



**COMMENT
to the
DISCOVERY SUBCOMMITTEE
of the
ADVISORY COMMITTEE ON CIVIL RULES**

August 1, 2021

AN UPDATED PROPOSAL FOR IMPROVING PRIVILEGE LOG PROCESS

Lawyers for Civil Justice (“LCJ”)¹ respectfully submits this Comment to the Discovery Subcommittee of the Advisory Committee on Civil Rules (“Subcommittee”) in response to its Invitation for Comment² on privilege log practice.

INTRODUCTION

Today’s *de facto* requirement for document-by-document logging is a “one-size-fits-all” regime that induces overlogging and imposes significant burdens on parties, non-parties, and courts. The Subcommittee has read LCJ’s August 2020 suggestion³ to replace the document-by-document default with a rule-based presumption favoring categorical logging and excluding certain categories of material from privilege logs, but noted that our specific rule proposal seemed more limited than that.⁴ LCJ now updates its submission with the attached revised proposal (“LCJ’s Revised Proposal”). LCJ’s Revised Proposal will curtail overlogging while protecting the ability of parties to obtain more specific information as warranted, achieving a much-needed balance while focusing parties and courts on the substantive issues in dispute.

¹ Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

² Available at <https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment/invitation-comment-privilege-log>.

³ Lawyers for Civil Justice, *Privilege And Burden: The Need To Amend Rules 26(B)(5)(A) And 45(E)(2) To Replace “Document-By-Document” Privilege Logs With More Effective And Proportional Alternatives* (August 4, 2020), available at https://www.uscourts.gov/sites/default/files/20-cv-r_suggestion_from_lawyers_for_civil_justice_-_rules_26_and_45_privilege_logs_0.pdf (hereinafter, “LCJ Suggestion”).

⁴ Report by the Advisory Committee on Civil Rules to the Standing Committee (May 21, 2021), available at https://www.uscourts.gov/sites/default/files/2021-06_standing_agenda_book_final_6-23_0.pdf.

I. LCJ’s Revised Proposal Establishes a Presumption in Favor of Categorical Logging—While Protecting More Particularized Logging When Needed

Rules 26(b)(5)(A) and 45(e)(2)⁵ should establish the presumption of categorical logging while allowing more comprehensive logging when justified by the needs of the case and the materiality of the information. The default to document-by-document logging for all materials is based on a flawed premise that each document (or redacted portion) should be treated with equal detail. Because documents and privilege claims differ greatly, so should their treatment, and subdivisions (A), (B) and (C) of LCJ’s Revised Proposal make this clear. Of course, certain materials may require detailed description, and LCJ’s Revised Proposal provides simple procedural guidance for achieving that in subdivisions (B) and (C). These provisions would help parties, non-parties, and courts to make appropriate decisions about logging, recognizing that resources devoted to identifying, logging and resolving disputes about privileged documents are often out of proportion to the needs of the case, particularly when the parties do not have or anticipate disputes over withheld documents. For non-parties facing the prospect of producing a privilege log pursuant to Rule 45, such transparency may be even more important. Although Rule 45 makes clear that non-parties should be entitled to greater protection against undue burdens, it fails to provide it expressly with respect to privilege logging. Rule 45 has no mechanism to facilitate categorical privilege logging by non-parties.

II. LCJ’s Revised Proposal Would “Codify” the Presumption that No Logging Is Required for Privileged and Trial-Preparation Materials Created After the Complaint is Filed

One of the most important functions of the FRCP is to provide clear guidance on issues that generate frequent, and largely pointless, satellite litigation despite being largely settled questions. In the realm of privilege logging, the issue that squarely fits that description is whether parties are required to provide logs of trial-preparation documents created after the commencement of litigation. Communications between counsel and client regarding the litigation after service of the complaint are privileged absent highly extraordinary circumstances. Similarly, communications exclusively between a party’s in-house counsel and outside counsel during litigation are also clearly within the privilege and almost never will be admissible in the substantive case. Unfortunately, because of the current lack of clarity in the rules and disparate case law in the circuits (as noted in LCJ’s original submission), parties frequently wrangle over whether documents in these categories must be logged. Rule 26(b)(5)(A) should reflect the reality that this category of materials is so unlikely to contain non-privileged information that any sort of logging should be the exception rather than the rule. Such a presumption, which is incorporated in Section (D) of the Revised Proposal, would improve the efficiency of litigation while reducing the acrimony that can develop when gray areas exist. It would also preserve everyone’s ability to obtain for more detail when a need is demonstrated. This clarity would reduce disputes regarding the scope of logging that arise under today’s *de facto* rule that all documents must be specifically described.

⁵ LCJ’s Revised Proposal expressly address Rule 26, but we suggest a parallel amendment to Rule 45.

III. LCJ's Revised Proposal Sets Forth Clear Procedures for Motions to Compel Production of Withheld Information—and Recognizes that Logs are Discovery Tools Rather than the Basis for Judicial Determinations of Privilege

It is well understood that privilege logs are discovery tools (and too often, strategic weapons in discovery battles) rather than the mechanism for providing courts a sufficient basis for determining privilege disputes. “Indeed, many judges will acknowledge that resolving privilege challenges almost always requires the *in camera* examination of the documents, and the logs are of little value when trying to determine the accuracy of either the factual or legal basis upon which documents are being withheld from production.”⁶ The rules governing logging should recognize this reality while setting forth clear procedural standards for resolving privilege disputes. To address motions to compel based upon categorical logs, Section (F) of LCJ's Revised Proposal provides that: (a) the responding party shall provide a description of a reasonable sample of the disputed items that is sufficient to permit the court to assess the privilege claim; (b) the court may order a document-by-document log; and (c) production orders cannot be based upon categorical descriptions, but rather must reflect a determination that each item to be produced is not privileged. And for the benefit of courts and parties alike, LCJ's Revised Proposal permits parties to submit items for *in camera* review only when the court has determined that it cannot assess the basis for withholding by the description provided. Such provisions will provide procedural transparency to the parties (and non-parties) while, importantly, protecting judicial resources by limiting *in camera* review to instances when it is necessary.

CONCLUSION

LCJ's Revised Proposal seeks to focus disputes regarding privilege withholding on an efficient and balanced process that minimizes court involvement. It is consistent with the 1993 Committee Note to Rule 26(b)(5), which contemplates that detailed logging such as document-by-document privilege logs may be suitable when only a few items are being logged, but identification by category is more appropriate in other circumstances. Unfortunately, the Committee's 1993 insight has been misunderstood or ignored, and now Rule 26(b)(5)(A) and its case law progeny have institutionalized a “one-size-fits-all” rule in the form of a *de facto* default to “document-by-document” overlogging. It is time for the Committee to rework the rule and include clear guidance in the Rule text itself while providing flexibility that permits the parties or

⁶*The Sedona Conference, Commentary on Protection of Privileged ESI*, *supra* note 4, at 103 (internal citation omitted). Judge Paul Grimm previously recognized the current incentive for collateral disputes:

Requesting parties also know of the limited utility of privilege logs (for they likely have served similar privilege logs in response to their adversary's discovery requests), and thus, when they receive the typical privilege log, they are wont to challenge its sufficiency, demanding more factual information to justify the privilege/protection claimed. This, in turn, is often met with a refusal from the producing party, and it does not take long before a motion is pending, and the court is called upon to rule on the appropriateness of the assertion of privilege/protection, often with the producing party's “magnanimous” offer to produce the documents withheld for *in camera* review. *In camera* review, however, can be an enormous burden to the court, about which the parties and their attorneys often seem to be blissfully unconcerned.

Victor Stanley, Inc., 250 F.R.D. at 265.

the court to employ the logging procedure that best meets the needs of the case. An amendment along the lines of LCJ's Revised Proposal is strongly needed because it would motivate and enable parties, non-parties, and courts to customize logging procedures (and develop new and emergent technologies) to the needs of each case. By prioritizing the most important issues, such an amendment would also serve to reduce the number of privilege claims at issue between the parties.

LCJ's REVISED PROPOSAL

Proposed Amended Rule 26(b)(5)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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