996 WL 125661, at *2 (S.D.N.Y. Mar. 20, 1996).

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rendition of legal services to the client.”¹⁰⁴ The *Thrasher* test has been utilized by numerous other courts.¹⁰⁵

Other courts do not require a showing of burden and, instead, focus on what information the requesting party needs, or the potential risk of revealing privileged information in a document-by-documents log.¹⁰⁶ Yet some other courts seem to refuse to permit categorical logs.¹⁰⁷

Although categorical logs have been utilized by parties to try and reduce their privilege logging burdens, this format can present its own issues, including resistance from opposing parties and courts if the content of the log is deemed to be insufficient to satisfy the requirements for Rule 26(b)(5)(A). It is the experience of the authors of this *Commentary* that the use of categorical logs has not been as effective at reducing costs and burdens on either the responding or receiving party, as compared to some of the other mitigation measure proposed by this *Commentary*. For example, in order to group “like” documents into a single category, there often can be much manual effort associated with analyzing and combining records off of the metadata of withheld documents to determine they should be associated in a single category. In addition, if categories are not described with sufficient particularity, it can lead to discovery disputes, which are costly and time consuming, and those disputes may result in the court requiring the amendment of the log, thereby eliminating any efficiencies the responding party sought to achieve with this type of log.¹⁰⁸

¹⁰⁴ *Id.*

¹⁰⁵ See *Asghari-Kamrani v. United Servs. Auto. Ass'n*, No. 2:15CV478, 2016 WL 8243171, at *3 (E.D. Va. Oct. 21, 2016) (utilizing *Thrasher* test and stating: “Although no district court within the Fourth Circuit has utilized the *Thrasher* test, it has been adopted in primarily unpublished opinions by district courts within the Second, Fifth, Sixth, Ninth, Tenth, Eleventh, and DC Circuits.” (citing cases)).

¹⁰⁶ *United States v. Gericare Med. Supply Inc.*, No. Civ. A. 99-0366-CB-L, 2000 WL 33156442, at *4 (S.D. Ala. Dec. 11, 2000) (“[D]efendants have not explained how a categorical privilege log impaired their ability to test the plaintiff’s claim of work product protection, which rises or falls as a unit.”); *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07–MD–1840–KHV, 2009 WL 959491 (D. Kan. Apr. 3, 2009) (defendants required to review post-litigation attorney communications because they did not make an adequate showing of the burden of review, but they could categorically group the documents in a privilege log).

¹⁰⁷ *Neelon v. Krueger*, 67 F. Supp. 3d 467, 470 (D. Mass. 2015), *aff’d in part, modified in part, vacated in part* by 2015 WL 1037992, at *4 (D. Mass. Mar. 10, 2015) (Plaintiff’s assertion of privilege over categories of documents “is no more than a variant of a blanket assertion of the privilege, which, as noted, does not comply with the requirements of the law.”).

¹⁰⁸ Courts within the Southern and Eastern Districts continue to clarify the requirements for categorical logs, rejecting overly vague, broad, and conclusory categories and, sometimes, requiring document-by-document log instead. See, e.g., *Aviles v. S&P Global, Inc.*, 17-CV-2987 (JPO)(KHP), 2022 WL 336951, at *3-*4 (S.D.N.Y. Feb. 4, 2022) (requiring responding party to redo categorical log to provide categories with maximum six-month time frame (instead of years) and to more completely identify non-attorneys involved in withheld communications); *U.S. Bank Nat’l Ass’n v. Triaxx Asset Mgmt.*, 18-CV-4044 (BCM), 2021 WL 1968325, at *3-*5 (S.D.N.Y. March 31, 2021) (finding categorical log inadequate where it provided 17 “vague and repetitive,” conclusory category descriptions; ordering “document-by-document” log for three categories and modified categorical logs for other categories, including narrower date ranges and identities of parties to the communications); *In re Aenergy SA*, 451 F. Supp. 3d 319, 326-28 (S.D.N.Y. 2020) (ordering document-by-document log because court had “lost confidence”

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Particular consideration should be given to using this format when a jurisdiction encourages it. Practitioners in New York, for example, should strongly consider how to make this solution work for their cases, or at least for large subsets of their document population. Also, for cases involving a large number of documents withheld that are similar in nature and repetitive over time, a categorical log may be appropriate. For example, in a case where 75% of privileged documents involve communications with outside counsel advising the client on a permit application and subsequent challenge. Also, if communications otherwise can be segregated into reasonably organized categories that a responding party can sufficiently understand and therefore is not likely to cause a costly challenge. For example, a privileged document population that heavily involves discussions with outside legal counsel pertaining to the lead up to, or after the initiation of, the action (if not already excluded as described above), a categorical log for this subset of documents may be appropriate. This is particularly the case if the privileged documents likely involve the same communicants (within each category).

2. Metadata logs.

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

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

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

that responding party would provide adequate categorical log); *Norton v. Town of Islip*, CV 04-3079 (PKC) (SIL), 2017 WL 943927, at *9 (E.D.N.Y. March 9, 2017) (rejecting categorical log for lack of sufficient information in category descriptions to permit requesting party to assess claims of privilege and ordering production of document-by-document log).

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- Email subject – note that where this field is provided there is the possibility that the field may contain privileged information and may need to be redacted
- File name – note that where this field is provided there is the possibility that the field may contain privileged information and may need to be redacted
- Custodian or Custodians
- File Path – this can often provide additional context about the document by the folder names in which it was stored but note that some take the position that if the custodian was an attorney this may contain privileged information¹⁰⁹
- Date/Time Created / Last Modified – note that these fields may not accurately reflect the date/time a file was created or modified
- (File) author – note that where this field is provided it may not accurately reflect the actual author of the file given the tendency to reuse previous documents as the starting point for new documents
- Last Edited By – this would provide additional information as to who has seen and edited the document.
- File Extension – can provide additional information about the type of document (email, spreadsheet, presentation, which may be important if File Type metadata is not a supported field.
- Family ID
- Email Thread ID
- Hash Value
- Other Legal Person – reflecting the name of legal personnel involved in earlier in time communications within the email chain; this field cannot be extracted from metadata and would have to be manually populated

For metadata logs, you may need to consider providing a “key” of legal personnel—names and affiliations / positions—as well as for third parties that the responding party states do not break the privilege. Use of a name normalization tool should not be used if the responding party agrees to a requesting party’s suggestion that email addresses be provided to help identify the affiliations of each person on the log.

Precedent for the use of this type of log format is mixed. In *U.S. Bank National Association v. Triaxx Asset Management LLC*,¹¹⁰ the Court allowed a party to remedy a deficient categorical log by providing either an itemized log or a metadata log for a particular category). In *McEuen v. Riverview Bancorp, Inc.*,¹¹¹ the Court held that providing a list of specific metadata fields on a log for documents kept on a withheld hard drive would satisfy the privilege log

¹⁰⁹ Note that the file path may not contain accurate information about where the document was saved on the party’s electronic systems if it was not collected forensically from the original source.

¹¹⁰ *U.S. Bank Nat’l Ass’n v. Triaxx Asset Mgmt. LLC*, 19-CV-00783 (DLI) (CLP), 2021 WL 1207122 (S.D.N.Y. Mar. 31, 2021).

¹¹¹ *McEuen v. Riverview Bancorp, Inc.*, NO. C12-5997 RJB, 2013 WL 12095581 (W.D. Wa. Oct. 1, 2013).

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requirements. However, in *LaVeglia v. TD Bank*,¹¹² the Eastern District of Pennsylvania rejected a metadata log as insufficient because it did not provide any basis for the privilege assertion. Similarly, in *McNamee v. Clemens*,¹¹³ the Eastern District of New York court determined a metadata privilege log was insufficient because the “subject line contains, in many instances, exceedingly unhelpful descriptions. Examples of such vague subjects include single word descriptions, such as: ‘tomorrow,’ ‘Media,’ ‘My info,’ ‘statement,’ ‘Costs,’ ‘Letter,’ ‘notes,’ ‘Inquiry,’ and ‘Discussion.’ These types of descriptions clearly do not provide sufficient information as to the content of the documents to enable plaintiff or the Court to evaluate whether each of the withheld documents is privileged”

Parties should consider using a metadata log format when the data population identified to be withheld is voluminous because it allows for serving a log much sooner than could occur with a traditional log.

3. Metadata plus topic logs.

Similar to a metadata log, a “metadata plus topic log” is a table of withheld documents that provides the metadata fields that can be extracted from a review platform with minimal effort. By omitting a full privilege description sentence, this log form requires less effort than creating a traditional document-by-document privilege log. However, in addition to the fields available in a pure metadata log, a metadata plus log will include an additional field—a category, or topic, description as a separate field. Examples of a category/topic field could include things such as: contract drafting and evaluation; settlement analysis; consumer outreach; internal investigation. *See* Exemplar D.

For most documents, the metadata of the document being withheld is likely to provide the details pertaining to time, persons involved, and general subject matter through providing fields such as to, from, cc, bcc, sent or modified date, email subject, and filename. The parties may wish to negotiate for the provision of additional fields, such as file extension, custodian, etc. The withholding party should also provide an explicit reference to the basis for withholding—whether it is for attorney client privilege, work product protection, or some other privilege or immunity. Indeed, for many documents, this may be all the information necessary to allow the receiving party to assess the validity of the claimed privilege.

However, where the metadata provided is not specific enough to provide the context of the subject matter, then providing an additional Privilege Topic, or Privilege Category, field of information, exported from the party’s review platform’s coding, provides further insight into the subject matter of the privileged content. This one additional field is what distinguishes a metadata plus topic log from a pure metadata log. The category/topic field will reflect an independent assessment by a reviewer of the category that most closely describes the withheld document. The responding party will prepare a set of coding options/tags for the most likely

¹¹² *LaVeglia v. TD Bank*, No. 2:19-cv-01917, 2020 WL 127745 (E.D. Pa. Jan. 10, 2020).

¹¹³ *McNamee v. Clemens*, No. 09 CV 1647 SJ, 2013 WL 6572899, at *3 (E.D.N.Y. Sept. 18, 2013).

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categories, which can be amended/supplemented as review progresses. Whichever tag the reviewer selects for that document will be exported as the privilege topic field.

By providing information regarding time, persons involved, and general subject matter from the available metadata and topic fields, the information provided generally meets the threshold showing required by Rule 26. Additional engagement between the parties is likely necessary for some portion of the documents on such a log, to request or provide additional substantiation. But engaging in that effort for a fraction of withheld documents involves a lesser effort, in terms of time, cost, and items of dispute, for both parties, than the traditional manner of logging. Preparing a metadata plus log, and then responding to subsequent requests for additional information as to specific entries, satisfies the parties' obligations to respond to discovery diligently in an efficient manner.

Metadata plus topic logs are particularly useful when the data population identified to be withheld is voluminous because it allows for serving a log much sooner than could occur with a traditional log. The benefit of a metadata plus topic log over a traditional metadata log is that by providing an associated topic, the log helps to narrow the entries that the requesting party may choose to challenge or request additional information about. Simply by providing a topic, the logged documents can now identify areas of dispute by topic, providing for a more streamlined and effective dispute resolution process.

Because of the additional benefits afforded by a metadata plus topic log, as compared to other alternative logging formats, this *Commentary* recommends this type of format be considered as a preferred format over the traditional document-by-document log.

4. Different logs for different, non-traditional sources.

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

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

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

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

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

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

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

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.¹¹⁴

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

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

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

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and ***proportional to the needs of the case***, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’

¹¹⁴ FED. R. CIV. P. 26(b)(5)(A).

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resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.¹¹⁵

The concept of proportionality was present in Rule 26 as far back as the 1983 Amendments to the Federal Rules of Civil Procedure.¹¹⁶ The Advisory Committee Notes for those changes include the following:

The elements of Rule 26(b)(1)(iii) address the problem of discovery that is *disproportionate* to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophical, social, or institutional terms.¹¹⁷

Further amendments to the Rule brought the concept of proportionality to the fore.

The 1993 Amendments to the Rules subdivided former paragraph (b)(1) into two paragraphs “for ease of reference and to avoid renumbering paragraphs (3) and (4).”¹¹⁸ This had the effect of placing the proportionality concept into sub-paragraph (b)(2), which was titled “Limitations,” rather than (b)(1), which was titled “In General.”¹¹⁹ In other words, the concept and its related factors¹²⁰ were now framed as a discovery limitation instead of governing the scope of discovery generally.

The Advisory Committee Notes to the 2015 Amendments, which added the word “proportional” to the Rule and moved the concept from Rule 26(b)(2) to Rule 26(b)(1), call this out: “The present amendment restores the proportionality factors to their original place in

¹¹⁵ FED. R. CIV. P. 26(b)(1) (emphasis added).

¹¹⁶ In 1983, Rule 26(b)(1) was amended to limit discovery that was duplicative, unduly burdensome or expensive, “taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.” FED. R. CIV. P. 26(b)(1) (1983); 97 F.R.D. 165, 172 (1983 amendments to Rule 26(b)). *See generally, Robertson v. People Mag.*, No. 14 CIV. 6759 (PAC), 2015 WL 9077111, at *2 (S.D.N.Y. Dec. 16, 2015) (noting that proportionality has been a limit on discovery since the 1983 amendments to Rule 26).

¹¹⁷ Advisory Committee Notes to 1983 Amendment to Rule 26 (emphasis added); *see also Eagle Air Med Corp. v. Sentinel Air Med. All.*, No. 218CV00680JCOMPAL, 2018 WL 3370528, at *4 (D. Nev. July 10, 2018) (“Federal judges were urged to evaluate the nature of the case, the limitations on a financially weak litigant to bear the burden of expensive discovery, and the need to prevent discovery from becoming a ‘war of attrition or as a device to coerce a party, whether financially weak or affluent.’”) (citing 97 F.R.D. 165, 218).

¹¹⁸ Advisory Committee Notes to 1993 Amendment to Rule 26.

¹¹⁹ *See* 146 F.R.D. 401 at **436-47 and Advisory Committee Note at *638.

¹²⁰ “The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether ‘the burden or expense of the proposed discovery outweighs its likely benefit,’ and ‘the importance of the proposed discovery in resolving the issues.’” Advisory Committee Notes to 2015 Amendment to Rule 26.

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defining the scope of discovery.”¹²¹ Some commentators have echoed this sentiment by stating that relevance is not the only factor in assessing the scope of discovery—it must also be proportional.¹²²

Although amendments to Rule 26 have highlighted the importance of proportionality regarding the scope of discovery, they do not state that proportionality is applicable to privilege logs. The Advisory Committee Notes to the 2015 Amendments do say, however, that the “parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.”¹²³ Courts have taken varying positions on whether proportionality applies to privilege logs. Before addressing these decisions, it is helpful to compare Rules 26(b)(5)(A) and 26(b)(1) regarding the factors and burdens associated with the privilege logging process.

2. Rules 26(b)(5)(A) and 26(b)(1)—different factors but same burdens.

a. Rule 26(b)(5)(A) versus Rule 26(b)(1) factors.

Under Rule 26(b)(5)(A), in order for a party to seek relief regarding its privilege log obligations, the party typically must demonstrate that producing a traditional document-by-document log “would be unduly burdensome and without much benefit.”¹²⁴ These courts often cite the Advisory Committee Note to the 1993 amendments of Rule 26(b)(5) in permitting the responding party to prepare a categorical privilege log¹²⁵ rather than a document-by-document

¹²¹ Advisory Committee Notes to 2015 Amendment to Rule 26.

¹²² See, e.g., Robert D. Keeling, Ray Mangum, *The Burden of Privacy in Discovery*, 20 Sedona Conf. J. 415, 420–21 (2019) (“Most recently, in 2015, the scope of discovery under Rule 26(b) was amended to ‘restore[] the proportionality factors to their original place in defining the scope of discovery.’ No longer are the proportionality considerations described as separate ‘limitations’ on an inquiry governed solely by relevance. Under the revised Rule 26(b)(1), proportionality once again stands on equal footing alongside relevance in defining the scope of discovery.”).

¹²³ Advisory Committee Notes to 2015 Amendment to Rule 26.

¹²⁴ *EPAC Techs., Inc. v. HarperCollins Christian Publ’g, Inc.*, No. 3:12-CV-00463, 2018 WL 3628890, at *1 (M.D. Tenn. Mar. 29, 2018), *aff’d sub nom.* *EPAC Techs., Inc. v. Thomas Nelson, Inc.*, No. 3:12-CV-00463, 2018 WL 3322305 (M.D. Tenn. May 14, 2018) (citing Advisory Committee Note to 1993 amendment to Rule 26(b)(5) that categorical log may be appropriate when documents are voluminous; also finding failure to associate categories of withheld documents with separate metadata log insufficient); see also *Benson v. Rosenthal*, No. CV 15-782, 2016 WL 1046126, at *10 (E.D. La. Mar. 16, 2016) (“The court has discretion to limit the burden of preparing a Rule 26(b)(5) privilege log when the typically detailed requirements of a log would be unduly burdensome and certain documents are obviously protected by the attorney-client privilege or work product doctrine.”); *In re Aetna Inc. Litig.*, 2020 WL 2770192, at *2 (C.D. Cal. Mar. 6, 2020) (permitting party to forego logging 8,800 “plainly privileged” documents because it would be unduly burdensome and party provided declaration to support its position).

¹²⁵ See Section III.B for a definition of “categorical log.”

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privilege log.¹²⁶ However, these courts are clear that the categorical log must provide sufficient information to evaluate the protections asserted.¹²⁷ As a result, and as explained in Section III.B.1 *supra*, categorical logs are fraught with their own concerns about adequacy and may be rejected by courts if they are not sufficiently particularized and specific in describing the documents.¹²⁸

In contrast to the single factor of undue burden courts often consider under Rule 26(b)(5)(A), there are six factors for analyzing the proportionality of discovery under Rule 26(b)(1): (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; (6) and whether the burden or expense of the proposed discovery outweighs its likely benefit.¹²⁹ Thus, Rule 26(b)(1)'s proportionality factors involve a more nuanced approach to discovery than just focusing on undue burden, although the balancing of burden and benefit is considered.¹³⁰

b. The burden remains on the party resisting discovery.

Although the factors considered under Rules 26(b)(5)(A) and Rule 26(b)(1) are different, the burden of satisfying those factors rests squarely on the party resisting discovery (*i.e.*, the

¹²⁶ See, e.g., *EPAC Techs.*, 2018 WL 3628890, at *1; *Benson*, 2016 WL 1046126, at *10; *Shufeldt v. Baker*, Donelson, Bearman, Caldwell & Berkowitz, P.C., No. 3:17-CV-01078, 2020 WL 1532323, at *5 (M.D. Tenn. Mar. 31, 2020).

¹²⁷ See, e.g., *In re Aenergy, S.A.*, 451 F. Supp. 3d 319, 325 (S.D.N.Y. 2020) (permitting categorical privilege logs does not obviate a party's obligation to provide sufficient detail); *Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n*, No. 3:15-CV-01300-JMC, 2016 WL 6539344, at *3 (D.S.C. Nov. 3, 2016) (holding that the court had discretion to limit a party's burden by allowing a categorical log but the categories must be sufficiently articulated); *Shufeldt*, 2020 WL 1532323, at *5 (finding one-page privilege log with broad categorical claims of privilege inadequate because log must still provide information needed to evaluate claims or privilege); *3rd Eye Surveillance, LLC v. United States*, No. 15-501C, 2021 WL 3828654, at *3 (Fed. Cl. Aug. 27, 2021) (noting that the required description will depend on the case and categories may be appropriate for voluminous documents; continually logging post-litigation communications would amount to disproportional burden but "customary contents" of log still required).

¹²⁸ See *Chevron Corp. v. Salazar*, No. 11 CIV. 3718 LAK JCF, 2011 WL 4388326, at *2 (S.D.N.Y. Sept. 20, 2011) (finding, after in camera review of withheld documents, that party's categorical privilege log "obscures rather than illuminates the nature of the materials withheld" and an itemized log was required).

¹²⁹ Federal Rule of Civil Procedure 26(b)(1).

¹³⁰ Courts regularly evaluate all six proportionality factors with respect to discovery generally. See, e.g., *Velez v. City of Chicago*, No. 18 C 8144, 2021 WL 1978364 (N.D. Ill. May 17, 2021) ("We need to point out here that the City's proportionality objection is all but a non-starter. Proportionality is assessed in terms of the . . . [Rule] 26(b)(1) [factors]. Like other concepts, proportionality requires a common sense and experiential assessment.") (citing cases); *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, 2017 WL 2889679, at *2 (N.D. Ala. July 6, 2017) ("Finally, to the extent that other documents might exist that are not shielded by these privileges, searching for them among the greater volume of privileged documents is disproportionate to the needs of this case. . . Here, given the likelihood that most of the responsive documents relating to Professional Liability insurance coverage will be subject to some privilege or work-product protection, the burden and expense of searching for the remaining non-privileged responsive documents outweighs the potential benefit.").

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logging party).¹³¹ As evidenced by the 2015 Advisory Committee Notes, the amendments to Rule 26(b)(1) were not intended to alter the burdens of parties in discovery:

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

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.¹³²

The need to consider proportionality in discovery is now front and center, but there is no requirement that the party seeking discovery demonstrate that it is proportional before the discovery is produced—the burden remains on the party resisting discovery.¹³³ Accordingly, when applying proportionality to privilege logs, the burden should rest on the party preparing the log to demonstrate why an alternative format for the privilege log, rather than a traditional document-by-document log, satisfies the party’s obligation to establish the privilege claim. As a practical matter, the party requesting the discovery may be called upon to explain why its request for a particular log format is proportional to the needs of the case. For example, this may occur if the requesting party files a motion to compel on the issue, is opposing the responding party’s motion for protective order, or is otherwise addressing a court’s questions about application of the proportionality factors.

As discussed below, in the six years since proportionality was inserted into Rule 26(b)(1) few courts appear to have undertaken a proportionality analysis based on the Rule as it relates to privilege logs. The limited number of courts that have done so have reached varying conclusions on its applicability.

3. Court decisions addressing proportionality and privilege logs.

¹³¹ See, e.g., *First Horizon National Corporation v. Houston Casualty Company*, No. 2:15-cv-2235, 2016 WL 5867268, at *6 (W.D. Tenn. Oct. 5, 2016) (“As to undue burden, the Plaintiffs must “establish[] undue burden with specificity ... [and] articulate explicitly why production of an itemized and descriptive privilege log is unduly burdensome”); *Tyco Healthcare Group LP v. Mutual Pharmaceutical Co., Inc.*, No. 07-1299, 2012 WL 1585335, at *4 (D. N.J. May 4, 2012) (where party did not provide an estimate of the cost of logging less than 3,000 documents in support of its claim of undue burden, court found document by document privilege log would not be unduly burdensome).

¹³² Advisory Committee Notes to 2015 Amendment to Rule 26.

¹³³ See, e.g., *Huseby, LLC v. Bailey*, No. 3:20-CV-00167 (JBA), 2021 WL 3206776, at *6 (D. Conn. July 29, 2021) (noting that the moving party must make a *prima facie* showing of relevance, after which it is up to the responding party to justify curtailing discovery); *N. Shore-Long Island Jewish Health Sys., Inc. v. MultiPlan, Inc.*, 325 F.R.D. 36, 48 (E.D.N.Y. 2018) (same); *Oxbow Carbon & Mins. LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 6 (D.D.C. 2017).

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The spectrum of cases discussing proportionality in the context of privilege logs ranges from applying the Rule 26(b)(1) factors,¹³⁴ to discussing proportionality without any reference to Rule 26(b)(1),¹³⁵ and outright rejecting the application of proportionality to privilege logs.¹³⁶

4. A framework moving forward.

Analyzing a party's obligation to produce a privilege log sufficient to satisfy the requirements of Rule 26(b)(5)(A) involves three inquiries: (1) which party bears the burden as to whether and how a log should be produced; (2) what factors should be employed to conduct the analysis; and (3) if the factors demonstrate a disproportionate burden, what type of log is sufficient?

With respect to the first question and as stated above, this *Commentary* agrees that no matter what factors are used to assess issues surrounding privilege logs, a party asserting

¹³⁴ See, e.g., *First Horizon Nat'l Corp. v. Houston Cas. Co.*, No. 2:15-CV-2235-SHL-DKV, 2016 WL 5867268, at *6 (W.D. Tenn. Oct. 5, 2016) (applying the Rule 26(b)(1) proportionality standard and concluding that a traditional document-by-document log, rather than a "categorical log" was proportional); *Finger v. Jacobson*, No. CV 17-2893, 2019 WL 7557821, at *1 (E.D. La. May 10, 2019) ("The privilege log is also proportional to the needs of the case given the parties' relevant access to the requested materials... The privilege log may also aid in resolving the issues in this litigation, and the burden or expense does not outweigh its likely benefit. While Meyer has intimated that he may need to charge a fee to confect a privilege log, neither party has informed the Court (1) whether any documents exist that were actually withheld, or (2) the numerosity of said documents. The parties do not address any of the other proportionality factors under Rule 26, and there is thus no evidence of them before the Court.) (internal citations omitted); *Hassienzadeh v. Bellevue Park Homeowners Assoc.*, No. C18-13585-JCC, 2020 WL 3271769, at *3 n.3 (W.D. Wash. June 17, 2020) (dictum) ("Whether a discovery request is proportional may depend on the costs of generating an expansive privilege log.").

¹³⁵ See, e.g., *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, No. 18-CV-4044 (BCM), 2021 WL 4973611, at *2 (S.D.N.Y. Oct. 25, 2021) ("[P]roportionality is an issue in evaluating privilege logs, just as it is with other aspects of discovery"); *Norton v. Town of Islip*, No. CV043079PKCSIL, 2017 WL 943927, at *8 (E.D.N.Y. Mar. 9, 2017) ("In determining whether a categorical log is appropriate, Courts consider whether its justification is 'directly proportional to the number of documents withheld.'") (quoting *Auto. Club of New York, Inc. v. Port Auth. of New York & New Jersey*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013)); *3rd Eye Surveillance, LLC v. United States*, No. 15-501C, 2021 WL 3828654, at *3 (Fed. Cl. Aug. 27, 2021); *In re Snap Inc. Sec. Litig.*, No. CV1703679SVWAGRX, 2018 WL 7501294, at *1 (C.D. Cal. Nov. 29, 2018) (logging documents dated after commencement of the litigation not proportional to the needs of the case) (citing cases); *but see Close Armstrong LLC v. Trunkline Gas Co., LLC*, No. 3:18-CV-270-PPS-MGG, 2021 WL 1207592, at *8–9 (N.D. Ind. Mar. 31, 2021) (finding that even for post-complaint communications, a party must still comply with its privilege log obligations but if the party believes doing so would impose undue burden and expense outweighing any benefit, it may seek relief from the required item-by-item listing on a privilege log in the form of a protective order) (citation omitted).

¹³⁶ See, e.g., *Main St. Am. Assurance Co. v. Savalle*, No. 3:18CV02073(JCH), 2021 WL 1399685, at *3 (D. Conn. Apr. 14, 2021) (drawing a distinction between whether "the information sought by the subpoena" is disproportional to the needs of the case versus whether "creating the privilege log" is somehow disproportionately burdensome and holding that a privilege log was required notwithstanding any alleged burden; "This tortures the meaning and purpose of Rule 26's proportionality requirement, which focuses on the marginal utility of the discovery sought"). Although this distinction precluded an application of proportionality to the privilege logging process, it is a good reminder that if the underlying request for documents is disproportional to the needs of the case, there may be grounds to avoid production (and, therefore, logging) altogether.

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privilege must provide sufficient information to the opposing party and the court, consistent with the requirements of Rule 26(b)(5)(A), to allow them to evaluate the claim. When applying proportionality to privilege logs, it does not mean a responding party may invoke the concept to circumvent its obligations to support its assertion of privilege with an appropriate log (or equivalent). It also does not mean a requesting party may seek unreasonably to force a traditional privilege log if the particular facts and circumstances of a case do not warrant one.

With respect to the second question, there have not been enough cases directly addressing application of the proportionality factors in Rule 26(b)(1) to the privilege logging process to reach a conclusion as to whether or how courts generally will treat such application. It is unclear, for example, whether the dearth of opinions is a result of most issues being resolved in discovery conferences/hearings without a subsequent formal opinion, courts are relying on Rule 26(b)(1) factors without explicitly citing them, or courts have rejected application of such factors to privilege logs without confirming as much. Additional clarity from the judiciary, either in standing orders, early discovery conferences, or in written opinions would benefit everyone.

Nevertheless, if the proportionality factors of Rule 26(b)(1) are applied and the responding party is able to demonstrate that something other than a traditional document-by-document privilege log is more appropriate for its case, there are several strategies and alternatives available, as explained elsewhere in this *Commentary*.

IV. EARLY COMMUNICATIONS, DISPUTE RESOLUTION & REMEDIES

A. Early Communications to Define the Protocol.

Early case communication is a critical step in streamlining the privilege log process and minimizing disputes between the parties. Parties can minimize or even eliminate many of the potential burdens associated with privilege logs by addressing them at the outset through an initial meet-and-confer, negotiation of an ESI protocol or other agreement regarding privilege logs, and then consummation of agreed-upon procedures at the Rule 26(f) conference. Some courts specifically require this type of discussion. For example, the United States District Court Northern District of California Guidelines for the Discovery of Electronically Stored Information Guideline 2.02 requires parties to discuss at the 26(f) conference, “Opportunities to reduce costs and increase efficiency and speed, such as . . . using agreements for truncated or limited privilege logs . . .”¹³⁷ Similarly, the Middle District of Tennessee’s Administrative Rule 174-1, ¶ 8(b) provides an expectation that the parties will “discuss foregoing using traditional document-by-document logs in favor of alternate logging methods, such as identifying information by category or including only information from particular metadata fields (e.g., author, recipient, date).”¹³⁸

Topics can include: (1) privilege log exclusions; (2) the use of technology like email threading to reduce what is reviewed/logged; (3) alternative log formats for some or all of the

¹³⁷ https://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines-12-1-2015.pdf.

¹³⁸ <https://www.tnmd.uscourts.gov/sites/tnmd/files/AO%20174-1%20entered%209-12-18.pdf>.

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ESI at issue; (4) when logs will be produced; and (5) court interaction to reduce costly disputes. More specifically, parties should consider the following questions:

What needs to be logged? Identify categories of information that can be excluded from the privilege log process, such as post-complaint privileged communications, documents collected from attorney custodians, litigation related documents, and/or communications with outside counsel.¹³⁹ Can the responding party identify and group of all of the emails in the same email thread and identify the inclusive email message in lieu of logging each email in the thread?¹⁴⁰ Can the parties agree to exclude redacted documents from the privilege log? If so, what bibliographic information must be included on the face of the redacted document?¹⁴¹ Consider whether any privileges or protections other than attorney client or work product could apply in the case and whether those warrant special/unique privilege procedures. Consider also whether to enter into a Rule 502(d) order, and the terms of that order.¹⁴²

How does it need to be logged? Consider whether categorical logs, metadata logs, metadata plus topic logs, or other alternative logs meet the needs of the case.¹⁴³

When does it need to be logged? Discuss whether privilege logs are to be provided on a rolling basis or after all or substantially all document productions have been completed. Discuss setting a specific time period after a complete or rolling production that logs will be produced.

What happens when a dispute arises? Commit to confer with other parties early to try to narrow disputes.¹⁴⁴ Discuss how privilege disputes will be presented to the court, which can include joint letter briefs and, in rare occasions, employing a sampling methodology (and what methodology) for documents to be presented to special discovery masters or the court for *in camera* review.¹⁴⁵

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

Consider incorporating the following concepts in a discovery protocol:

¹³⁹ See Section III.A.

¹⁴⁰ See Section II.D.

¹⁴¹ See Section III.A.

¹⁴² See Section I.B.4.c.

¹⁴³ See Section III.B.

¹⁴⁴ See Section IV.B.

¹⁴⁵ *Id.*

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- Seek a discovery conference with the court halfway through the discovery period. Parties are more likely to agree to this at the beginning of the case because everyone is on equal footing. As discovery progresses, the prospect of having to defend one's discovery process or positions in front of the court may help keep all parties in line.
- Exchange sample privilege logs (10, 25, 50, or 100 entries) at the outset of discovery to confirm format and amount of content.
- Set requirements for what privilege logs should contain, including what level of detail will be required for the description, the use of alternatives to a log¹⁴⁶ or the exclusion of certain documents from logs.¹⁴⁷ As with other aspects of the discovery process (such as document requests and search terms), getting to the "right" level of specificity can be facilitated through early discussion among the parties and the court to define what type and level of specificity to use for the privilege logs and a process for requesting parties to ask for more specific information, but protect a responding party from abuse. The parties and court may benefit from a time-limited process for the parties to meet and confer on any concerns about the log and present disputes to the court on the sufficiency of the nature of the information provided in the log. Thereafter, if either party perceives continued obstruction or excessive challenges, that complaint can be addressed to the judicial officer supervising discovery.
- Establish a requirement that privilege logs or other privilege designations are certified by counsel. Such certifications might be required only for certain types of logs, *e.g.*, categorical logs.
- A process for challenging a privilege designation. This process can include: (1) a timeline for identification of possible errors or oversights with a set timeline for the designating party to either agree and produce the documents or affirm that the privilege was properly asserted (see more below); (2) a commitment to meet and confer in advance of contacting the court or filing a motion; (3) a requirement that a party objecting to privilege designations raise specific challenges to individual or categories of documents in writing with a set time period for the designating party to respond in writing by either agreeing to remove the privilege, providing additional information to support the assertion of privilege, or affirming the party's position that no additional information is required to properly support the existence of a privilege; and (4) a commitment to contact the court for a status conference or other guidance prior to filing motions.

¹⁴⁶ See Section III.B.

¹⁴⁷ See Section III.A.

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- Identify specific deadlines for when privilege logs will be produced (*e.g.*, a certain time period after each production, after production is complete) that takes into account the practical reality of preparing the logs (including the burdens) and the receiving party's need to review and potentially challenge the logs in time to obtain documents and use them in depositions, in dispositive motions, with an expert, and/or at trial.¹⁴⁸

A Note on Timing: Some courts have held that assertions of privilege must be made and substantiated (for instance, through a privilege log) at the time of each production, and that failure to do so may result in a finding of waiver.¹⁴⁹ These decisions imply that privilege logs should be served on a “rolling basis.” However, the so-called “rolling” production of privilege logs may not be appropriate in every case. For example, in cases involving large volumes of documents, it is typical for the responding party to apply a “privilege screen” to the documents and to withhold all documents hitting on that screen from its initial productions until they can be subjected to further privilege review. Does this initial withholding, or de-prioritization for review, give rise to a duty to log those screened documents (even if no final determination has been made)? In order to minimize disputes, it may be in the parties' joint interest to communicate the intent to produce privilege logs after the privilege review (following a first pass responsiveness review) is complete and any non-privileged documents are produced to the requesting party.

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

A thoughtful approach to the timing of privilege logs (particularly when accompanied by early, candid discussion of the issue) can alleviate burdens in a number of ways. For example, if a responding party will be using a two-level review (responsiveness followed by privilege), allowing time for that to occur may reduce the overall volume of materials to be logged (if the privilege review narrows the scope). If a responding party believes some or all of its privileged materials are susceptible to categorical logging, it likely makes sense to provide that log later in the production process. By contrast, if the production is extremely large, rolling logs of some

¹⁴⁸ See Section II.C.

¹⁴⁹ See, *e.g.*, *Valley Forge Ins. Co. v. Hartford Iron & Metal Inc.*, No. 115MC00103TWPDM, 2018 WL 1948882, at *4 (S.D. Ind. Apr. 25, 2018); *Jochem v. PolyMedica Corp.*, No. 05-14259-CIV, 2006 WL 8433830, at *1 (S.D. Fla. June 8, 2006); *Brown v. Barnes & Noble, Inc.*, 474 F. Supp. 3d 637, 647 (S.D.N.Y. 2019), *reconsideration denied*, No. 116CV07333RAKHP, 2020 WL 1082464 (S.D.N.Y. Mar. 5, 2020), and *aff'd*, No. 116CV07333MKVKHP, 2020 WL 5037573 (S.D.N.Y. Aug. 26, 2020), and *aff'd*, No. 116CV07333MKVKHP, 2020 WL 5037573 (S.D.N.Y. Aug. 26, 2020); *City of Gallup, New Mexico v. Hotels.com., L.P.*, No. CV 07-644 JEC/RLP, 2010 WL 11500086, at *4 (D.N.M. Aug. 12, 2010).

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type may lessen the burden of dispute resolution by allowing the parties to engage earlier with each other and, if necessary, with the court to resolve issues over the sufficiency of the logs and lines being drawn over what is and is not properly withheld as privileged so that adjustments can be made going forward instead of waiting until the end when a responding party may seek to assert that revising its log for the entire production is too burdensome.

B. Communications to Resolve Disputes.

1. Preliminary communications to narrow issues.

Rather than seeking court intervention as a first step, parties should engage with each other first. What appears to be a potentially contentious issue may be nothing more than a simple oversight or unintentional error by the party who produced the privilege log. For example, an entry on a log may be designated as both privileged and work product but the date of the document calls into question whether litigation reasonably could have been anticipated at that time. This may be the result of a simple coding error that was not caught by quality control in the final preparation of the log or there may be a legitimate reason for asserting that type of privilege. When brought to the responding party's attention, the party may withdraw the work product claim if it was an error or explain the claim further.

Additionally, it may be that the process and format that the parties agreed on at the beginning of discovery does not, in practice, meet one or both of the party's needs. This may be because of a misunderstanding or miscommunication, or may also be a function of counsel making decisions before knowing what the discovery would actually include. It may not be too late to alter the format or provide additional information. To this end, rather than letting these issues sit until it is time to set a formal meet and confer in advance of a motion to compel, it is worth communicating with the opposing party more informally to address what appear to be oversights, mistakes, or inadvertently poor entries. Try to narrow the issues before engaging in more contentious discovery dispute resolution.

2. Formal meet-and-confer.

Typically, the applicable rules will require that parties hold a formal "Meet and Confer" prior to the filing of a motion.¹⁵⁰ Even if the filing of a motion is not imminent, a formal conference should be set when informal discussions have reached a stalemate or when issues with a privilege log appear to be intentional, systemic, or involve genuine issues regarding how the law should be applied to a particular document.

A formal conference can be used to identify any areas where the parties agree, where a compromise can be had, and where court intervention is needed. To this end, consider providing a concrete plan for the conference with a scope of the issues to be discussed. Identify the specific

¹⁵⁰ E.g., FED. R. CIV. P. 37(a)(1); Cal. Civ. Proc. Code § 2016.040; La. Dist. Ct. R. 10.1; N.C. Gen. Stat. Ann. § 1A-1, R. 37(a)(2).

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document identifiers, log entries, or categories and the claimed deficiencies so that a constructive discussion can be had about them. Remember that, a specific and well-defined concern is more likely to be considered than an ambiguous complaint. For example, where the receiving party has insufficient information to assess the privilege asserted via a categorical log, the receiving party should specify what additional information they need. If particular entries are at issue, be as specific as possible in explaining why they are deficient. Then, use the conference to resolve misunderstandings and narrow the issues.

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

3. *In camera* review.

The failure of parties to provide sufficient information on a privilege log can lead to such logs being of little use.¹⁵¹ One mechanism parties have employed to address this issue is seeking *in camera* review of some or all of the documents by the court. This has become, however, a time-consuming process for courts. Whether to conduct an *in camera* review lies within the court's discretion and should not be conducted if review is not warranted.¹⁵² The decision on whether to conduct *in camera* review turns on many factors including the needless use of the court's resources.¹⁵³ To reduce the burden and to preserve the court's resources, a court may

¹⁵¹ See, e.g., *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 99 (D.D.C. 2012) ("But, the descriptor in the modern database has become generic...the human being creates one description and the software repeats that description for all the entries for which the human being believes that description is appropriate. . . This raises the term 'boilerplate' to an art form, resulting in the modern privilege log being as expensive to produce as it is useless."). See also *Earthworks v. U.S. Dep't of the Interior*, 279 F.R.D. 180, 193 (D.D.C. 2012); *Lurensky v. Wellinghoff*, 271 F.R.D. 345, 355 (D.D.C. 2010) (finding "privilege logs to be on the whole useless"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-489(PLF/JMF/AK), 2009 WL 3443563, at *10 (D.D.C. Oct. 23, 2009); *Marshall v. D.C. Water & Sewage Auth.*, 214 F.R.D. 23, 25 n.4 (D.D.C. 2003); *Mitchell v. Nat. R.R. Passenger Corp.*, 208 F.R.D. 455 (D.D.C. 2002); *Avery Dennison Corp. v. Four Pillars*, 190 F.R.D. 1, 2 (D.D.C. 1999) ("I have found that counsel rarely provides more than minimal information in the logs they submit which usually tell me the date of the document, its author and recipient, and the briefest possible description of its contents ('Letter from client to attorney'). Finding such a log useless, I have instead cut to the quick and ordered the production of the documents at issue.").

¹⁵² See, e.g., *Washtenaw Cty. Emps.' Ret. Sys. v. Walgreen Co.*, No. 15 C 3187, 2020 WL 3977944, at *3 (N.D. Ill. July 14, 2020) ("But ultimately the question of whether to engage in an *in camera* review lies within the Court's discretion, and the Court ought not to engage in an *in camera* review of even a manageable number of documents if the review is not warranted. Where a court's discretion is involved, two judges can reach two correct yet contrary conclusions based on identical fact patterns.") (citations omitted).

¹⁵³ See, e.g., *Washtenaw*, 2020 WL 3977944, at *3 (citing *Am. Nat. Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc. of the United States*, 406 F.3d 867, 879-880 (7th Cir. 2005)) ("The judicial discretion to review the described documents *in camera* has turned on multiple factors, including the burden involved in reviewing the sheer number of documents, but the thrust of these cases is that *in camera* review is more critical before compelled disclosure, so courts might make sure that the disclosed materials truly are not privileged."); see also *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 307 (D.D.C. 2009) ("[D]eeming the log a waiver is the most draconian but the

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provide guidance to parties to apply to contested documents and recurrent privilege issues.¹⁵⁴ In addition, judge's may consider the use of special discovery masters to help parties secure prompt resolution of discovery disputes, including potential *in camera* review of contested documents. However, requiring a log with details describing the privilege may alleviate the need for *in camera* review.¹⁵⁵

C. Certification of Process and/or Log.

To resolve or head off a dispute, parties and courts may consider the use of certifications relating to the privilege log process. Such limited certifications can inform receiving parties about the privilege log process and build trust between the parties about the privilege log. Because privilege logs are arguably covered by Rule 26(g) (certifying discovery responses, disclosures, and objections), parties can also use meet and confers and ESI protocols to inform each other of their privilege log processes without a separate certification. This section describes types of certifications that can be used and some of the few situations where certifications are required.

1. Types of certifications.

Parties can consider using several different types of certifications. For example, in cases where a receiving party can identify issues with a party's privilege log, courts have ordered a certification from counsel that (1) the documents on the privilege log were reviewed by an attorney; and (2) the attorney made a good faith determination that the documents are privileged.¹⁵⁶ When using a categorical privilege log, attorneys may provide an affidavit attesting to facts supporting the privileged or protected status of documents in that category.¹⁵⁷ Attorneys might also certify that certain individuals listed on a privilege log are officers, employees, or other individuals protected by the attorney client privilege.¹⁵⁸

least consumptive of judicial resources while *in camera* inspection of all of the withheld documents is the most forgiving but the most consumptive of judicial resources.”).

¹⁵⁴ See, e.g., *Chabot v. Walgreens Boots All., Inc.*, No. 1:18-CV-2118, 2020 WL 3410638, at *3 (M.D. Pa. June 11, 2020) (“To lessen the burdens associated with *in camera* review, the Court may dictate its holding on contested issues, which the parties will then apply when determining whether its documents are privileged.”).

¹⁵⁵ See, e.g., *Bethea v. Merchants Com. Bank*, No. 11-51, 2012 WL 5359536, note 5 (D.V.I. Oct. 31, 2012) (“[p]roviding information [a description] pertinent to the applicability of the privilege or protection should reduce the need for *in camera* examination of the documents.”).

¹⁵⁶ E.g., *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, 2018 WL 2676165, at *1 (N.D. Ala. Jan. 29, 2018) (noting that the magistrate judge had required the responding party to “certify that each document listed had actually been examined and determined to be privileged”); see *Wells v. Gen. Dynamics Info. Tech., Inc.*, No. DKC 11-2748, 2011 WL 5036022, at *4 (D. Md. Oct. 21, 2011) (requiring husband of the plaintiff responding to a subpoena pro se to include the following certification on his privilege log “I hereby certify under the penalty of perjury that the information contained herein is accurate and correct to the best of my information and belief”).

¹⁵⁷ The Facciola-Redgrave Framework, 4 Fed Cts. L. Rev. 20, 47 (2009).

¹⁵⁸ E.g., *Christian Coal. Int'l v. United States*, No. 2:01CV377, 2002 WL 1482523, at *3 (E.D. Va. May 31, 2002).

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Understanding that perfection is not the standard in discovery, a certification can be used to describe the process a responding party uses to create the privilege log and certify that the process was followed in good faith and with reasonable diligence. It should be noted that Sedona cautions that unless parties agree otherwise, they “should not be required to produce documentation of their discovery processes unless there has been a showing of a specific deficiency in their discovery processes (*see* Comment 6.b.), and, even then, the production requirement is subject to the normal protections afforded by the attorney-client privilege or the work product doctrine.”¹⁵⁹ In some situations, parties have used a certification of the process to replace providing a full privilege log. For example, in a case involving a significant number of potentially-privileged documents, a court endorsed a certification in lieu of generating a full privilege log that: (1) attested to the sufficiency of the privilege review; and (2) provided a reasonable estimate of the number of withheld documents.¹⁶⁰ The court also required the party to log any allegedly privileged documents that were shared with third parties.¹⁶¹

2. Required certifications: Rule 26(g), local rules, and rules of professional conduct.

Most applicable rules do not explicitly require attorneys to provide any kind of certification for privilege logs. One of the few jurisdictions to require certifications of privilege logs is the New York State Supreme Court.¹⁶² Its Commercial Division Rules establish a “preference . . . for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs.”¹⁶³ The rule also requires a certification when using a categorical privilege log. In establishing a preference for categorical privilege logs, Rule 11-b also requires the responding party to certify “with specificity those facts supporting the privileged or protected status of the information included within the category.”¹⁶⁴ Additionally, the certification must “describe the steps taken to identify the documents so

¹⁵⁹ The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production A Project of the Sedona Conference Working Group on Electronic Document Retention and Production*, 19 SEDONA CONF. J. 1, 127 (2018). Other commentators advocate for transparency regarding a responding party’s discovery process. *E.g.*, Paula Schaefer, “*Trust Me*” *Versus Transparency in Civil Document Discovery*, 50 U. Tol. L. Rev. 491, 500 (2019).

¹⁶⁰ *Fifty-Six Hope Road Music, Ltd. v. Mayah Collections, Inc.*, No. 2:05-cv-01059-KJD-GWF, 2007 WL 1726558, at *6-8 (D. Nev. June 11, 2007).

¹⁶¹ *Id.*; *see* Lake as Tr. of Richard D. Lake Revocable Living Tr. Dated Aug. 24, 2011 v. Charlotte Cty. Bd. of Cty. Commissioners, No. 2:20-CV-809-JLB-NPM, 2021 WL 2351178, at *2 (M.D. Fla. June 9, 2021) (ordering that in lieu of producing a privilege log, the subpoenaed parties could categorically withhold privileged documents if they produced a “certification by both the subpoenaed party and [the plaintiff trustee] that none of the withheld or redacted documents were distributed to or reviewed by anyone other than [the trustee], [the trustee’s] counsel, [the subpoenaed individuals], or their respective staffs”).

¹⁶² The New York State Supreme Court is a trial court in the State of New York.

¹⁶³ N.Y. Ct. R. 202.70, Rule 11-b(b)(1).

¹⁶⁴ *Id.*

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categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted.”¹⁶⁵ In addition to following this procedure when practicing in jurisdictions where it is required, a responding party might consider providing a similar certification when producing a categorical privilege log in other jurisdictions to address some of the receiving party’s concerns and attempt to avoid a dispute.

In federal court, the process of asserting a privilege is controlled by Rule 26(b)(5) and Rule 45(e)(2)(A)), which, as discussed above, both require a responding party withholding information on the basis of privilege or work product-protection to expressly make the claim and to describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. Neither Rule requires such descriptions be certified by counsel.

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

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

...

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

- (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
- (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
- (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.¹⁶⁶

An attorney that signs a discovery request, response, or objection that violates Rule 26(g) without substantial justification faces sanctions, either by party motion or the court on its own.¹⁶⁷

While Rule 26(g) governs a party’s assertion of privilege, it is less clear whether Rule 26(g) applies to the format of privilege logs or the process parties use to generate privilege logs.¹⁶⁸ Courts occasionally turn to Rule 26(g) to impose sanctions in the privilege log context,

¹⁶⁵ *Id.*

¹⁶⁶ FED. R. CIV. P. 26(g)(1)(B).

¹⁶⁷ *Id.* 26(g)(3).

¹⁶⁸ Courts occasionally reference Rule 26(g) obligations in the privilege log context, and in at least one case, a court admonished a party to bear in mind Rule 26(g) when re-doing a privilege log to provide better descriptions. *E.g.*, *Kosjer v. Coffeyville Res. Crude Transportation, LLC*, No. 17-1181-JTM, 2018 WL 1151515, at *4 n. 15 (D. Kan.

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though this does not appear to be common.¹⁶⁹ In these scenarios, courts have found that deficient privilege logs undermine the basis for objecting to discovery requests, complete with a Rule 26(g) signature, on privilege grounds. Thus, the courts' use of 26(g) certifications has remained tethered to counsel's assertion of privilege and not to the contents of the log or the process used in preparing it.

Rules of professional conduct do not require the use of certifications, though a number of rules likely apply to the process of preparing a privilege log or challenging a privilege log.¹⁷⁰ Accordingly, while counsel should always be guided by their professional obligations, turning to the rules of professional conduct is not likely to be a useful endeavor when attempting to resolve privilege log disputes.

Certifications are not typically required, but counsel should determine and follow the applicable local rules. Even where certifications are not mandated, however, the use of certifications remains a tool that parties can use to build trust and resolve disputes over the form and content of privilege logs. They are also, on rare occasions, a tool used by courts to resolve privilege disputes.

V. CONCLUSION

The privilege logging process can be fraught with challenges and burdens. This Commentary suggests ways to mitigate the burdens on both sides—allowing the responding party to minimize the burdens associated with preparing a privilege log and protecting its privilege claims and the receiving party to minimize its burdens associated with assessing those claims. A key ingredient to this process is cooperation among the parties. As a result, parties

Mar. 5, 2018) (counsel “would be well-advised to comply with the certification requirements of Fed. R. Civ. P. 26(g), lest they incur sanctions by way of attorneys’ fees”); *Rhodes v. Ingram*, No. 7:13-CV-192-BR, 2015 WL 1038136, at *4 (E.D.N.C. Mar. 10, 2015) (requiring that the responding party seeking to assert a privilege “must expressly state it in response to the particular discovery request involved and serve with the discovery responses a privilege log in conformance with Rule 26(b)(5)(A) that is signed in accordance with Rule 26(g)”). However, these Rule 26(g) signatures apply to the reasonableness of the privilege assertion rather than the process the parties used to create the privilege log.

¹⁶⁹ *In re Spoonemore*, 370 B.R. 833, 840 (Bankr. D. Kan. 2007); *Precision Pine & Timber, Inc. v. United States*, No. 98-720 C, 2001 WL 1819224, at *6 (Fed. Cl. Mar. 6, 2001).

¹⁷⁰ Rule 9 of the ABA Model Rules for Lawyer Disciplinary Enforcement provides grounds for discipline that include violating rules of professional conduct of any jurisdiction and willfully violating a valid order of the court imposing discipline. ABA Model Rule 3.1 requires a lawyer not assert an issue in a proceeding “unless there is a basis in law and fact for doing so that is not frivolous” and ABA Model Rule 3.3, prohibits a lawyer from knowingly making a false statement of fact or law or fail to correct a false statement of material fact or law previously made to the tribunal. These rules might apply to the assertion of a privilege objection, including representations made in court during a privilege challenge, or the contents of the log itself in the same way as Rule 26(g). ABA Model Rule 3.4(d) prohibits a lawyer from failing to make a “reasonably diligent effort to comply with a legally proper discovery request by an opposing party.” *See also* Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, 30 Geo. J. Legal Ethics 1, 17 n. 105 (2017)). Importantly, though, “discipline referrals and the imposition of discipline for document discovery misconduct that occurred in federal court are exceedingly rare.” *Id.* at 20.

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should endeavor to address as many privilege log issues as possible early in the discovery process, including through the Rule 26(f) conference and discovery protocols.

One simple but effective way to reduce burdens for a responding party is to seek agreement that certain categories of documents may be excluded from a privilege log altogether. As detailed above, this Commentary suggests that traditional privilege logging does not materially add to the necessary threshold showing of privilege substantiation for (1) communications with counsel after the commencement of the litigation and (2) redacted documents. As to the former category, there will undoubtedly be certain situations where those communications may be pertinent to the litigation, but that is expected to be the exception, not the rule. And as expressed above, if done properly, the redacted production image (with corresponding metadata) will provide the receiving party with the information needed to assess the claim of privilege as to a large portion of the production. By excluding both types of documents from inclusion on privilege logs, the responding party's burden to prepare a log containing entries that truly need to be evaluated is diminished, and the receiving party's burden of assessing the sufficiency of the information provided on those logs is likewise reduced.

In addition, the use of alternative log formats may help parties strike a balance between providing information necessary to support a privilege claim without having to generate a costly traditional document-by-document privilege log. This Commentary proposes that a metadata plus topic log will generally be the best format to streamline the privilege log process in a way that is beneficial to both parties. For most documents, the metadata of the document being withheld, coupled with a topic to further describe the nature of the document in a simplistic manner, and an explicit reference to the basis for withholding (e.g., privilege, work product), will be sufficient to allow the receiving party to assess the validity of the claimed privilege. If this is not the case for a particular set of documents, the requesting party can solicit additional information. But engaging in that effort for a fraction of withheld documents involves a lesser effort, in terms of time, cost, and items of dispute, for both parties, than the traditional manner of logging.

When parties reach an impasse regarding the how, what, and when of privilege logs, courts are called upon to resolve the disputes. Typically, an undue burden analysis has been used to assess whether and to what extent a responding party may employ means other than a traditional log to satisfy the requirements of Rule 26(b)(5)(A). The 2015 Amendments to the Federal Rules of Civil Procedure brought the concept of proportionality to the fore and courts have provided varying, but limited, guidance as to whether the proportionality factors of Rule 26(b)(1) apply to privilege logs. Regardless of which standard is applied by a specific court in a specific litigation, however, this Commentary affirms that when there are disputes about privilege logs, the burden rests with the responding party to satisfy Rule 26(b)(5)(A)—although, as a practical matter, the requesting party may be called upon to support its position for why it may need more information than has been provided.