**SUGGESTION FOR RULEMAKING**
**to the**
**ADVISORY COMMITTEE ON CIVIL RULES**

# 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

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Suggestion for Rulemaking to the Advisory Committee on Civil Rules ("Committee"), recommending amendments to Rule 26(b)(5)(A) and Rule 45(e)(2) of the Federal Rules of Civil Procedure ("FRCP") that would modernize the procedure for withholding otherwise discoverable information under claims of privilege or other protection and replace "document-by-document" privilege logs with more effective and proportional alternatives. Rule 25(b)(5)(A), adopted prior to the explosion of electronically stored information ("ESI"), has remained untouched for over twenty-five years. The time has come to amend rule 26(b)(5)(A) to reflect best practices and eliminate the disparities among local rules.

## I. INTRODUCTION

"[T]he modern privilege log [is] as expensive to produce as it is useless."[2] This conclusion – widely shared by judges, litigants, and litigators – is based on common experience with producing, receiving, and ruling on "document-by-document" privilege logs. Importantly, this indictment of the status quo is not a castigation of counsel preparing logs but a critique of prevailing practices and existing rules. The inherent difficulties in describing applicable privileges for all withheld documents individually have been compounded by the geometric growth of ESI, often resulting in claims by requesting parties that privilege logs fail to meet the standard of Rule 26(b)(5)(A)(ii) or provide sufficient information to resolve privilege claims.

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[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal civil 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] *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 99 (D.D.C 2012).

These challenges provoke a large amount of satellite litigation unrelated to the merits of the case.[3]

The burdens of preparing privilege logs, the inherent futility of many logging exercises, and the resulting collateral disputes arise from Rule 26(b)(5)(A) and its case law progeny. Some courts interpret the Rule as establishing a *de facto* default to "document-by-document" logs by interpreting the "expressly make the claim" language to require document-by-document logging. While the 1993 Advisory Committee Note indicates that alternative approaches could be considered, few litigants or courts follow that advice. That such a "default" expectation exists is evident in a plethora of cases requiring that producing parties must provide "document-by-document" logs in order to maintain claims of privilege.

Recognizing the ineficiencies of document-by-document privilege logs and collateral disputes, several district courts have adopted local rules or guidance that embrace the flexibility intended by the Advisory Committee Note. Consequently, a patchwork of different standards has emerged, resulting in today's lack of uniformity among federal districts.[4]

The Committee should modernize the procedures for privilege logs to provide greater procedural clarity and consistency and make them more useful, efficient, and proportional to the needs of the case. The amendments proposed in Attachment A and Attachment B (the "Proposed Amendments") are targeted to reduce the disputes that ultimately require judicial attention and resolution as well as promote procedural consistency and predictability without imposing an inflexible standard for form and content. The Proposed Amendments motivate and enable parties (and subpoenaed non-parties) to customize logging procedures and log content proportional to the needs of each case, while assuring the appropriate scope of information subject to logging, clarifying the standards, and reserving a role for the court in the event that the parties need guidance. The Proposed Amendments endorse: (1) categorical logs where appropriate in cases (with sampling and provisions to ascertain whether privilege claims are factually and legally sound); (2) iterative logging (moving from broad categories or summary logs to more detailed logs for subsets of important, material documents); (3) excluding from logging categories of communications that are facially privileged; (4) alternative logging protocols for particular types of linked/serial communications (e.g., emails); (5) procedures for privilege challenges and limitations of challenges to truly material and unique information; and (6) other procedures and protocols that either technology or the creativity of parties, counsel, and the bench may devise.

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[3] The authors used a Westlaw search (lasted updated on 1/9/2020) in the ALLFEDS databases using the following search syntax "privilege /s index log /s insufficient waiv! fail! & date(aft 10/01/2006)" to find cases where there was an attack on a privilege log as being insufficient, a failure, or should result in a waiver of privileges. The search pulled back 4,018 cases and more than 10,000 "trial court documents." A cursory examination of selected cases demonstrates the extraordinary amount of time and effort invested in logging, logging disputes, and court involvement in resolving these disputes.

[4] *See The* Sedona Conference *Commentary on Protection of Privileged ESI, 17 SEDONA CONF. J.* 95, 156 (2016) ("The process of logging is further complicated by the lack of a uniform standard applied by the courts regarding the adequacy of the content of privilege logs.").

## II. BACKGROUND

Since 1993, Rule 26(b)(5)(A) and Rule 45(e)(2) have directed litigants and non-parties withholding documents from production based on claims of privilege or work product protection to identify those documents in a manner that "will enable other parties to assess the claim."[5] The *de facto* default method of doing so (reflected in most relevant case law) is for the withholding entity to prepare a log of all withheld records on a "document-by-document basis."[6] But a comprehensive document-by-document logging method should be used only infrequently, when clearly justified by the needs of the case and the materiality of the information. Such logs are expensive to produce and inefficient in conveying useful information,[7] and they frequently lead to disputes that require *ex parte* and *in camera* reviews by courts. The default to document-by-document logging is based, in part, on a flawed premise that each document (or portion of document) should be treated with equal detail when, in reality, documents and the foundation of the privilege and protection claims differ greatly. Some categories of documents and communications are by their authorship, exchange, or content transparently privileged or protected, while others merit more information. The exponential proliferation of ESI since Rule 26(b)(5)(A) was enacted in 1993 has rendered the current practices unworkable.

Although the Committee has retooled many rules to equip parties, counsel, and the courts to address discovery issues related to ESI, Rule 26(b)(5) largely has been left behind. And despite

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[5] Specifically, Fed. R. Civ. P. 26(b)(5)(A) provides:

> **(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;
> **(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.

[6] *See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 159 comment 10.h (2018) ("[T]he precise type and amount of information required to meet the general standard set forth in Rule 26(b)(5)(A)(ii) varies among courts…").

[7] *See* Hon. John M. Facciola & Jonathan M. Redgrave, ASSERTING AND CHALLENGING PRIVILEGE CLAIMS IN MODERN LITIGATION: The Facciola-Redgrave Framework, 4 FED. CTS. L. REV. 19 (2010) ("The authors submit that the majority of cases should reject the traditional document-by-document privilege log in favor of a new approach that is premised on counsel's cooperation supervised by early, careful, and rigorous judicial involvement."); *see also Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008) (emphasis added):

> 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. *Few judges find that the privilege log is ever sufficient to make the discrete fact-findings needed to determine whether a privilege/protection was properly asserted and not waived.*

the 1993 Committee Note to Rule 26(f) regarding flexibility with respect to privilege logging,[8] rulemaking is required to provide guidance about optional methods due to the continued adherence to inflexible, archaic standards.

Adopting the Proposed Amendments would enhance efficiency and expedite litigation by enabling parties to work collaboratively and creatively to avoid needless costs and disputes, saving judicial resources. The Proposed Amendments would also permit the parties to develop new and emergent technologies, including technology applications that automatically identify privileged documents and ESI, and extracting information for automated logging. Finally, the Proposed Amendments would bring uniformity to the best practices that have developed in many federal courts pursuant to local rules and pilot programs.

## III. CURRENT PROCUDRES GOVERNING PRIVILEGE LOGS ARE OVERBURDENSOME, DISPROPORTIONAL, AND OFTEN UNHELPFUL

### A. Document-by-Document Privilege Logs are Very Time Consuming and Expensive to Produce.

Indiscriminate document-by-document privilege logs are one of the most labor-intensive, burdensome, costly and wasteful parts of pretrial discovery in civil litigation,[9] and many courts have interpreted current rules 26(b)(5)(A) and 45(e)(2) as making document-by-document logs the default form. The costs associated with creating traditional privilege logs have become a significant - possibly the largest - category of pretrial spending for litigants in document-intensive litigation.[10] The Sedona Conference has recognized that "[i]n complex litigation, preparation of [privilege] logs can consume hundreds of thousands of dollars or more. . . ."[11] Typically, preparing such logs requires lawyers to identify potentially privileged documents, conduct extensive research into the elements of each potential claim, make and then validate initial privilege calls, and then construct a privilege log describing each withheld document

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[8] FED. R. CIV. P. 26(b)(5) advisory committee's note to 1993 amendment:

> 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 categories.

[9] *See* New York State Bar Association, REPORT OF THE SPECIAL COMMITTEE ON DISCOVERY AND CASE MANAGEMENT IN FEDERAL LITIGATION, at 73 (June 23, 2012) ("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.").

[10] *The Sedona Conference, Commentary on Protection of Privileged ESI, supra* note 4, at 155 ("Privilege logging is arguably the most burdensome and time-consuming task a litigant faces during the document production process.").

[11] *The Sedona Conference, Commentary on Protection of Privileged ESI, supra* note 4, at 103; *see also* New York State Bar Association, *Report of the Special Committee on Discovery and Case Management in Federal Litigation*, at 73 (June 23, 2012) ("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.").

without disclosing privileged or protected information. In jurisdictions where all emails in an email chain must be separately itemized on a privilege log, the degree of difficulty is increased many fold.[12] For example, metadata that can be used to populate the log entry automatically, e.g., author and recipients, is available only for the most recent email in a chain, and information for all other emails in the chain must be manually entered on the log. Even in cases with relatively modest quantities of discoverable documents and ESI, this labor-intensive procedure results in substantial costs.[13]

### B. Document-by-Document Privilege Logs Are, By Their Nature, Rarely Proportional to the Needs of the Case.

The 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. It is a rare case in which privileged documents, whether the claim is sustained or overruled, are introduced as evidence and have any discernible effect on the outcome of the litigation. Although there are exceptional instances where documents withheld as privileged are central to resolving the issues, the current default of "boiling the ocean" is unjustified when rules with sufficient flexibility (such as the Proposed Amendments) would enable targeted identification and adjudication when appropriate.

A proportional approach is perhaps even more important for non-parties facing the prospect of producing a privilege log pursuant to Rule 45. While Rule 45 makes clear that non-parties should be entitled to greater protection against undue burdens, it fails to provide it. There is no current mechanism in Rule 45 to facilitate scaled and proportional approaches to privilege logs by non-parties.

The logic behind revising Rule 45 is highlighted by the January 2020 release of The Sedona Conference's revised Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition (Public Comment Version).[14] The document specifically notes the need to consider alternative logging:

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[12] *See In re Universal Serv. Fund Tel. Billing Practices Litig*., 232 F.R.D 669, 674 (D. Kan. 2005). The court in *In re Universal Serv. Fund* recognized:

> requiring each e-mail within a strand to be listed separately on a privilege log is a laborious, time-intensive task for counsel. And, of course, that task adds considerable expense for the clients involved; even for very well-financed corporate defendants such as those in the case at bar, this is a very significant drawback to modern commercial litigation. But the court finds that adherence to such a procedure is essential to ensuring that privilege is asserted only where necessary to achieve its purpose.

*Id.*

[13] *See 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) ("[p]laintiffs assert that production of a document-by-document privilege log would cost them $150,000 and take three to four weeks.") (plaintiff's log in *First Horizon* was to describe 5,941 documents, a cost of $25.25 per entry. ECF No. 186, Plaintiff's Opposition).

[14] *Available at* https://thesedonaconference.org/publication/Commentary_on_Non-Party_Production_and_Rule_45_Subpoenas.

> Practice Pointer 15. Rule 45(e)(2)(A) and (B) require a non-party subpoena recipient to, among other things, expressly make a "claim [of privilege] and the basis for it" and set forth a process for the handling of the inadvertent production of such information. 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, where appropriate, should agree to alternatives to the traditional privilege log.[15]

### C. Document-by-Document Privilege Logs Frequently Fail to Assist Parties or Courts to Resolve Privilege Issues.

Privilege disputes are most often collateral to the issues in the case and often involve form over substance. Unfortunately, document-by-document privilege logs are frequently of marginal value to the requesting party and the court in assessing the privilege claims, despite the time, effort and money spent preparing them.[16] Privilege logs also rarely 'enable other parties to assess the claim' as contemplated by Rule 26(b)(5). Nor do the logs achieve the other goal of the rule - to 'reduce the need for *in camera* examination of the documents.' "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. In short, the procedure and process for protecting privileged ESI from production is broken."[17]

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[15] *Available at* https://thesedonaconference.org/publication/Commentary_on_Non-Party_Production_and_Rule_45_Subpoenas at p.43.

[16] *TheSedona Principles*, *supra* note 6, at p. 81 ("[o]ften, the privilege log is of marginal utility."); *id at* p. 159, Comment 10.h ("[T]he precise type and amount of information required to meet the general standards set forth in Rule 26(b)(5)(A)(ii) varies among courts, and frequently fails to provide sufficient information to the requesting party to assess the claimed privilege."); *Auto. Club of New York, Inc., v. Port Authority of New York and New Jersey*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) ("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.") (internal citation omitted); *The Sedona Conference, Commentary on Protection of Privileged ESI*, *supra* note 4, at 155. ("[T]he deluge of information and rapid response time required by pressing dockets have forced attorneys into using mass-production techniques, resulting in logs with vague narrative descriptions. In some instances, the text of privilege logs 'raise[] the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive to produce as it is useless.'").

[17] *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*

### D. Disparate Local Rules Regarding Privilege Logs Demonstrate the Need for Amendments to the FRCP that Update and Unify Privilege Log Practices.

In the absence of new national rulemaking many district courts across the country have attempted to address the problems with Rules 26 and 45 by adopting local rules and standing orders that provide for limits on logging requirements and endorse alternative methods of privilege logging.[18] While some of these rules reduce the burdens in creating logs, others create new burdens. And while some are consistent with each other, others are in conflict.[19] But all indicate a need to modernize the current regime and address procedural inconsistencies that result in uncertainty and the consequential inability to predict and meet differing logging procedures. Here is a sampling:

- In the District of Connecticut, Local Rule of Civil Procedure 26(e) reduces the scope of privilege logs by providing that a party need not prepare a privilege log for "written or electronic communications between a party and its trial counsel after commencement of

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> *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.

[18] Even in jurisdictions where courts have not undertaken larger-scale efforts to address the problem of logging privileged documents in the digital age, a growing number of courts have recognized the appropriateness of categorical privilege logs based on the burden imposed by individual logs and lack of benefit they provide. *See, e.g.*, *Asghari-Kamrani v. U.S. Auto. Ass'n*, No. 2:15-cv-478, 2016 WL 8243171, at *1– 4 (E.D. Va. Oct. 21, 2016) (finding party's categorical privilege log complied with 26(b)(5) and holding that requiring plaintiffs to separately list each of the 439 documents categorically logged would be "unduly burdensome for no meritorious purpose"); *Companion Prop. and Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n*, No. 3:15-cv-01300, 2016 WL 6539344 (D.S.C. Nov. 3, 2016); *Manufacturers Collection Co., LLC v. Precision Airmotive, LLC*, No. 3:12-CV-853-L, 2014 WL 2558888, at *4-5 (N.D. Tex. June 6, 2014) (permitting categorical privilege log when a "document-by-document listing…. would be unduly burdensome" and provide "no material benefit to Precision in assessing whether a privilege …. claim is well grounded."); *First Horizon National Corp.*, 2013 WL 11090763, at*7 (permitting categorical privilege log).

[19] LCJ has conducted a review of local rules and guidelines pertinent to the scope, form and content of privilege logs. The review reflects the disparate approaches among districts. Although pertinent local district court rules can be classified in a number of ways, LCJ has identified four general groupings that have emerged:

> (1) Federal district courts in 28 states do not address Rule 26(b)(5)(A)(ii) in their local rules. Accordingly, each judge and magistrate may apply the current rule in accordance with their interpretation of whether a document-by-document log is required and whether the content of the log complies with the (A)(ii) standard.
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> (2) Local district court rules or guidelines in 13 jurisdictions expressly follow the (A)(ii) standard and either require document-by-document logs or document-by-document logs are the *de facto* default.
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> (3) The local rules or guidelines in two jurisdictions emphasize the importance of addressing privilege logs at the parties' 26(f) discovery conference.
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> (4) Ten jurisdictions emphasize alternatives to document-by-document logging, specifically exclude certain categories of attorney-client privileged communications and trial preparation materials from logging, and, in several instances mandate discussion of privilege logs at the 26(f) conference, but generally do not expressly address or modify the 26(A)(ii) standard.

the action and the work product material created after commencement of the action." [20] The local rule further provides that "[t]he parties may, by stipulation narrow or dispense with the privilege log requirement, on the condition that they agree not to seek to compel production of documents that otherwise would have been logged."[21]

- In the Southern and Eastern Districts of New York, the Committee Note to Local Rule 26.2 recognizes that, with the proliferation of emails and email chains, traditional privilege logs are expensive and time-consuming to prepare. To address the problem, the Committee Note states that parties should cooperate to develop efficient ways to communicate the information required by Local Rule 26.2 without the need for a traditional log and otherwise proceed in accordance with Rule 1 to ensure a just, speedy and inexpensive termination of the case. The rule states, "For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form."[22] The Western District of New York has adopted the same local rule.[23]

- The District of Colorado's ESI Discovery Guidelines specifically addresses the escalating costs of document-by-document privilege logs, urges counsel to confer in good faith "in an effort to identify types of document (*e.g.*, email strings, email attachments, duplicates, or near-duplicates, communications between counsel and a client after litigation commences) that need not be logged on a document-by-document basis pursuant to FED. R. CIV. P. 26(b)(5)(A) or at all, if the parties so agree. "The end-result should be a more useful log for a narrowly defined range of documents, thereby minimizing the need for judicial intervention."[24]

- The Southern District of Florida's detailed local rule both expands the requirements for logging while also exempting post-complaint materials:

> (i) The party asserting the privilege shall in the objection to the interrogatory or document demand, or subpart thereof, identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

[20] D. Conn. Civ. R. 26(e).

[21] *Id.*

[22] S.D.N.Y. Civ. R. 26.2(c).

[23] W.D.N.Y. Civ. R. 26(d)(4).

[24] D. Colo. Guidelines Addressing the Discovery of Electronically Stored Information 5.1.

(ii) The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(a) For documents or electronically stored information, to the extent the information is readily obtainable from the witness being deposed or otherwise: (1) the type of document (e.g., letter or memorandum) and, if electronically stored information, the software application used to create it (e.g., MS Word, MS Excel); (2) general subject matter of the document or electronically stored information; (3) the date of the document or electronically stored information; and (4) such other information as is sufficient to identify the document or electronically stored information for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the document or electronically stored information, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(b) For oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and the place of communication; and (3) the general subject matter of the communication.

(C) This rule requires preparation of a privilege log with respect to all documents, electronically stored information, things and oral communications withheld on the basis of a 44 claim of privilege or work product protection except the following: written and oral communications between a party and its counsel after commencement of the action and work product material created after commencement of the action.[25]

- District of New Mexico Local Rule 26.6 provides 21 days to challenge entries on a privilege log.[26]

- The District of Maryland promulgated "Principles for the Discovery of Electronically Stored Information in Civil Cases" recognizing that discovery of ESI is a source of "cost, burden, and delay" and instructing parties to apply the proportionality standard to all phases of ESI discovery.[27] The Principles contemplate conferral amongst the parties to

[25] S.D. Fla. R. 26.1(B) and (C).

[26] *See Sedillo Elec. v. Colorado Cas. Ins. Co.*, No.15-1172 RB/WPL, 2017 WL 3600729, at *7 (D.N.M. Mar. 9, 2017) (holding that a challenge to a privilege log is subject to Rule 26.6).

[27] District of Maryland Principles for the Discovery of Electronically Stored Information in Civil Cases 1.01 and 1.02.

determine whether categories of information may be excluded from logging and explore alternatives to document-by-document privilege logs.[28]

- The District of Delaware created a "Default Standard for Discovery, Including the Discovery of Electronically Stored Information (ESI)" that contemplates the parties will confer to determine "whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged."[29]

- A judge in the Northern District of Ohio has a case management order stating: "Where the 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." [30]

In parallel to such local rulemaking by federal districts, many state courts are also modernizing procedures for privilege logs. For example, the New York Commercial Division recognizes a preference for categorical privilege logs and requires the parties to meet and confer to discuss "whether any categories of information may be excluded from the logging requirement."[31] The Commercial Division guides parties to agree, where possible, to utilize a categorical approach to privilege designations.[32] To the extent the requesting party refuses to agree to a categorical approach in favor of a document-by-document privilege log, the producing party, upon a showing of good cause, may apply to the court for the allocation of costs, including attorneys' fees, incurred with respect to preparing the document-by-document log.[33]

Similarly, the New Jersey Complex Business Litigation Program has adopted a preference for the use of categorical designations in privilege logs to reduce the time and cost associated with document-by-document privilege log preparation.[34]

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[28] *Id.* 2.04(b).

[29] District of Delaware Default Standard for Discovery, Including the Discovery of Electronically Stored Information (ESI). Similarly, the Model Stipulated Order Regarding Discovery of Electronically Stored Information for Standard Litigation" in the Northern District of West Virginia clarifies that the use of a categorical privilege log is acceptable. ("Communications may be identified on a privilege log by category, rather than individually, if agreed upon by the parties or ordered by the Court.").

[30] Judge Carr Civil Cases - Case Management Preferences.

[31] *See* Rules of the Commercial Division of the Supreme Court [22 NYCRR] § 202.70, Rule 11-b.

[32] "The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs." *See id.*

[33] *Id*. at 11-b(2).

[34] N.J. R. 4:104-5(c).

## IV. AMENDING THE PRIVILEGE LOGGING RULES WOULD ENCOURAGE NATIONWIDE BEST PRACTICES AND DELIVER NEEDED PROCEDURAL UNIFORMITY

### A. Encouraging Meaningful Meet-and-Confers and Enabling Early Judicial Management Would Lead to Sensible Handling of Privilege Issues.

The 2006 Committee Notes to Rule 26(f) recommend that parties address issues concerning privilege during the Rule 26(f) conference. Unfortunately, the suggestion has been largely ignored, and the current practice appears to have been largely parties proceeding in silence at their own peril. At the same time, early discussions when the matter has not been fully framed for discovery could be counterproductive. The Proposed Amendments contemplate that the parties take the initiative in addressing and reaching agreement with respect to the scope, structure, content, and timing of submission of privilege logs at the appropriate time in each matter.[35] The discussion may be initiated at the parties' 26(f) initial conference and agreement finalized at a reasonable time preceding the commencement of document productions. The precise procedures agreed to is best incorporated in a court order. If agreement, in full or part, is not achieved, each party could submit its plan or disputed parts to the court for guidance and, if necessary, resolution. The objective of the parties' conference is to agree on procedures for providing sufficient information to assess privilege claims relating to information that is likely to be probative of claims and defenses and that is not facially subject to protection. Such agreements are likely to be proportional to the needs of the case and would reduce, if not eliminate, satellite litigation over collateral disputes regarding the sufficiency of privilege logs. If needed, court guidance regarding the parameters of the legal and factual contours of privilege as applied to the matter at the outset of discovery would get the parties heading in the right direction and reduce the burden on judicial resources including *in camera* review.

### B. Presumptive Exclusion of Certain Categories of Documents and ESI Would Improve the Effectiveness of Privilege Logs and Help Ensure Proportionality.

Some categories of documents and ESI are facially privileged or protected and can be excluded from logging. For example, absent extraordinary circumstances, communications between counsel and client regarding the litigation after the date the complaint is served can be excluded as clearly privileged or protected. Similarly, the Proposed Amendments contemplate that parties might agree that work product prepared for the litigation need not be logged in detail. Certain forms of communications, for example communications exclusively between in-house counsel or outside counsel to an organization, might be so clearly privileged that a simplified log merely identifying counsel as the exclusive communicants is needed. Express exclusions both reduces the burdens of reviews and logging and possible disputes regarding the scope of logging that arise when a party unilaterally excludes documents and ESI otherwise deemed relevant.

[35] The Proposed Amendments to Rules 26(b)(5(A) and 45(e)(2) do not expressly incorporate recommendations regarding the parties' meet and conferral process and the court's involvement when and if necessary. LCJ believes that Advisory Committee Notes are more appropriate for such recommendations and permit the flexibility required for parties to address issues as the case progresses.

### C. Flexible, Iterative and Proportional Approaches Are More Effective and Efficient than Document-by-Document Privilege Logging.

Although it is widely understood that tiered discovery can be an efficient way to focus attention on the most important documents and ESI, courts and parties have been slow to apply that concept to privilege logs. But just as not all documents are equally important to a case, so it is that not all documents withheld on the basis of privilege have the same value in the litigation. Whereas sampling and other procedures are employed to determine whether various categories of documents and ESI are sufficiently probative to warrant additional productions, so can iterative, proportional logging determine which privilege claims should be subject to greater scrutiny in the circumstances of the case. For example, certain claimed privileged documents or ESI may pertain to a mixture of privileged and business information that is probative and requires additional information to assess the claim. Providing initial logs with limited information, for example logs based on extracted metadata fields, permits the receiving party to focus on documents and ESI for which further information in needed to assess the privilege claims.[36] Similarly, well-structured categorical logging can include procedures for the receiving party to sample documents or ESI and receive document-by-document log entries for those documents to ascertain the sufficiency of the privilege claims for the category.

The 1993 Committee Notes to Rule 26(b)(5) recognize that detailed logging (i.e. document-by-document privilege logs) is appropriate when only a few items are being logged, but contemplate identification by category in other circumstances. Thus, even 25 years ago, as the current issues created by the volume of ESI were just beginning to emerge, the Committee recognized the benefit of categorical logs in the face of voluminous productions and claims of privilege. Unfortunately, the case law has largely missed the Committee's perspicacity. The time has come to expand this correct analysis into the Rule text.

Iterative logging prioritizes the most important areas of inquiry. This practical application of proportionality mirrors what courts and local rules have done to tier discovery that has been widely accepted as a means to reduce burdensome ESI discovery.[37] This approach also recognizes the reality that identifying and asserting privileges is an inherently difficult task[38] that

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[36] The proposed amended rules substitute "understand" for "assess" which better reflects the intent of the initial identification and the concepts of flexible and iterative logging set forth herein.

[37] *See Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (citing The Sedona Conference Commentary on Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289 (2010), the court ordered parties in longstanding case to meet and confer on phasing of discovery "to ensure that discovery is proportional to the specific circumstances of this case, and to secure the just, speedy, and inexpensive determination of this action"). For examples of local rules and guidelines that encourage phasing discovery as a means to achieve proportionality, *see* Northern District of California *Guidelines for the Discovery of Electronically Stored Information*, (as a potential Rule 26(f) topic "where the discovery of ESI is likely to be a significant cost or burden"); Eastern District of Michigan *Model Order Relating to the Discovery of Electronically Stored Information*, Principle 2.01(4) ("the potential for conducting discovery in phases or stages as a method for reducing costs and burden").

[38] "The analysis of any privilege is… historical, common law based, and judge-made. The benefit of codification – uniform rules that apply on a national basis, the hallmark of the rest of the Federal Rules of Evidence – is lost. This

should not made even more cumbersome by a process proven to yield a higher number of disputes than resolutions.

### D. Prioritization of Privilege Claims Reduces the Need for Judicial Intervention.

By prioritizing the most important issues, categorical and iterative logging procedures reduce the number of privilege claims at issue between the parties. Under the Proposed Amendments, parties (and non-parties) would be empowered to address procedures for challenging and resolving challenges to claims of privilege. Such procedures could include meet-and-confers to address samples or categories of claims in which the producing party can provide additional information regarding the factual and legal bases of the claims(s) without detailed document logging. Such flexible procedures are sure to reduce the number of claims subject to motions to compel and adjudication of claims requiring *in camera* review.

### E. Amending the Rules Governing Privilege Logs Would Enhance Parties' and Courts' Ability to Identify Specious Claims.

Some defenders of document-by-document logging assert that categorical and iterative logging may provide incentive or ability to cheat the system by hiding important relevant documents and ESI behind invalid claims of privilege or protection. Setting aside that such conduct would violate the rules of ethics in every jurisdiction, the amendments proposed here contemplate meet-and-confers at the appropriate juncture, providing the opportunity for timely judicial involvement if necessary. Flexible rules such as the Proposed Amendments would allow for new mechanisms for accountability, such as the use of sampling procedures and a challenge process,[39] although all stakeholders must recognize that identifying and describing privileged information is an inexact science and there must be room for good faith disputes and error.[40] It is also important to note that document-by-document logs have often been seen as inherently flawed no matter how well-intended the parties and counsel involved[41]

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creates a dramatic need for [guidance] that must exhaustively cover all the relevant judicial opinions for differences in approach, from the most nuanced to outright contradiction of each other.… [This guidance should be] as thorough an analysis of the case law as can be imagined to lead judges and lawyers through a difficult forest." Hon. John M. Facciola, U.S. Magistrate Judge, U.S. District Court for the District of Columbia, *Forward* to 1 David M. Greenwald et al., *Testimonial Privilege*, at xxiii, xxiv (2015-2016 ed. 2015).

[39] The Facciola-Redgrave Framework, *supra* note 7, at 52-53.

[40] *See, e.g., Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc'y of the United States*, 406 F.3d 867, 878 (7th Cir. 2005) (reversing district court's imposition of discovery sanctions based on the magistrate judge's determination that a significant number of sampled documents on defendant's log were not privileged and stating that "[defendant] was sanctioned for having too many good-faith differences of opinion with the magistrate judge. That is unacceptable. Simply having a good-faith difference of opinion is not sanctionable conduct."); *Ackner v. PNC Bank, Nat'l Ass'n*, No. 16-CV-81648, 2017 WL 1383950, at *3 (S.D. Fla. Apr. 12, 2017) ("[A]s there has been a good faith dispute [over privileged documents] . . . an award of costs and attorney's fees would be unjust."); *Rogers* at *3 ("[B]ecause Defendants put forth a cogent argument, supported by caselaw, that the [relevant document] was protected by the attorney-client privilege and work product doctrine, an award of costs and fees is inappropriate.").

[41] *See, e.g., Victor Stanley, Inc.*, 250 F.R.D. at 264-65 (noting limitations and challenges to privilege logs). *See also* The Facciola-Redgrave Framework, *supra* note 7, at 19 ("The volume of information produced by electronic

### F. Amending the Rules Would Provide an Opportunity to Include a Helpful Cross-Reference to Federal Rules of Evidence 502(d) and 502(e).

Rule 502 of the Federal Rules of Evidence is one of the most beneficial yet least used tools for an improved privilege log process because it protects all parties from inadvertent waivers. One of the main drivers for the rule's adoption was the recognition that "the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information."[42] Unfortunately, many observers have recognized that the rule is underutilized in practice.[43] An explicit cross-reference to FRE 502, such as that included in the Proposed Amendments, would improve the handling of privilege log issues by increasing awareness among practitioners and providing an important roadmap for its use.

## V. CONCLUSION

Rules 26(b)(5)(A) and 45(e)(2) establish a *de facto* default obligation to prepare document-by-document privilege logs. Notwithstanding the 1993 Committee Note suggesting that other

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discovery has made the process of reviewing that information, to ascertain whether any of it is privileged from disclosure, so expensive that the result of the lawsuit may be a function of who can afford it. The volume also threatens the ability to accurately identify and describe relevant and privileged documents so that the system of claims and adjudication teeters on the brink of effective failure."). Similarly, any process must recognize that the obligation to protect client confidences necessarily and typically yields initially conservative calls and over-inclusion of documents in the privilege net in large document productions *Cf. American Nat. Bank and Trust Co. of Chicago*, 406 F.3d at 878-79 (Because privileged attorney-client communications are "worthy of maximum legal protection, it is "expected that clients and their attorneys will zealously protect documents believed, in good faith, to be within the scope of the privilege.") (internal quotation omitted).

[42] U.S. Judicial Conference's Letter to Congress on Evidence Rule 502 (Sept. 26, 2007). *See also* A BILL TO AMEND THE FEDERAL RULES OF EVIDENCE TO ADDRESS THE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE, U.S. Rep. No. 110-264, at 2–3 (Feb. 25, 2008):

> In sum, though most documents produced during discovery have little value, lawyers must nevertheless conduct exhaustive reviews to prevent the inadvertent disclosure of privileged material. In addition to the amount of resources litigants must dedicate to preserving privileged material, the fear of waiver also leads to extravagant claims of privilege, further undermining the purpose of the discovery process. Consequently, the costs of privilege review are often wholly disproportionate to the overall cost of the case.

[43] A 2010 survey of federal magistrate judges found that "[a]lmost 6 in 10 respondents…indicated that the parties rarely or never employ FRE 502(d)." Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure, 11 SEDONA CONF. J. 201, 212 (Fall 2010). This level of awareness may not have changed much in the intervening years: "Despite the obvious benefits of agreeing to a Rule 502 order, I have found that the bar in general is largely uninformed about the rule and what it offers. So, to avoid problems down the line, the standard discovery order that I issue contains a Fed. R. Evid. 502(d) order that protects them automatically from inadvertent waiver of these important protections." Hon. Paul W. Grimm, District Judge, U.S. District Court for the District of Maryland, *Practical Ways to Achieve Proportionality During Discovery and Reduce Costs in the Pretrial Phase of Federal Civil Cases*. 51 Akron L. Rev. 721, 739 (2017). *See also Arconic Inc. v. Novelis Inc.*, No. 17-1434, 2019 WL 911417 at *3 (W.D. Pa. Feb. 26, 2019) for a similar example of 'making the horse drink' approach ("[t]he court's model Rule 26(f) report adopts Rule 502(d) as the default standard and provides a model order in Local Rule 16.1. An overwhelming majority of parties in civil cases in this district choose the default standard and a Rule 502(d) order is entered.").

procedures might be employed, this entrenched default remains by far the common expectation and practice. Local districts have embraced alternatives resulting in a "swiss-cheese" approach to privilege logging that defies the Rule's goal of uniformity. The status quo puts substantial burdens on the parties, non-parties, and the judiciary because expensive and ineffective logs create collateral disputes concerning the sufficiency of logs without providing the information necessary to resolve them. In light of the 2015 FRCP amendments and consistent with the spirit of those amendments, the time is ripe for the Committee to replace the default logging obligation with a modern approach such as the Proposed Amendments that encourages the parties to devise proportional and workable logging procedures while facilitating timely judicial management where necessary to avoiding later disputes. Doing so would reduce both the burdens on the parties and the court while addressing the continual frustration that document-by-document logs seldom, if ever, "enable of the parties [and the court] to assess the claim[s]."

**Attachment A: Proposed Amendment to 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, unless otherwise agreed to by the parties or ordered by the court, must:

(i) expressly make the claim; and
(ii) furnish information, without revealing information itself privileged or protected, by item, category, or as otherwise that is reasonable and proportional to the needs of the matter, to enable other parties to understand the scope of information not produced or disclosed and the claim.

(B) *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; must take reasonable steps to retrieve the information if the party disclosed it before being notified; 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.

**Attachment B: Proposed Amendment to Rule 45(e)(2)**

(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, unless otherwise agreed to or ordered by the court, must:

(i) expressly make the claim; and

(ii) furnish information, without disclosing information itself privileged or protected, by item, category, or as otherwise that is reasonable and proportional to the needs of the matter that will enable the parties to understand the scope of information not produced or disclosed and the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

If the person and 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.