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THE SEDONA CONFERENCE
COMMENTARY ON PRIVILEGE LOGS

*A Project of The Sedona Conference Working Group
on Electronic Document Retention and Production (WG1)*

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PREFACE

Welcome to the final, May 2024 version of *The Sedona Conference Commentary on Privilege Logs* (“*Commentary*”), a project of The Sedona Conference Working Group 1 on Electronic Document Retention and Production (WG1). This is one of a series of Working Group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, intellectual property rights, and data security and privacy law. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

The intent of this *Commentary* is to offer tools and strategies for both responding and requesting parties to mitigate the considerable burdens and competing interests that can be associated with privilege logs, consistent with Federal Rule of Civil Procedure 1’s mandate “to secure the just, speedy, and inexpensive determination of every action” while also ensuring that parties have the ability to obtain discoverable evidence. Its primary conclusions include addressing format, timing, and anticipated issues early in the case to help reduce costly discovery disputes later; excluding certain categories of documents from the logging process; considering whether alternative formats to a “traditional” privilege log might be appropriate to the specific needs of the case; affirming that the burden is on the responding party to support its privilege claims; and recognizing that the concept of proportionality is integral to the privilege logging process. The *Commentary’s* appendices include examples of various privilege log formats that provide a visual representation of each format’s strengths and weaknesses.

This project was a topic of dialogue at the Working Group 1 Midyear and Annual meetings in 2021, the Midyear Meeting in

2022 and the Midyear Meeting in 2023. Previous drafts of the *Commentary* were published for member comment in 2022 and 2023 and for public comment in February 2024. Where appropriate, the comments received during the public comment period have been incorporated into this final version.

On behalf of The Sedona Conference, I thank drafting team leaders Adam Gajadharsingh and Meghan Podolny for their leadership and commitment to the project. I also recognize and thank drafting team members Toni Baker, Travis Bustamante, MaryBeth Gibson, Nathaniel Giddings, Jennifer Scullion, Hon. Thomas Vanaskie (ret.), and Margot Want for their dedication and contributions, and Steering Committee liaisons Rebekah Bailey, Andrea D'Ambra, Tessa Jacob, Sandra Metallo-Barragan, and Claudia Morgan for their guidance and input.¹

We encourage your active engagement in the dialogue. Membership in The Sedona Conference Working Group Series is open to all. The Series includes WG1 and several other Working Groups in the areas of international electronic information management, discovery, and disclosure; patent remedies and damages; patent litigation best practices; trade secrets; data security and privacy liability; and other “tipping point” issues in the law. The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be. Information on membership and a description of current Working Group activities is available at <https://thesedonaconference.org/wgs>.

1. We also acknowledge the contributions of those who served on the Privilege Logs Brainstorming Group: Kelly Atherton, James Canaday, Todd Itami, Nichole Sterling, Hon. Becky R. Thorson, and Florence Yee.

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May 2024

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EXECUTIVE SUMMARY

When a party withholds otherwise responsive documents in discovery based on the attorney-client privilege, work-product doctrine, or some other protection,² it must satisfy the requirements of the relevant jurisdiction for explaining the bases for withholding production. This *Commentary* focuses primarily on cases in federal courts and, therefore, the Federal Rules of Civil Procedure, but where helpful, some state rules and cases are referenced.

The operative rule for withholding otherwise discoverable information based on the assertion of a privilege or protection is Federal Rule of Civil Procedure 26(b)(5)(A). This Rule provides two primary requirements for a responding party to withhold information as privileged—the party must (1) “expressly make the claim” and (2) describe the nature of the information in such a way that allows the receiving party to assess the claim. This Rule, however, does not specify *how* the responding party must satisfy its obligation. This ambiguity has led to responding parties employing a variety of approaches to substantiate their assertions of privilege, with courts and commentators noting that some forms of substantiation can be more problematic, including being less informative, than others.³

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

3. 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.”). See also *The Sedona Conference, Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 155 (2016) (“[T]he current method used

Rule 26(b)(5) does not explicitly require the creation and exchange of a privilege log, nor does it define what information must be provided.⁴ However, the most common tool parties have used to satisfy their obligation under Rule 26(b)(5) is a “traditional” privilege log.⁵ Generally speaking, a traditional privilege log is a table providing the following information 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.⁶ This

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.”).

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

5. This *Commentary* uses the term “traditional privilege log” or “traditional log” to refer to a document-by-document log that typically includes factual information about a document, as well as a narrative description of basis for claiming privilege over the withheld document.

6. “[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

traditional privilege log is arguably the most thorough and, therefore, defensible method for “expressly describing” the bases for withholding documents as privileged.⁷ It is also typically the most costly and burdensome to prepare.

Most of the elements of a traditional log can be generated fairly easily for electronically stored information (“ESI”), assuming metadata⁸ exists for the document, by exporting relevant fields from a document review platform into a spreadsheet. Determining the Privilege Asserted and crafting a custom Privilege Narrative/Description, however, requires

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 date 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).”).

7. 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”).

8. Metadata is “the generic term used to describe the structural information of a file that contains data about the file, as opposed to describing the content of a file.” The Sedona Conference, *The Sedona Conference Glossary: eDiscovery and Digital Information Management, Fifth Edition*, 21 SEDONA CONF J. 263, 337–38 (2020). For example, metadata might include the author of an electronic document, or the date it was last modified.

analysis for each document and, depending on the complexity of the document, can take significant time to draft a defensible custom privilege description. As a result, including these elements can increase the amount of time, and thus burden, associated with creating a traditional privilege log, particularly if a responding party (the party preparing the privilege log) is withholding a large number of documents on the basis of privilege.⁹ With the proliferation of ESI in discovery, this situation presents more frequently and can result in the responding party withholding thousands or tens of thousands of documents based on claims of privilege. The time and cost incurred in the effort to form descriptive sentences for each entry on these voluminous logs, as is frequently conducted for traditional privilege logs, can be burdensome.¹⁰ Nevertheless,

9. *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 document 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.”).

10. *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.”); *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.”); *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

the responding party has a legal obligation to satisfy the requirements of Rule 26(b)(5). This *Commentary* does not propose shifting the responding party's obligations to the requesting party. Rather, this *Commentary* provides options for how responding parties can reduce the burden of satisfying their obligations and how parties can engage in constructive discussions to minimize disputes.

The privilege logging process can also raise issues for the requesting party (i.e., the party receiving the privilege log). These issues typically relate to the amount and nature of information on the privilege log. Specifically, a privilege log with fewer details can impair the requesting party's ability to understand the assertion of privilege, leaving the party to guess as to whether (or not) privilege properly attaches to the withheld documents.¹¹ Additionally, a responding party may intend to produce its privilege log only after it substantially completes its productions or on a "rolling basis."¹² This delay

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).

11. 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.").

12. 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

may impair the requesting party's ability to perform a timely analysis of the assertions of privilege and, if privilege is determined to have been improperly asserted, make use of the later-produced documents earlier in the litigation.

Not surprisingly, the competing interests—and countervailing burdens and rights—of requesting and responding parties in discovery can lead to disputes about how and when a responding party will substantiate its assertions of privilege, and if a privilege log is used, whether the form and content of that privilege log are sufficient. This *Commentary* outlines the burdens that can be associated with privilege logs for *both* responding and requesting parties and presents tools and strategies that can mitigate them. However, one size does not fit all, and litigants and the courts should consider the specific needs of their case, as well as any specific requirements of specific courts or judges, when deciding which of the recommendations in this *Commentary*, if any, should be employed.

Consistent with Federal Rule of Civil Procedure 1, which encourages parties “to secure the just, speedy, and inexpensive determination of every action,”¹³ as well as *The Sedona Conference Cooperation Proclamation*,¹⁴ which encourages parties to work together to resolve discovery issues, this *Commentary*

production is received), a party 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).

13. FED. R. CIV. P. 1.

14. *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.), available at https://thesedonaconference.org/publication/The_Sedona_Conference_Cooperation_Proclamation.

outlines how parties and, if necessary, the courts can cooperatively address the burdens—to the responding parties, the requesting parties, and the courts—associated with privilege logs. The primary conclusions and recommendations in this *Commentary* are as follows:

1. Because not all cases are the same, the methods by which a responding party may satisfy its requirements under Rule 26(b)(5) depend on the case, including the procedures set forth in local rules or standing orders.¹⁵ The parties should address privilege log format, timing, and anticipated issues, as well as contemplate procedures for seeking court assistance in resolving any privilege disputes, early in their case to help reduce costly discovery disputes later. Consistent with the Rule revisions being evaluated by the Advisory Committee on Civil Rules,¹⁶ which this *Commentary* supports, this discussion should begin as part of the Rule 26(f) conference and be incorporated into the Rule 16(b) scheduling order, to the extent the parties have sufficient information at that time.
2. Parties should discuss whether certain categories of documents, such as communications between a client and its outside litigation counsel about the litigation after a complaint has been filed, can be excluded from a privilege log in the first instance. This *Commentary* supports such exclusions as an

15. 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 obligation).

16. See *infra* Section I.D.

effective and appropriate way to mitigate privilege logging burdens in most cases.

3. Parties should discuss whether a “metadata plus topic log,” or another alternative format, should be employed in their case. This *Commentary* takes the position that a “metadata plus topic log” is a preferred format over the traditional privilege log because it generally is more effective in satisfying the requirements of Rule 26(b)(5) while also mitigating the burdens associated with narrative descriptions. However, alternative formats may vary in effectiveness depending on the documents and factors at issue in each case.
4. Acknowledging that practical burdens exist in the privilege logging process does not mean that the responding party’s legal burden of supporting its privilege claims should shift to the requesting party. Consistent with the Federal Rules, 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. Although the responding party maintains the legal burden of supporting its privilege claims, this *Commentary* suggests ways that burden can be minimized.
5. The 2015 Amendments to the Federal Rules of Civil Procedure brought the concept of proportionality in discovery to the fore, and in 2018, The Sedona Conference stated that proportionality should be considered and applied to all aspects of discovery,

including the preparation of privilege logs.¹⁷ This *Commentary* does not alter the 2018 Principle.¹⁸

17. The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1 (2018). The Sedona Conference has also touched upon privilege logging issues in several prior publications: *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.) (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 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) Orders*, 23 SEDONA CONF. J. 1 (2022).

18. Practitioners should be aware, however, that the application of proportionality to privilege logs continues to be disparately examined by courts after undertaking varying levels of analysis. Some courts directly apply the Rule 26(b)(1) proportionality factors. *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, citing the proportionality factors, 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) (finding the privilege log “proportional to the needs of the case given the parties’ relevant access to the requested materials,” may also “aid in resolving the issues in this litigation, the burden or expense does not outweigh its likely benefit,” and noting it had no evidence of “any of the other proportionality factors under Rule 26” available as evidence”) (internal citations omitted). Other courts discuss whether a privilege log is proportional without any explicit reference to the Rule 26(b)(1) factors. *See,*

e.g., *Las Brisas Condo. Homes Condo. Ass’n, Inc. v. Empire Indem. Ins. Co.*, No.: 2:21-cv-41-KCD, 2023 WL 2788873, *2 (M.D. Fla. Mar. 8, 2023) (agreeing that itemized privilege logs are “not always necessary” because “Rule 26 requires proportionality”); *U.S. Bank Nat’l Ass’n v. Triaxx Asset Mgmt.*, 18-CV-4044-BCM, 2021 WL 1968325, at *5 (S.D.N.Y. Mar. 31, 2021); *Norton v. Town of Islip*, No. CV043079PKCSIL, 2017 WL 943927, at *8 (E.D.N.Y. Mar. 9, 2017) (determining whether a categorical privilege log is appropriate, courts consider whether its justification is “directly proportional to the number of documents withheld” but not evaluating any of the Rule 26(b)(1) factors); *3rd Eye Surveillance, LLC v. United States*, No. 15-501C, 2021 WL 3828654, at *3 (Fed. Cl. Aug. 27, 2021) (ordering revised privilege descriptions to better articulate common interest doctrine claims but stating “the burden of identifying and logging each and every communication between counsel to the parties to the [joint defense agreement] over six years . . . is not proportional to the needs of the case”); *In re Snap Inc. Sec. Litig.*, No. CV1703679SVWAGR, 2018 WL 7501294, at *1 (C.D. Cal. Nov. 29, 2018) (concluding that the logging of documents dated after commencement of the litigation was not proportional to the needs of the case, but no evaluation of the Rule 26(b)(1) factors). Although the drafting team was unable to find a court outright rejecting application of proportionality to privilege logs, one case appears to do so in dicta. *See 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).

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 as follows:

(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.¹⁹

The Committee Notes provide more detail on the goals of Rule 26(b)(5), stating 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.”²⁰

The Federal Rules of Civil Procedure do not explicitly require “a privilege log,” nor do they provide a defined list of the information that must be provided.²¹ Although they are

19. FED. R. CIV. P. 26(b)(5).

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

21. As the Committee Notes indicate, “The rule does not attempt to define for each case what information must be provided when a party asserts

silent regarding format, practitioners have regularly used traditional privilege logs as the mechanism by which parties comply with Rule 26(b)(5)(A) (and Rule 45(e)(2)(A)).²² Practically speaking, the format of a privilege log can allow 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.”²³

One of the possible repercussions for not satisfying the requirements of the Rule is waiver of the privilege or protection. 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 (or providing of no log whatsoever).²⁴ Thus, parties may be reluctant to diverge from

a claim of privilege or work product protection.” FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment.

22. *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. 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). For an example of a traditional log, *see* Appendix A.1.

23. *See* FED. R. CIV. P. 26(b)(5).

24. *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*

traditional privilege logs out of concern that if a court finds the associated description insufficient, the privilege will be waived.²⁵ A more common result, however, is that a court will require the responding party to provide more detailed information to substantiate the assertion of privilege, or order in camera review.²⁶

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).

25. 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 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 responding party had waived his claims of privilege by failing to timely produce an adequate log); *Maxus Energy Corp. v. YPF, S.A.*, Nos. 16-11501, 18-50489, 2021 WL 3619900 (D. Del. Aug. 16, 2021) (questioning the confidentiality and privilege applicable to documents withheld in three categories on a categorical privilege log, rejecting the responding party’s request for a “redo” with a traditional privilege log, and requiring production).

26. 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

From a responding party's perspective, the goal of a privilege log is to satisfy its burden under Rule 26(b)(5) without waiving privilege over protected information by, for example, disclosing privileged content. From a requesting party's perspective, the privilege log must provide sufficient information to understand the assertion of privilege and evaluate whether there is a good-faith basis to believe nonprivileged documents have been improperly withheld.

A privilege log is not the only option, however, for expressly making a privilege claim.²⁷ Nor is there a "monolithic form of

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); *In re Aenergy, S.A.*, 451 F. Supp. 3d 319, 325 (S.D.N.Y. 2020).

27. 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 Federal Rule 26(b)(5)(A)); *Genesco, Inc. v. Visa U.S.A., Inc.*, 302 F.R.D. 168, 191-94 (M.D. Tenn. 2014) (plaintiff's counsel submitted affidavits and other documents in lieu of log, and court determined that only certain documents needed to be logged); *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) (endorsing 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, while providing log for any purportedly privileged documents that were shared with third parties).

privilege logs.”²⁸ Simply put, expressly claiming the privilege in a manner or format different from the traditional privilege log (described in the Executive Summary and an exemplar attached as Appendix A.1) is permissible so long as the responding party satisfies its burden to substantiate its assertion of privilege.

B. Other Relevant Federal Rules

There are several other Federal Rules that touch on the assertion of privilege.

1. Federal Rule of Civil Procedure 1

As discussed in this *Commentary*, the time, expense, and effort required to create a traditional privilege log can be in tension with Federal Rule of Civil Procedure 1, which requires the rules to “be construed, administered, and employed by the court and the parties to secure the *just, speedy, and inexpensive* determination of every action and proceeding,”²⁹ particularly with the proliferation of ESI, which can result in parties withholding hundreds or thousands of documents based on an assertion of privilege. This *Commentary* recommends that litigants and the courts be mindful of Rule 1 in discussing how to address and resolve privilege log issues.

2. Federal Rule of Civil Procedure 29

Rule 29 states that “[u]nless a court orders otherwise, the parties may stipulate that . . . other procedures governing or

28. *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 from opining on log format as long as it permits court and parties to assess the claim of privilege).

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

limiting discovery be modified.”³⁰ Many of this *Commentary*’s proposals provide options for negotiation between the parties. While local rules and standing orders should be considered, parties should explore opportunities under Rule 29 to stipulate as to what they are willing to accept in connection with privilege logging, including the content and format, and the court should abide by the terms of that agreement. To avoid disputes, stipulations reached under Rule 29 should be in writing.

3. Federal Rule of Civil Procedure 45

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” But a non-party seeking to quash a subpoena because it requires disclosure of privileged materials must substantiate its assertion of privilege.³¹

Pursuant to Rule 45(e)(2), a subpoena recipient asserting privilege 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

30. FED. R. CIV. P. 29.

31. *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).

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.³² It is also not uncommon for a subpoenaing party and a responding non-party to agree that a privilege log is not required. However, a non-party’s failure to satisfy its burden may result in the non-party waiving privilege, so non-parties should be diligent in complying with relevant rules.³³

32. 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.”).

33. 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); *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)

Consistent with the Sedona Principles and Rule 1, the party and non-party should confer about potential means of reducing the burden on the non-party associated with preparing a privilege log.³⁴ 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.³⁵

4. Federal Rule of Evidence 502

Federal Rule of Evidence 502 clarifies privilege waiver rules in the federal courts and sets out mechanisms whereby parties

the fact that the discovery Plaintiffs requested here is, at least, of ‘moderate relevance’ to their claims and defenses”) (internal citations omitted); *but see* *Dell Inc. v. DeCosta*, 233 F. Supp. 3d 1, 3 (D.D.C. 2017) (quashing a subpoena, in part, served on the party’s former counsel because it “would impose an undue and disproportionate burden on [former counsel] to prepare a privilege log [for] thousands of documents”).

34. *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.”).

35. *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”).

can obtain further protections against the waiver of attorney-client privilege and work-product protections.³⁶

Rule 502 is comprised of several sections. Rule 502(d), in particular, provides that with a court order, the production of privileged material, whether inadvertent or otherwise, is not a waiver in the case, nor in any other federal or state proceeding, even involving other parties.³⁷

C. Federal District and State Local Rules and Standing Orders

While the Federal Rules do not provide specific direction on how a responding party can satisfy its burden to substantiate its assertion of privilege, some federal District Courts have adopted local rules that do so.³⁸

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

36. 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 of Evidence 502(d) Orders*, 23 SEDONA CONF J. 1 (2022).

37. Additional information regarding Rule 502 can be found in The Sedona Conference’s *Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders*, 23 SEDONA CONF J. 1 (2022).

38. For a compilation survey of various local rules adopted for privilege logs, *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.uscourts.gov/sites/default/files/20-cv-r_suggestion_from_lawyers_for_civil_justice_-_rules_26_and_45_privilege_logs_0.pdf.

information required by this rule by group or category.”³⁹ As another example, the U.S. District Court for the District of Connecticut Local Civil 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.”⁴⁰

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 require parties to “meet and confer at the outset of the case” and affirmatively includes the use of categorical logs in the privilege log discussions.⁴¹ 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.⁴² Additionally, the Commercial Division Rules require the responding party to certify “with specificity those facts supporting the privileged or protected status of the information included within the category” and “describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or

39. 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).

40. D. CONN. R. 26(e).

41. N.Y. COMP. CODES R. & REGS. tit. 22 § 202.20-a.

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

some form of sampling was employed, and if the latter, how the sampling was conducted.”⁴³

Some judges also provide standing orders on what they expect of privilege logs, or what may be excluded from privilege logs. As an example, one judge in the Northern District of 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.”⁴⁴ A standing order for a judge in the Middle District of Florida requires the production of privilege logs containing specific information, including “the degree of confidentiality with which the information was treated.”⁴⁵

Some courts have developed model orders and programs to explore alternative methods for complying with Rule 26(b)(5). For example, the U.S. 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 that a party deems burdensome to provide on a metadata-only log.⁴⁶ This

43. N.Y. Ct. R. 202.70, Rule 11-b(b)(1); *see* Hon. John M. Facciola & Jonathan M. Redgrave, *The Facciola-Redgrave Framework*, 4 FED CTS. L. REV. 20, 47 (2009) (advocating for production of an affidavit by the responding party that attests “to the facts that support the privileged or protected status of document and ESI within that category”).

44. Judge Carr Civil Cases – Case Management Preferences, <https://www.ohnd.uscourts.gov/judge-carr-civil-cases-case-management-preferences> (last visited May 16, 2024).

45. Standing Order of Judge Kidd on the Procedure for Assertion of Privilege, www.flmd.uscourts.gov/sites/flmd/files/documents/flmd-standing-order-re-procedure-for-assertion-of-privilege-6-19-mc-42-orl-ejk.pdf (last visited May 16, 2024).

46. Seventh Circuit Council on eDiscovery and Digital Information, *Model Discovery Plan and Privilege Order*, EDISCOVERY COUNCIL.COM,

Commentary explores these formats in Section III.B and the Appendices. In addition, the U.S. District Court for the Southern District of New York’s Pilot Program for Complex Civil Cases makes an explicit recognition that communications with party counsel and work product created after the commencement of an action did not need to be logged.⁴⁷

D. Evaluation by the Judicial Conference Advisory Committee for Civil Rules

In mid-2020, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States began to consider whether to implement changes to Rule 26(b)(5) to address the competing interests of requesting and responding parties in the privilege logging process. As stated in one Advisory Committee report, in some cases privilege logs “imposed considerable burdens,” which “escalated as digital communications supplanted other means of communication. The volume of material potentially subject to discovery escalated, and the cost of preparing a privilege log for all of them also escalated. Nevertheless, there were also regular objections that these very expensive and voluminous lists did not really provide the needed information.”⁴⁸ A Discovery Subcommittee was formed to investigate the issue and received

<https://www.ediscoverycouncil.com/content/model-discovery-plan-and-privilege-order> (last visited May 16, 2024).

47. U.S. Dist. Court S.D.N.Y., *In re* Pilot Project Regarding Case Management Techniques for Complex Civil Cases, at 6 (Nov. 1, 2011), https://www.nysd.uscourts.gov/sites/default/files/pdf/Complex_Civil_Rules_Pilot_14.11.14.pdf.

48. Committee on Rules of Practice and Procedure, Report of the Advisory Committee on Civil Rules, at 3 (Dec. 9, 2022), included in the Committee on Practice and Procedure, Meeting Agenda Book, at 205 (Jan. 4, 2023), https://www.uscourts.gov/sites/default/files/2023-01_standing_committee_meeting_agenda_book_final_0.pdf.

more than 100 written comments, taking a variety of positions.⁴⁹ The Advisory Committee issued a report after its October 5, 2021, meeting, noting the “recurrent and stark divide” between plaintiff and defense bars regarding proposed logging formats, the specificity element, costs, and timing of privilege logs.⁵⁰

Ultimately, the Advisory Committee concluded that trying to amend Rule 26(b)(5)(A) to provide an all-purpose solution for every case was not feasible. Instead, the Committee unanimously recommended revising Rule 16(b) and Rule 26(f) to require litigants to discuss issues regarding “the timing and method for complying with Rule 26(b)(5)(A)” in the 26(f) conference and 16(b) scheduling order.⁵¹ This *Commentary* supports encouraging early discussion among parties, promoting negotiation and agreement where possible, or seeking early court intervention when negotiation fails.

49. Comments on Privilege Logging Practice, https://www.uscourts.gov/sites/default/files/comments_on_privilege_log_practice.pdf.

50. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Report of the Advisory Committee on Civil Rules, at 17 (Dec. 14, 2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_civil_rules_-_december_2021_0.pdf.

51. Report of the Advisory Committee on Civil Rules, at 5, 8 (Dec. 9, 2022), Meeting Agenda Book, at 207, 210 (Jan. 4, 2023), https://www.uscourts.gov/sites/default/files/2023-01_standing_committee_meeting_agenda_book_final_0.pdf.

II. BURDENS AND CHALLENGES WITH PRIVILEGE LOGGING

In evaluating whether the creation of a privilege log in a certain manner would be “unduly” burdensome, some courts look to the scope of a document request and the relevancy of the requested information.⁵² Courts often 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.”⁵³ This *Commentary* does not seek to define what rises to the level of being “unduly” burdensome in the privilege logging process. Rather, it acknowledges that, to varying degrees, burdens and challenges can exist for both the responding party and requesting party. This Section of the *Commentary* identifies and discusses those burdens and challenges, while Section III provides various mitigation strategies parties should consider to address these burdens and challenges.

Asserting privilege and substantiating that claim with a privilege log can be a complex process that often requires a significant investment of time, money, and business resources. For traditional logs, a review for privilege is often done either (a) as part of the initial relevance/responsiveness review or (b) through a separate privilege review. In the latter case, the potentially privileged documents have been identified either during the initial relevance/responsiveness review or through application of a privilege screen, such as keyword searching

52. See, e.g., *Food Delivery Holding 12 S.a.r.l. v. DeWitty and Assocs. CHTD*, 538 F. Supp. 3d 21, 31 (D.D.C. 2021).

53. *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*, 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.”).

and/or machine-learning tools. Typically, at the first level of privilege review, the reviewing attorney selects coding fields within a document review platform that provide information to support the assertion of privilege, particularly as it relates to the Privilege Asserted and Privilege Narrative/Description fields. Those coded fields, as well as certain document metadata, are exported and combined to computer-generate an initial privilege log entry for each document. This initial privilege log entry is then, in most cases, reviewed by senior level attorneys to ensure accuracy, perhaps on a sampling basis in larger data sets. This process usually occurs after the first-level review has completed, in part because information discovered later in the review helps to further inform the legal team's awareness of the extent and scope of privileged documents. Additionally, because privilege determinations can prove to be thorny, the review of the privilege log entries is usually conducted by more experienced (and thus, more expensive) attorneys.

Apart from the multiple layers of review often required for potentially privileged documents, the burdens of privilege logging are most pronounced in the creation of descriptive narratives, which identify the subject matter and privileged parties involved, as well as the basis for the privilege being asserted. Narrative descriptions, therefore, require an attorney to analyze the contents of each document (some of which can be lengthy and unfamiliar to the reviewer) and craft a privilege description that provides enough detail to substantiate the privilege claim without disclosing the privileged information itself. This is frequently a time-intensive process, which can present significant burdens and costs to responding parties.

The burdens of creating privilege logs are borne by responding parties. For requesting parties, the challenges lie in evaluating the privilege log, particularly if the log is voluminous or contains deficient descriptions that do not allow the party to assess the validity of the asserted privilege claims.

These challenges faced by the parties are often exacerbated by factors such as the enormous volume of ESI in modern litigation, timing pressures in discovery, and the potential for costly motions practice when the parties cannot resolve privilege log disputes on their own.

A. The Descriptive Narrative

As discussed above, Rule 26(b)(5)(A) does not define what is required to “expressly make the claim” of privilege or how specific and detailed the description must be to “enable other parties to assess the claim” of privilege. This ambiguity has resulted in the descriptive narrative becoming one of the more contentious aspects of privilege logs, with the responding party and requesting party often having divergent views regarding the level of specificity required.

In general, a descriptive narrative is a sentence describing the type of document, the fact of legal advice sought or rendered, the confidential nature of the communication,⁵⁴ and the general subject matter of the legal advice.⁵⁵ For logs without independent fields identifying the specific names of communicants, those descriptive sentences include the identities of the clients or attorneys (or third-party agents) involved in the communications. For documents withheld for work-product protection, the narrative may describe the type of document, the identities of the preparer and recipient(s) of the document, and the nexus to anticipated or pending litigation.

From the requesting party’s perspective, a descriptive narrative that fails to provide sufficient information hinders its

54. To the extent the information is not available in other fields, such as the sender and recipient fields.

55. See Appendix A.1 for examples of descriptive narratives in a traditional log.

review of the privilege log and determination of whether privilege attaches to the withheld document(s). For example, the descriptive narrative may be too generic to identify clearly whether the communication in a given log entry concerns legal as opposed to business advice, or it may conflict with other information in the privilege log for the same entry. In short, insufficient details in a log shift the burden to the requesting party to initiate a discovery conference and, possibly, motion practice to get the information it needs, all of which adds to cost and time expended for both parties.

From the responding party's perspective, the creation of the descriptive narrative can be a significant undertaking, often requiring a good deal of time and deliberation. The attorney preparing the log entry typically needs to determine the document type (e.g., an email chain, memorandum, summary, compilation, or report), the affiliation of each communication participant (e.g., an attorney, client, representative, or non-party), the directional flow of the communication (e.g., seeking legal advice, providing legal advice, memorializing a conversation with counsel, or providing information to enable the rendering of legal advice), and the subject matter of the communication. As to this last component, counsel needs to define a description regarding the referenced topic without disclosing the actual advice sought or provided.

It is possible to generate such a description by creating and using single or multichoice coding fields in a review platform to denote, for example, the purpose of the communication or the subject matter of the legal advice. Once selected, these fields can be exported outside of the review platform in a report, such as in an Excel workbook. Those multiple fields can then be concatenated (an Excel-specific formula that merges text content from multiple cells into a single cell) into a string

sentence.⁵⁶ However, such effort requires reviewers to take additional time to think about and select each element that best ties to each logged document.⁵⁷ Unlike a single choice field in document review (i.e., Responsive or Not Responsive; or Not Privileged, Redact for Privilege, or Withhold for Privilege),

56. Some practitioners and technologists are exploring the use of tools utilizing artificial intelligence to assist in the generation of narrative descriptions. However, such technologies may require substantial upfront costs depending on data volume and vendor pricing or are otherwise inaccessible to certain litigants. In addition, there is significant attorney time required to draft narrative descriptions to train the technology on a sample of documents, sample the results, and validate the accuracy of the generated narratives. The use of such technologies may someday be helpful in reducing the time and potentially overall cost of creating privilege logs, but certain barriers to accessing and leveraging these technologies exist. Nevertheless, as these options evolve, they may become more valuable in reducing the burdens of the privilege logging process.

57. 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 several field selections or “clicks” for a privileged document will take longer than making only two (e.g., Responsive and Withhold for Privilege). Further, the menu of choices under each field that is required to form the descriptive sentence makes privilege log coding similar in complexity to issue coding and provides multiple ways for reasonable minds to differ when compared to a binary choice. Additional layers of complexity also increase the efforts required to 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 increases. 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* (Mar. 20, 2006), <https://www.apa.org/research/action/multitask> (summarizing research on the impact to productivity when humans switch between complex tasks).

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.⁵⁸

Moreover, while the concatenated string approach may be useful in certain circumstances in which document metadata is not informative and the choices for the concatenated string are few and straightforward (e.g., lawyer markups of internal drafts of various policies over the years), this approach takes additional time and consideration where the documents are not easily described by a few common strings. Absent a case where the concatenation choices are few and easily explain the withheld documents, the additional effort required to string together a descriptive sentence to provide information beyond what is identifiable from the document's metadata will not only be more time consuming than a metadata-plus privilege log, but the additional words contained in the descriptive sentence may not provide significantly more insight than the document's own metadata would provide.⁵⁹

Given the additional time and expense associated with creating these descriptive narratives, as well as the fact that much of the same information contained in these descriptions can be exported from the metadata of withheld documents,

58. Responding parties may wish to provide reviewers with 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.

59. See Sections III.B.2 and III.B.3, discussing the merits of metadata and metadata-plus-topic logs as alternative means to traditional logs in appropriate circumstances.

alternatives to logging that do not involve such a descriptive narrative offer a more efficient way for a responding party to satisfy its burden, though, as discussed in Section III.2.B, more information may be required for the responding party to meet its burden. As stated throughout this *Commentary*, alternative privilege log formats may be helpful in addressing the tension between specificity and burden.

B. *Subject Matter*

As stated above, the descriptive narrative also contains the general subject matter of the legal advice. The extent to which courts require subject-matter descriptions and their required level of specificity varies, although the touchstone appears to be whether the details provided are useful to assess the claim of privilege.⁶⁰ For example, the Second Circuit and Third Circuit

60. 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 (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). However, in the context of the assertion of a common-interest privilege, some courts have held that it is sufficient to identify only 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. 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

have held that “cursory” descriptions, such as “Fax Re: DOL Findings,” “Fax: Whistleblower article,” “daily log entries,” or “notes/correspondence,” are insufficient.⁶¹ By contrast, privilege logs that specifically state that the document includes communications of legal advice on an issue generally pass muster.⁶²

As responding parties have moved toward 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 may be sufficient to illustrate the “general subject matter” sought by the 1993 Advisory Committee Notes. Other times, however, generic subject lines or titles will not be

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)).

61. 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”).

62. 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 seeking legal advice regarding medical procedure,” and “Email requesting advice of counsel regarding FDA request” to be sufficient); but compare *RBS Citizens, N.A. v. Husain*, 291 F.R.D. 209, 218 (N.D. Ill. 2013) (finding insufficient the following description: “Document containing non-responsive and privileged analysis re loan facilities including NBB based in part on and reflecting advice of counsel”); see also *Vaughan v. Celanese Americas Corp.*, No. 3:06CV104-W, 2006 WL 3592538, at *3 (W.D.N.C. Dec. 11, 2006).

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.⁶³ On the other hand, including email subjects, filenames, and/or document titles raises another burden concern. The responding party must assess whether these fields, either alone or combined, reveal sensitive privileged content requiring additional protection through redaction.

In these scenarios, the custom descriptions may become extensive, each taking time to craft the information needed to support the elements of each privilege/doctrine claimed throughout the entire document, which further underscores the importance of consulting with adversaries about privilege log format.

From the requesting party's perspective, if a privilege log fails to provide sufficient information regarding the subject matter of a withheld document that would allow it to understand the nature of each document and assess the privilege claim, it can impact the privilege log review. This is further discussed in Sections II.C (identifying the source of the privilege), II.E (assessing privilege claims amidst increasing volumes of documents), II.F (resolving disputes in time to use the information in the litigation) and II.G (motion practice).

C. Identifying Privileged Parties

The descriptive narrative also often incorporates identification of the privileged parties who generated or received the withheld document, or whose legal advice or requests for legal advice are reflected within. For corporate or

63. *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”).

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 non-party. Where there is a request to provide the job title or role for individuals listed on the log, that request can become complex if the documents on the log span a long period of time, because this causes a greater likelihood of corporate position changes within the pool of communicants on the log and the fact that information such as job titles going back in time are often not available. Potential courses of action could include agreement that all non-parties will be unambiguously identified (such as by providing email addresses on the privilege log itself), agreement that a responding party will provide this information for specific party individuals upon request, or agreement to provide 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 separate list of all individuals whose involvement they assert give rise to the privilege or protection.⁶⁴ In-house attorneys representing corporations or institutions may wear multiple hats. Asserting privilege based on in-house attorneys may give rise to a question of whether they were providing business or legal advice in the communication, and parties should be prepared to provide additional substantiation where the in-house attorney is the only legal personnel identified and the log entry does not otherwise provide sufficient information for the requesting party to understand the assertion of privilege.

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 to determine the

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

privilege status. While it may be reasonable to withhold a communication between nonattorneys memorializing and/or reflecting the advice of counsel, additional investigation may be necessary to substantiate the assertion of privilege. Although courts recognize that a document may be privileged even if an attorney is not a direct sender or recipient of the correspondence, without some other indicia on the log indicating these documents were prepared for the purpose of obtaining legal advice or in anticipation of litigation, disputes can arise.⁶⁵ In addition, email communications without attorneys on the to/from/cc of the metadata may contain counsel communications farther down the email chain (i.e., when nonattorneys forward attorney advice), which may require explanation on the log.

From the requesting party's perspective, a responding party may not have met its obligations when privilege logs fail to adequately identify or explain the roles of the individuals involved in a document and their effect on the privilege claim. For example, when name normalization is used,⁶⁶ Listservs are

65. 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). Some privileges do not depend on the direct involvement of an attorney (e.g., deliberative process, executive privilege, legislative privilege, etc.), and the absence of an attorney from the log entry provided for such privileges does not necessarily give rise to a justified privilege challenge.

66. 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;

present, or the privilege log contains a large number of individuals, the requesting party often must spend significant amounts of time attempting to discern the basis for the claims of privilege—e.g., whether individuals listed in a log are “outsiders” or lower-level employees whose access to or involvement in the communication may preclude a claim of privilege or give rise to waiver.

D. Basis of Privilege

Responding parties must identify the privilege(s) or protection(s) (i.e., attorney-client privilege, work product, etc.) on which they are withholding each document or category of documents. However, merely identifying the nature of the claimed privilege(s) may not in every instance fulfill the requirement of providing information necessary for the responding party to substantiate the assertion of privilege.⁶⁷ For example, it may be necessary to add information to log entries to substantiate claims of work-product protection (e.g., identifying the specific litigation for which the document was

joe@abccorp.com; jmith@gmail.com all normalize on the privilege log to “Smith, Joe.” Name normalization has a manual component, and therefore, is an additional burden on the responding party. Before undertaking this effort, the parties should discuss whether the requesting party prefers name normalization, as requesting parties may find it unhelpful.

67. 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, 641–42 (S.D. N.Y. 1991) (finding an index including date, addressor, addressee, document type, and grounds for nondisclosure insufficient).

prepared) or the common-interest doctrine (e.g., the nature of common interests between communicants on the log entry).⁶⁸

E. Substantial Volume

Since the addition of Federal Rule 26(b)(5) in 1993, there has been a tremendous rise in the volume of email and other electronic forms of communications, which, along with the increased ease of transmitting privileged information, has increased the number of documents potentially subject to a claim of privilege. Where a responding party desires to assert privilege over a large number of documents, the time required to complete a traditional privilege log necessarily increases, as does the burden of preparing individualized narrative descriptions for the increased volume of documents.⁶⁹ For instance, a party withholding hundreds of documents can typically prepare a defensible privilege log within a week or

68. 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).

69. 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.”). The Sedona Conference has acknowledged previously that preparation of a privilege log in a complex matter can “consume hundreds of thousands of dollars, or more.” The Sedona Conference, *Commentary on the Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 103 (2016).

two, but a party withholding thousands or tens of thousands of documents as privileged could potentially need months to prepare a defensible privilege log.⁷⁰

The opinion in *Hopson v. Mayor & City Council of Baltimore* aptly describes this challenge and the need for flexible solutions to address it:

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

70. Increasing volumes of ESI have led many litigants to look for solutions to streamline responsiveness review. Responsiveness review burdens can be alleviated, at least in part, through Technology Assisted Review (“TAR”) and other artificial intelligence (“AI”) tools. See *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 technology-assisted review). 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 nuanced and difficult to recognize than a simple responsiveness binary choice. 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) (ebook), available at <https://www.rand.org/pubs/monographs/MG1208.html>, (stating that 73 percent 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).

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-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 . . . [C]ourts 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.⁷¹

Consistent with the foregoing, this *Commentary* recommends that litigants discuss the expected volume of privileged documents early in the case and the implications of that volume on the format and timing for the production of privilege logs, to the extent that information is reasonably available.

While the time-intensive process of identifying, logging, and conducting quality-control review of a large number of documents as privileged imposes an obvious burden on the responding party, it also can impose a burden on the requesting party. Whereas counsel may be able to more easily analyze a log of a few hundred documents, it takes a significant amount of time to assess privilege logs containing thousands of documents

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

and determine which entries require further clarification or reflect documents that may not, in fact, be privileged.

One advancement in technology that has attempted to address the proliferation of emails is the use of email thread identification and suppression, also known as “email threading.” Email threading is the technical process of recombining emails that comprise an email discussion, including replies and forwards. Email threading identifies inclusive emails⁷² within a given document set, and email thread suppression is the process whereby noninclusive emails within email threads are removed (suppressed) from a review set to reduce the overall review population without removing any unique content. In many cases, email thread suppression may be used to reduce the volume of documents that the responding party must review, and to the extent the emails are privileged, subject to an additional review for privilege logging. This, in turn, can increase the speed of review.

To avoid later disputes, it is recommended that parties discuss early in the case whether threading will be used for review. This includes not just for review but also for logging, because there is a lack of consensus among courts that have addressed in the context of email chains (i.e., one document that contains multiple emails) whether it is sufficient to log the top-level email or whether each component email in the chain must

72. Inclusive emails are emails containing content that is not present in its entirety in any other email in the set of emails being analyzed. Generally those are the last-in-time email in any branch of the thread, as well as any email with an attachment that is not also attached to a later-in-time email that contains the full content of the earlier email. Noninclusive emails are all emails that are not categorized as inclusive. The Sedona Conference, *The Sedona Conference Glossary: eDiscovery and Digital Information Management, Fifth Edition*, 21 SEDONA CONF J. 263, 381 (2020).

be individually logged.⁷³ While one practice is to reflect on the privilege log only the top-level email information (while having the description accurately reflect the assertion of privilege over the entire chain), some court decisions endorse the position that every email in the chain must be separately logged. The drafters of this *Commentary* are not aware of any decision addressing whether emails suppressed from review through email thread identification technology must be separately logged. These decisions assessing the need to individually log emails in an email chain would logically be applied to the question of whether individual emails suppressed via threading also need to be individually logged. Courts reaching decisions consistent with the *Rhoads Industries v. Building Materials Corp. of America* cases require logging of each individual email in a chain as a

73. Practitioners should be aware that courts have taken different approaches on whether each message in the chain must be logged or if one entry will suffice. A few courts, despite acknowledging the increased burden, have required parties to log each message in the chain, 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. *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); *Universal Serv. Fund*, 232 F.R.D. 669, 674 (D. Kan. July 26, 2005) (requiring each email in chain 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 email in a chain 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”).

separate document being withheld.⁷⁴ On the other side of the question, courts reaching the decision consistent with *Muro v. Target* allow multiple emails in the same chain to be logged as a single entry, provided that all the parts of the communication in the email chain were properly privileged, or nonprivileged portions were otherwise produced.⁷⁵

Absent clear guidance from the court, parties should consider several factors when discussing email threading. When objective information in the log is populated only from top-level email metadata, the potential remains that responsive communications (from suppressed emails in the chain) will be withheld on the basis of privilege without being disclosed on the log. In that case, the direct involvement of an attorney in a suppressed email may not be reflected if metadata is used to

74. *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 court's earlier order regarding which emails were privileged). *See also* *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).

75. *See Muro v. Target Corp.*, 250 F.R.D. 350, 362–363 (N.D. Ill. 2007), *aff'd*, 580 F.3d 485 (7th Cir. 2009) (finding that requiring separate entries for multiple emails in the same string risks forcing parties to disclose privileged information); *EPAC Technologies, Inc. v. Thomas Nelson*, No. 3:12-cv-00463, 2015 WL 13729725, at *5 (M.D. Tenn. Dec. 1, 2015) (“The Magistrate Judge, however, finds persuasive the standard set forth in *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 641–42 (D. Nev. 2013) whereby email threads are not required to be separately itemized on privilege logs, but nonprivileged portions of e-mail chains should be produced.”); *Dawe v. Corr. USA*, 263 F.R.D. 613, 621 (E.D. Cal. 2009) (using the first email in a chain to determine privilege); *Williamson v. S.A. Gear Company, Inc.*, Case No. 3:15-cv-365-SMY-DGW, 2017 WL 10085017, at *1 (S.D. Ill. June 6, 2017) (“If applicable, the parties are not required to include separate entries for multiple e-mails within the same string.”).

generate and populate the privilege log.⁷⁶ This leaves the requesting party guessing at whether any attorney was involved at all, or whether non-parties are included in the suppressed emails. This is one area where parties can negotiate alternatives to providing information regarding communicants of noninclusive emails in the absence of individually logging suppressed emails to address such concerns.

The time required to separately log each lesser included email in a thread can be laborious. Although certain threading tools attempt to parse metadata and text of a document to identify names of senders and recipients on lesser included emails, those tools are not always available or accurate. Without those tools, this can only be achieved through manual effort.

Given the burden of logging each member of an email thread separately, it would be reasonable for the parties to negotiate a single log entry for the inclusive emails within an email thread. The parties should discuss email threading and its implications on the information that will be reflected in the privilege log, and whether it may be helpful to provide additional information about the metadata of suppressed emails, early in the case and before privilege logs are created and produced.

F. Timing Pressures

Parties often have competing interests with respect to the timing of privilege log productions. Common options include producing one log after all documents have been produced, or

76. Consider a privileged email between an attorney and her nonattorney client, which is then forwarded by the client to a nonattorney company employee. The metadata on the log for the later-in-time inclusive email would reflect only the communication between the nonattorney client and employee. If email threading is used, the original communication with the attorney may be suppressed from review and production and not accounted for on the log (absent negotiation on how to reflect it).

“rolling” privilege logs produced sequentially after a set number of days after the production of a tranche of documents. Because preparing a privilege log can be time consuming and expensive, and perhaps because litigants hope to settle the case before those costs are incurred, some responding parties may prefer to place the effort at the end of discovery. Though Rule 26 does not contain an explicit timing requirement for providing a privilege log, parties are encouraged to discuss the expected timing of serving a privilege log and plan to give themselves sufficient time to address privilege log challenges with the court before the close of discovery, if necessary. Moreover, parties should consider whether their jurisdiction requires serving logs contemporaneous with productions.⁷⁷

From the requesting party’s perspective, receiving a privilege log only after all productions have been completed can be problematic for several reasons. First, putting off the logging process risks delaying depositions, summary judgment, and trial, especially where a requesting party challenges the responding party’s assertion of privilege over a large number of documents, or where the documents withheld largely implicate contentious privilege disputes. 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 the parties have

77. Courts may have their own standing orders providing expectations on when privilege logs are to be served. For example, one court in the Middle District of Florida orders that privilege logs shall be served simultaneously with the response to written discovery requests in which the documents are withheld on the basis of privilege. See <https://www.flmd.uscourts.gov/sites/flmd/files/documents/mdfl-hoffman-standing-order-regarding-privilege-logs.pdf> (June 17, 2019).

reached an impasse as to whether a particular privilege basis is defensible. In such situations, it may be difficult to get additional time to make use of any documents later determined to be not privileged when logs have been delayed or large swaths of documents have been de-designated from an initial withholding position. Yet, conferring as to numerous iterations of a rolling log requires detailed organization to track and resolve disputes.

Second, it may be more difficult to assess the responding party's claims of privilege if logs are not produced with each production, so that everything can be analyzed in context. Rolling logs may facilitate earlier identification and resolution of concerns over the format, level of specificity, and substance of the privilege claims, and indeed, some courts have expressed an expectation for parties to use rolling privilege logs.⁷⁸

From a producing party's perspective, there may be significant downsides to rolling privilege logs. Foremost, having to provide privilege logs at or near the same time as corresponding document productions potentially decreases the quality and accuracy of the privilege log because resources must be diverted away from the privilege log to complete a document

78. "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 requesting 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).

production on time. Thus, rolling logs may result in privilege logs of inferior quality, which may often lead to disputes (including motion practice requiring court attention) where the receiving party objects to various log entries. Rolling logs may require 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, which leads to decreased consistency in assertions of privilege and increased risk of the inadvertent production of privileged documents. For this reason, in cases involving large volumes of documents, it is typical for the responding party to apply a “privilege screen” (list of privilege-associated search terms) to the documents and to withhold all documents resulting from that search from its initial productions until they can be subjected to further privilege review. It may also be the norm that responding parties in this situation will be overly cautious in making early privilege assertions that would not have been made with the benefit of more time and context prior to providing a privilege log.

G. Motion Practice

As shown above, there is no agreed standard for 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 uncertainty can raise concerns for both parties—for the requesting party, who may have to expend time and resources pressing for more details when presented with a log they believe to be insufficient; for the responding party, who may have to expend additional time and resources responding to demands for more specific logs. Because there is no clear

standard regarding how much specificity is required, this can create tension between the parties and lead to disputes about the sufficiency of a privilege log. If the parties are unable or unwilling to resolve these disputes in a cooperative manner, it can lead to costly motion practice that imposes a burden on both parties, as well as the court.

III. METHODOLOGIES TO MITIGATE BURDENS

The burdens often presented by the privilege logging process can be mitigated in a number of ways. These include (1) exclusion from the logging process of certain categories of documents that require less or no substantiation for a recognition of privilege protection, (2) utilization of alternative, less-involved privilege logging formats, and (3) early case communication via the Rule 26(f) conference and negotiation of an ESI protocol or other agreement to address the details regarding content, format, and timing of privilege logs.

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

Generally, for certain categories of documents, an entry on a traditional privilege log does not materially add to the threshold of substantiation needed for a requesting party to assess a claim of privilege. Excluding these categories of documents from privilege logs in the first instance can greatly reduce the burdens associated with privilege logs for the parties.

As explained below, this *Commentary* recommends excluding three categories of documents from logging in the typical case: (1) communications with outside counsel after the date of litigation, (2) documents that post-date the complaint and constitute work product prepared in connection with the litigation at issue, and (3) redacted documents (provided that the basis for the redactions is evident on the face of the document itself).

Communications between a party and its outside counsel⁷⁹ after the date the litigation commenced about issues related to

79. The responding party may also request to include in-house counsel in the scope of this exemption if it can demonstrate that the attorney(s) was

the litigation can reasonably be construed as communications between a client and attorney in connection with the request for or provision of legal advice related to the pending litigation.⁸⁰ In most circumstances, reasonable minds would agree such communications are protected by the attorney-client privilege, and likely also the work-product doctrine, and may be withheld from production. These documents generally are not subject to dispute as to the validity of a privilege claim.

For the same reason, work product generated by the party or its litigation counsel, prepared in connection with the litigation, after the date of the complaint, is generally understood to be protected from disclosure. In most cases, it benefits both parties to exclude these two document categories from privilege logging. For the responding party, excluding these document categories minimizes the time and expense required to prepare privilege log entries, and for the requesting party, it minimizes the number of log entries the party must assess. Moreover, agreeing to exclude these categories will decrease the number of log entries that may be subject to dispute between the parties. There may be cases, however,

exclusively providing litigation-related advice, rather than serving in a business or mixed role.

80. Courts have routinely found that, for example, post-litigation communications with counsel do not need to be logged. *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 the burden of laborious privilege review “would far exceed any likely benefit” of finding relevant, nonprivileged documents); *Quincy Mutual Fire Ins. Co. v. Atlantic Specialty Ins. Co.*, 2019 WL 3409980, at *7 (D. Mass. July 29, 2019).

where the requesting party has particular questions or concerns about post-complaint communications, in which case the parties should discuss and negotiate the contours of this exclusion. Additionally, the parties should discuss whether and how to apply these exclusions where the underlying subject of the litigation may be ongoing and is relevant.

Documents produced with redacted text are another example where the privilege log entry may not materially add to the level of required substantiation. Where specific lines of text in an email chain are redacted, but the email sender, recipient(s), date, and subject line remain viewable and the nonprivileged metadata produced, the produced image and metadata of the document reflects much of the information already required to substantiate the claim of privilege—the “details concerning time, persons, and general subject matter” that the 1993 Advisory Committee Notes to Rule 26 state as 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.”⁸¹ 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.⁸² Any information that would be put into

81. The same may also be true for redacted portions of a non-email attachment documents such as a Word document or PowerPoint presentation where the transmittal email is produced. This is the case because the produced transmittal email will present the time and persons details, and the nonredacted portions of the attachment document will provide the context of the subject matter. Often, the author or filename of a document will be in the produced metadata.

82. *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

a traditional privilege log entry is likely already reflected in the produced document, so the time it takes to create a log line entry adds to the responding party's burden but does not substantially add to the requesting party's ability to properly assess the claim.

However, 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 need to seek clarification. Also, there may be situations in which the requesting party needs additional information regarding the subject matter of the documents to assess the privilege claims. To address such questions, the responding party may need to list the privilege asserted in the text of the redaction box and/or provide a Bates/assertion log only (e.g., a spreadsheet with the Bates numbers for redacted documents and the type of protection claimed—work product (WP), attorney-client privilege (ACP), or other protection). Alternatively, the parties could agree to have this information provided in the document's metadata, through the provision of a user-created metadata field containing the privilege basis.

In addition, a requesting party may not be able to determine the existence of a privilege where attorney names are not reflected as involved communicants or where new forms of communication or certain file types present unique challenges. In the interest of minimizing burdens, the responding party can agree to provide supplemental information about specific documents identified by the requesting party, rather than creating an additional log line for each redacted document. To aid in the identification of redacted documents and assess the metadata associated with them, it is recommended that

requesting party could still ascertain all the necessary information from the document itself).

redacted documents contain a populated value in a “redacted” field in the load file produced to the requesting party.

In summary, as additional description is not necessary to state a claim of privilege for such documents, this *Commentary* recommends exclusion from logging requirements for three categories of documents in the typical case:

- Post-Complaint Outside Counsel—Communications between outside counsel and the client after the complaint was filed.⁸³
- Post-Complaint Work Product—Communications and work-product documents related to the underlying litigation (e.g., draft pleadings or discovery responses, litigation strategy memos) that post-date the complaint.
- Redacted Documents—Parties can negotiate the exclusion of redacted documents from a 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.

Agreeing to exclude these documents from logging in the first instance not only limits privilege log disputes to the entries that are more likely to be the subject of a true dispute, but also reduces the time and cost necessary to create the privilege log. This helps *both* parties reduce burdens. Furthermore, agreeing

83. 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.”). There may be other categories of documents that the parties agree are, on their face, likely to be privileged and exempt from a logging obligation, such as attorney billing entries.

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 of the case will engender a degree of goodwill in cooperation between the parties.

B. Alternative Construction of Logs

In general, and as noted above, parties are free to create a log that provides the necessary information in the manner they agree is most appropriate for the case. There are several alternatives to the traditional log that may meet the requirements of Rule 26, such as categorical logs, metadata logs, metadata-plus-topic logs, and bespoke logs for nontraditional data sources. Each is discussed in greater detail below, but there is no "one size fits all" approach, and litigants should consider the document population and select the option that will most efficiently allow the responding party to substantiate the reason for withholding of otherwise responsive information. A responding party should also consider whether it is appropriate to use more than one type of privilege log formats for different sources or topics of withheld documents.

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 manually categorize the nature of the document (by a topic category) during privilege review. Once identified by category, the documents

will be manually organized by overlapping sender/recipient groups. The log will reflect the date range applicable to that category, sender/recipient group for that category, and the number of documents withheld. (See Appendix A.2 for an example of a categorical log.) Because this is a manual task, it requires familiarity with all of the different ways in which the privileged documents present, so that the attorney can determine the schema of categories for the privilege log. Making these determinations is often a time-consuming process for the responding party.

Categorical logs have their origins in the Advisory Committee Notes to Rule 26. Specifically, prior to 1993, Federal Rules of Civil Procedure did not address privilege logging, though some district courts had requirements or local rules for logs. When subparagraph (5) was added to Rule 26(b) in 1993, the Advisory Committee Notes explained that a specific format was not required and could vary based on the needs of the case:

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection 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.*⁸⁴

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

The emphasized portion of the Note above—suggesting description by categories—led to the creation of “categorical logs” as a means of potentially reducing the burden of having to draft descriptive narratives for each document.⁸⁵

In the years since, some jurisdictions, such as the Southern District of New York, have implemented local rules stating that categorical logs are presumptively proper.⁸⁶ For example, New York state courts affirmatively require parties to discuss if using categories is more efficient.⁸⁷ The Supreme Court of New York adopted Rule 11-b of Section 202.70(g), which establishes a preference for categorical privilege logs.⁸⁸ Even in states where traditional logs are required, there may be an exception for

85. 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, at *5.

86. See, e.g., Local Rules of the U.S. Dist. Courts. for S.D.N.Y. & E.D.N.Y., Civ. R. 26.2 (Oct. 29, 2018), 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 requesting party to make an intelligent determination about the validity of the assertion of the privilege.”).

87. N.Y. COMP. CODES R. & REGS. tit. 22 § 202.20-a.

88. Comm. on State Courts of Superior Jurisdiction, Guidance and a Model for Categorical Privilege Logs, <https://www2.nycbar.org/pdf/report/uploads/20072891-GuidanceandaModelforCategoricalPrivilegeLogs.pdf> (last visited May 16, 2024).

categorical logs for some portion of the privileged population.⁸⁹ There are several cases authorizing categorical logs as a less burdensome means of asserting privilege.⁹⁰ There are also cases confirming that parties are making affirmative use of this option.⁹¹

89. Delaware Chancery practice guidelines, p. 24, <https://courts.delaware.gov/forms/download.aspx?id=99468> (last visited May 16, 2024) (“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 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.”).

90. *United States v. Magnesium Corp. of Am.*, 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 F.R.D. 55 (S.D.N.Y. 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 . . .”).

91. *See, e.g.,* *Mfrs. Collection Co. v. Precision Airmotive LLC*, No. 3:12-cv-853-L, 2014 WL 2558888 (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. Mar. 27, 2008) (requiring defendants to “identify the date on which each of the insurance companies assumed the defense of this litigation”); *In re Imperial Corp. of Am.*, 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

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.⁹² One of the initial cases to evaluate use of a categorical log on a showing of burden was *SEC v. Thrasher*.⁹³ In that case, counsel had already represented that the privileged documents reflected communications between defense attorneys and that all of the documents had been kept in confidence. The court only required as additional privilege substantiation: “(1) an identification of the time period encompassed by the withheld documents; (2) a listing of the individuals who were authors or addressees or were copied on the documents; [and] (3) a representation by counsel as to whether all of the documents either (a) were prepared to assist in anticipated or pending litigation or (b) contain information reflecting communications between (i) counsel or counsel’s representatives and (ii) the client or the client’s representatives, for the purpose of facilitating the rendition of legal services to the client.”⁹⁴ The *Thrasher* test has been utilized by numerous

withheld documents,” and an affidavit representing that the withheld documents were trial preparation materials or contained information reflecting confidential communications between counsel and plaintiff).

92. *Tyco HealthCare Grp. LP v. Mut. Pharm. Co.*, No. 07-1299 (D.N.J. May 2, 2012) (holding that party was required to produce a document-by-document, post-complaint privilege log because the party did not establish that logging potentially less than 3,000 documents would be unduly burdensome); *Sprint Commc’ns 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 1,000 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).

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

94. *Id.*

other courts.⁹⁵ Some 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-document log.⁹⁶ Yet other courts have found categorical logs provide insufficient information for courts and requesting parties to assess the claim.⁹⁷

Although categorical logs have been utilized by parties to 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 insufficient to satisfy the requirements of Rule 26(b)(5)(A).

Categorical logs have often been critiqued as not being as effective at reducing costs and burdens as perhaps originally anticipated. For example, grouping “like” documents into a single category often requires more manual effort to analyze

95. 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)).

96. *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 Pracs. 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).

97. *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.”).

and combine records than would be incurred compared to alternative methods. In addition, if categories are not described with sufficient particularity or encompass large numbers of documents over a lengthy time period within a single category, it can lead to discovery disputes. These disputes are costly and time consuming and may result in the court requiring either amendment of, or conversion to, a traditional privilege log for some or all of those categories, thereby eliminating any perceived efficiencies the responding party sought to achieve with this type of log.⁹⁸ Moreover, the timing of when in the review process to define a “category” can be problematic—a list of categories determined through early client discussions and

98. Courts within the Southern and Eastern Districts of New York continue to clarify the requirements for categorical logs, rejecting overly vague, broad, and conclusory categories and, sometimes, requiring a 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 nonattorneys 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. Mar. 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” 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. Mar. 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); *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 that an itemized log was required).

sampling may evolve and change contours as more information is gained through review. This, in turn, may necessitate significant evolutions on categorization protocols and efforts to change category decisions previously applied to documents.

Notwithstanding, particular consideration should be given to using this format when a jurisdiction encourages it. Practitioners in New York, for example, should consider whether and 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 withheld privileged documents that can fairly be grouped together by subject matter and overlapping communicants, a categorical log may be appropriate. For example, for a privileged document population that heavily involves discussions with outside legal counsel pertaining to the lead up to the action (if not already excluded through negotiation), a categorical log may be appropriate.

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 descriptive narrative. (See Appendix A.3 for an example of a metadata log.) Generating such a log is generally a straightforward process that involves exporting existing metadata fields associated from a document review platform for the documents that a party asserts are privileged. The parties may agree, in the first instance, to provide a document-level metadata log that provides the existing metadata for fields that correspond to information that would be on a traditional privilege log. The parties can agree to a sampling process to provide additional information for a percentage of the withheld documents or focus on entries for which the requesting party

has indicated that the metadata does not provide enough information to understand the assertion of privilege. Parties can explore alternative approaches, including a combination of such approaches, for different types of documents.

Metadata logs are prepared by extracting information from the metadata of the native document maintained in the review platform. The fields can be easily exported, on a document-by-document basis, from the review platform into a spreadsheet-type table for further review, and if necessary, editing. Common examples of such fields are Priv Log ID, From, To, CC, BCC, Date, File Type or Extension (e.g., Email or .msg, Spreadsheet or .xls), Basis for Claim (Attorney-Client Privilege, Work Product, other). Additional fields that may be requested are as follows:

- Family ID⁹⁹—identifying the relationship between a parent document and an attachment.
- Email subject/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
- Date/Time Created/Last Modified—note that these fields may not accurately reflect the date/time a file was created or modified.

99. This field may help address the issue of where documents in the same electronic “family” (e.g., emails and attachments) are logged in separate, disjointed entries. Identifying the relationship between the parent and child documents (email and attachment, or presentation with embedded charts, etc.) in some manner in the log would allow for better assessment of the documents in relation to one another. *See* Appendix B for a detailed description of fields for various log formats.

- (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.
- Email Thread ID¹⁰⁰
- HashValue¹⁰¹

For metadata logs, counsel will often need to provide a “key” of legal personnel—names and affiliations/positions—as well as for non-parties that the responding party asserts do not break the privilege. 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.

In many instances, the metadata maintained in the to/from/cc, document type, and email subject/filename fields

100. This field will reflect an ID value that indicates which conversation an email belongs to and where in that conversation it occurred. See Email threading, RELATIVITY ONE, https://help.relativity.com/RelativityOne/Content/RelativityAnalytics/Email_threading.htm (last visited May 16, 2024).

101. Hash Value, or Hash Coding, is a “mathematical algorithm that calculates a unique value for a given set of data, similar to a digital fingerprint, representing the binary content of the data to assist in subsequently ensuring that data has not been modified.” It may include MD5 or SHA. The Sedona Conference, *The Sedona Conference Glossary: eDiscovery and Digital Information Management, Fifth Edition*, 21 SEDONA CONF J. 263, 317 (2020).

will provide information synonymous with much of what is contained in a descriptive narrative, which is omitted from metadata logs. Because a descriptive narrative can be understood to be a combination of multiple points of information—the involved communicants, the privilege claim, and the subject matter—that same formula may be easily met with the provision of metadata fields that 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 may be sufficient to establish the privilege basis for many withheld documents, narrowing the disputes or requests for additional information to a smaller number of documents on the log.

One potential challenge to metadata privilege logs arises where email threads withheld in their entirety 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.¹⁰² The top email metadata may not provide sufficient information to support the privilege claims for emails elsewhere in the string. If the requesting party raises a concern, the parties can confer so that the responding party can, for example, provide additional information about particular documents, which may include individualized descriptions to account for the separate privileges and subject matters within a document.¹⁰³

Similarly, if using email thread suppression and logging only the top-line email, the direct involvement of an attorney in

102. For example, an attorney-client communication is forwarded between nonattorneys that are then communicating to prepare material to support a litigation.

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

a suppressed email may not be reflected if metadata is used to generate and populate the privilege log.¹⁰⁴ This leaves the requesting party wondering whether any attorney was involved at all.¹⁰⁵ In these situations, parties may also need to provide identification of other legal personnel involved in the communication that are reflected solely in the earlier communications within the email chain; this field cannot be extracted from a document's innate metadata and would have to be manually populated.

Metadata will not be perfect for every document. For example, the filename or subject line may be uninformative or not applicable to the subject matter at issue. Metadata may be missing or inaccurate. Scanned hard-copy documents may have no useful metadata. However, where these potential deficiencies prevent a reasonable assessment of the claim, the parties can confer on those entries for which the receiving party believes it needs additional information to assess the claim of privilege. This iterative process can occur a few ways. For example, the responding party can agree to provide supplemental descriptions for a limited number of entries, or over specific categories of entries (such as those without reference to an attorney, where a third-party communicant is included, or where the subject matter appears to be business rather than legal in nature).

104. Consider a privileged email between an attorney and her nonattorney client, which is then forwarded by the client to a nonattorney company employee. The metadata on the log would reflect only the communication between the nonattorney client and employee. The original communication with the attorney may be suppressed from production, but not accounted for on the log.

105. 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. *See supra* Section II.E and corresponding footnotes.

Precedent for the use of metadata privilege logs is mixed. In *U.S. Bank National Association v. Triaxx Asset Management LLC*,¹⁰⁶ 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.*,¹⁰⁷ 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 requirements. However, in *LaVeglia v. TD Bank*,¹⁰⁸ 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*,¹⁰⁹ the Eastern District of New York determined that a metadata privilege log was insufficient because the “subject line contains, in many instances, exceedingly unhelpful descriptions.”¹¹⁰

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 other privilege log formats.

106. *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).

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

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

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

110. *Id.* (“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 . . .”).

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 privilege log. However, in addition to the fields available in a pure metadata log, a metadata-plus-topic log will include an additional field—a category, or topic, description. Examples of a category/topic field could include things such as: contract drafting and evaluation; settlement analysis; consumer outreach; or internal investigation. (See Appendix A.4 for an example of a metadata-plus-topic log.) This one additional field is what distinguishes a metadata-plus-topic log from a pure metadata log.

As explained above, 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 by 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 responding 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 requesting party to assess the assertion 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 field, exported from the party's document review platform, provides further insight into the subject matter of the privileged content. The 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 topics, 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 category/topic fields, the metadata-plus-topic log 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 subset of the withheld documents involves lesser effort in terms of time, cost, and items of dispute for both parties. Preparing a metadata-plus-topic 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 to be withheld is voluminous, because they allow the responding party to serve a log much sooner than could occur with a traditional log. Another benefit of a metadata-plus-topic log over a metadata-only log is that the associated topic often helps the requesting party narrow the entries it may challenge or for which it may request additional information. Providing a topic for each logged document allows the requesting party to more easily identify areas of dispute by topic, which provides for a more streamlined and effective dispute resolution process.

Because of the additional benefits afforded by a metadata-plus-topic log, this *Commentary* recommends this type of log be considered the preferred format over a traditional log for most cases. However, the alternative log formats discussed in this

Commentary should be evaluated for their suitability to the case, based on the unique documents and factors at issue.

4. Different logs for different, nontraditional 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 log that is generated from metadata. For example, does a text message chain between attorney and client over several weeks, in which nonprivileged content is also discussed, constitute one communication or several? For collaboration tools such as Slack content or Teams channels, how does counsel log a question posed by one participant to the entire room, where responding communications span several days and intermixed messaging? These new forms of communication may have unique metadata fields that should be considered in determining how to log these sources.

It may be more efficient and lead to fewer disputes to prepare a log of nontraditional 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 by agreement, the responding party can log the channel by providing fields such as: Date, Participants, Channel Name, Privilege Basis, Topic/Subject Matter. Note that the Participants field would reflect only the individuals that were in that channel/room in that allotted date/time slice. This is just one example of the emerging, nontraditional business communications that may give rise to unique privilege logging challenges.

C. *Early Conferences to Discuss Privilege Logging Issues*

As discussed above, privilege logging imposes burdens on both the requesting party and the responding party, and the parties' divergent views on what constitutes an adequate privilege log often lead to costly and time-consuming disputes. 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 conference, 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 U.S. District Court for the Northern District of California Guidelines for the Discovery of Electronically Stored Information 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 . . ." ¹¹¹ Similarly, the Middle District of Tennessee's Administrative Rules provide 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)." ¹¹²

111. N.D. Cal. Guidelines for the Discovery of Electronically Stored Information, Guideline 2.02, available at https://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines-12-1-2015.pdf (last visited May 16, 2024).

112. M.D. Tenn. Admin. Rule 174-1, ¶ 8(b) (Sept. 12, 2018), available at <https://www.tnmd.uscourts.gov/sites/tnmd/files/AO%20174-1%20entered%209-12-18.pdf>.

Topics for these early communications can include: (1) privilege log exclusions; (2) the use of technology like email threading and its impact on the information contained in the privilege log; (3) alternative log formats for some or all of the ESI at issue; (4) when logs will be produced; and (5) court interaction to reduce disputes. More specifically, parties should consider the following questions:

What needs to be logged? Identify categories of information that can potentially be excluded from the privilege log process, such as the categories identified above.¹¹³ Discuss if the responding party intends to identify and group all of the emails in the same email thread and identify the inclusive email message in lieu of logging each email in the thread.¹¹⁴ Where the parties agree that only last-in-time emails will be included on a privilege log, discuss whether privilege logs will include (either in a separate field or in the narrative description) the names of the attorneys or third parties that were directly involved in the unlogged emails, if any, that give rise to or call into question the assertion of privilege. If the parties agree to exclude redacted documents from the privilege log, discuss what bibliographic information must remain unredacted on the face of the redacted document or provided in the metadata.¹¹⁵ Discuss whether any privileges or protections other than attorney-client or work product may apply in the case, and if so, whether those privileges or protections warrant special/unique privilege procedures.

How does it need to be logged? Parties should consider the form, format (i.e., Excel vs. PDF), contents, and how attorneys and non-parties will be identified on the privilege logs (or

113. See Section III.A.

114. See Section II.E.

115. See Section III.A.

through a separate document) to be used in the case and build that into an order entered by the court. Parties should seek agreement on how attorneys and third parties will be identified in the privilege logs, such as by providing separate lists and/or providing email addresses for logged emails. Similarly, consider whether to provide a list of the individuals identified in the privilege logs, with information such as titles/roles and company affiliations, and any limitations to that request. Further, parties should evaluate what additional metadata fields should be provided as part of the privilege logs to better illustrate the nature of the documents, including potentially “FamilyID” (to identify which documents relate to one another); “EmailThreadID” (to identify emails that are part of the same email thread, if threading is used); and “Redacted” (to identify when a document contains a redaction). If email thread suppression is used, decide whether the logging party will provide a description only for the inclusive emails in a thread, propagate the description to all of the noninclusive emails in the thread, or provide a separate description for all of the withheld emails in the thread. Confirm how the privilege log will be provided to the requesting party (PDF or Excel). Discuss if name normalization will be employed, or if the log will instead provide the email addresses of each individual on the log (if exporting this information from the document’s metadata).

When does it need to be logged? A thoughtful approach to the timing of privilege logs (particularly when accompanied by early, candid discussion of the issue) can alleviate burdens. Parties should discuss early whether they intend to provide privilege logs either after substantial completion of production, or a “rolling” log that reflects withheld documents at the time of each production. As discussed in Section II.F, if the production is extremely large, rolling logs of some 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 concerns with the logs themselves (format, detail, mechanics), as well as the scope of the applicable privilege or waiver—potentially informing later productions/logs on similar issues. On the other hand, requiring rolling logs in large volume cases where later document review may be necessary to inform or correct proper privilege determinations typically is extremely inefficient. This could lead to lower quality privilege logs, additional costs to revise privilege logs, and an increased likelihood of inadvertent production of privileged material. Where possible, the parties should seek agreement on whether depositions should be delayed until privilege log issues are resolved (by the parties or the court), or alternatively, whether witnesses may be recalled for an additional deposition for questioning documents that are later found to be not privileged.

What happens when a dispute arises? Planning 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, or as soon as the responding party has obtained a grasp on the general nature and volume of privileged documents in its document population.

Consider incorporating the following concepts in a discovery protocol:

- At the beginning of a case, seek to include a date in the protocol to have a discovery conference with the court later during the discovery period. As discovery progresses, the prospect of defending one's discovery process or positions in front of the court at the set date 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, fields, and how, generally, the information in the log will be presented.
- Set requirements for what privilege logs should contain, including, at a minimum, the use of alternatives to a traditional log,¹¹⁶ or the exclusion of certain documents from logs.¹¹⁷ 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. The parties and the court should seek to define what type and level of specificity should be used for the privilege logs and a process that allows requesting parties to ask for more specific information, while also protecting responding parties from undue burden.
- Determine 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 confer before 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

116. See Section III.B and Appendix A.

117. See Section III.A.

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.

- 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 requesting 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, or at trial, or to raise challenges with the court before the close of discovery.¹¹⁸
- Discuss clawback procedures. The expanding volume of ESI 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.¹¹⁹ Parties should also discuss the applicability of a Federal Rule of Evidence 502(d) Order.

Early case assessment and planning by the parties at the outset of the case can help alleviate, or at least make less burdensome, disputes related to the privilege logging process that may arise later in the case.¹²⁰

118. See Section II.F.

119. 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." FED. R. CIV. P. 26 advisory committee's note to 2006 amendment.

120. It should be noted, however, that parties may not be in a position to fully discuss and negotiate privilege logging issues during the Rule 26

conference. At this early stage of the case, parties generally do not have a complete picture of what will be required during discovery, including as it relates to privilege logs. For example, responding parties are not likely to know their full custodian list, the prevalence of privileged communications in the production set, or the complexity of privilege issues that may arise once the review begins. Thus, even where parties engage in early discussion at the Rule 26 conference and memorialize agreements related to privilege logging in a discovery protocol, privilege logging challenges may still arise as the case proceeds. In these cases, parties should further confer on privilege logging issues as soon as the responding party has enough information related to the scope and volume of privileged documents in its document population to meaningfully engage on the issues.

IV. RESOLVING PRIVILEGE LOG DISPUTES

A. *Preliminary communications to narrow issues*

Rather than seeking court intervention as a first step, parties should engage with each other when a privilege logging issue first arises. What appears to be a potentially contentious issue may be nothing more than a simple oversight or unintentional error by the responding party. It could be the result of a coding error, a formatting mistake, or mere oversight. When brought to the responding party's attention, the party may be willing to fix the issue if it was an error or explain the claim further. If the parties have agreed on a Rule 502(d) order, they may consider leveraging it to allow the requesting party's counsel to view challenged innocuous privileged documents to resolve the dispute and then claw back.

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 parties' needs. This may be because of a misunderstanding or miscommunication, or it may also be a function of counsel making decisions before knowing what the discovery would actually include. Parties should be open to altering the format or providing additional information where necessary.

To this end, rather than letting these issues sit until it is time to set a formal conference 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. It will benefit both parties to try to narrow the issues before engaging in more contentious discovery dispute resolution.

B. Formal conference

Typically, the applicable rules will require that parties hold a formal conference prior to the filing of a motion.¹²¹ 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 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 requesting party has insufficient information to assess the privilege asserted via a categorical log, the requesting party should specify what additional information it needs. 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 that need to be brought before the court.

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

121. See, 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).

C. *In camera review*

The failure of parties to provide sufficient information on a privilege log can lead to disputes between the parties.¹²² One mechanism to address this issue is seeking in camera review by the court of some or all of the withheld documents.¹²³ Depending on the volume of documents subject to challenge, this can be a time-consuming process for the courts. Whether to conduct an in camera review lies within the court's discretion.¹²⁴

122. 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.”).

123. 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.”).

124. 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

The decision turns on many factors, including whether it would be a needless use of the court's resources.¹²⁵ To reduce the burden and to preserve the court's resources, a court may provide guidance to parties to apply to contested documents and recurrent privilege issues¹²⁶ or sample a subset of the documents subject to challenge to determine whether further *in camera* review is appropriate. In addition, judges 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. The use of special discovery masters, or other neutral specialists, to review documents for privilege may come at a high cost to litigants, who will have to pay for their services, either jointly or by one party, depending on whether the challenge or the assertion of privilege was in good faith. However, requiring a log with

court's discretion is involved, two judges can reach two correct yet contrary conclusions based on identical fact patterns.") (citations omitted).

125. 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 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.").

126. 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.").

sufficient detail to describe the privilege may alleviate the need for in camera review.

V. CONCLUSION

The privilege logging process can be fraught with challenges and burdens for requesting parties, responding parties, and the courts. This *Commentary* suggests ways to navigate these issues, including (1) mitigating the burdens on responding parties associated with preparing a privilege log and protecting its privilege claims, (2) promoting the rights of requesting parties to be able to assess those claims, and (3) reducing the challenges on the courts to resolve privilege log disputes. A key ingredient in this process is cooperation among the parties. As a result, parties should endeavor to address as many privilege log issues as possible as early as practicable in the discovery process, including through the Rule 26(f) conference and discovery protocols.

As detailed above, this *Commentary* suggests that traditional privilege logging does not materially add to the necessary threshold showing of privilege substantiation for certain groups of documents, such as communications with outside counsel after the date of litigation, post-complaint work product, and redacted documents, and the parties should discuss excluding those groups of documents from privilege logging altogether. In addition, the use of alternative log formats may help parties strike a balance between providing information necessary to support a privilege claim with having to generate a costly traditional privilege log.¹²⁷ This *Commentary* takes the position 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 and the courts and allows the requesting party to focus requests for additional information where warranted. This approach may reduce the number of documents in dispute and lead to lesser effort, in terms of time, cost, and items of

127. See Appendices A, B, and C.

dispute, for both parties than the traditional manner of logging every withheld document.

APPENDIX A: INTRODUCTION TO WIDGETS EXEMPLARS AND EXAMPLE PRIVILEGE LOGS

Background

Certain information fields may be typical or expected on a privilege log and others are optional, depending on the needs of the case. Included in Appendices A and C are examples of various privilege log formats along with sample documents that appear on the logs. The exemplar documents and privilege logs are hypothetical and not intended to be perfect from a substantive, factual, or legal standpoint. However, these exemplars are useful tools for helping to understand terminology and illustrate different types of privilege logs, as well as provide a visual representation of the strengths and weaknesses of each type of privilege log. Ultimately, the party producing the privilege log must determine what is required and/or appropriate based on the particular circumstances of its case, including applicable rules, case law, judicial standing orders, volume and type of documents, and agreements between the parties.

To help illustrate the distinct features of the various privilege log formats, we are providing several reference points here. First, each field on the exemplars is defined in Appendix B and, where appropriate, commentary is provided. Second, the exemplars themselves are annotated to identify fields and items that are common in that type of privilege log versus potential ones, which may or may not be included (asterisked) depending on various factors.

For ease of readability, the exemplars can be downloaded in their native .xlsx format by [clicking on this link](#).

A-1 TRADITIONAL PRIVILEGE LOG EXEMPLAR

Click here to view the Traditional Privilege Log in its native .xlsx format.

Privilege Log #	Entity Referencing (Option 1, Email)	Entity Referencing (Option 2, Date)	Producing Party	Date	From/As to	To	Copy	Based for Claim	Narrative Description
PRIV010001	PRIV010001	1	WIDGET 000002	5/17/2022	Allegator, Abraham	Fox, Fox		Work Product	Email prepared in anticipation of litigation and attaching information prepared at the request of counsel related to same.
PRIV010002	PRIV010001	11 (option 2)	WIDGET 000004	5/17/2022	Allegator, Abraham			Work Product	(option 2) attachments prepared at the request of counsel regarding breach of contract by Fish in anticipation of litigation.
PRIV010003	PRIV010001	12	WIDGET 000003	5/17/2022	Hen, Henner*	Lion, Leonard; Tiger, Tercas*	Doc, Olivia; Grahic, Mason; Client, Sam*; Maccost, Mason*; Allegator, Abraham	Attorney/Client Privilege; Work Product	Email discussing legal advice from Tiger, Tercas* and Hen, Henner* regarding breach of contract by Fish in anticipation of litigation and requesting information prepared at the request of counsel related to same.
PRIV010004	PRIV010001	13	WIDGET 000002	5/15/2022	Tiger, Tercas*	Lion, Leonard	Doc, Olivia; Hen, Henner*	Attorney/Client Privilege	Email seeking legal advice regarding overdue accounts with Fish.
PRIV010005	PRIV010001	14	WIDGET 000003	5/15/2022	Lion, Leonard	Tiger, Tercas*	Doc, Olivia	Attorney/Client Privilege	Email seeking legal advice regarding overdue accounts with Fish.
PRIV010006	PRIV010005	2	WIDGET 000002	5/15/2022	Fox, Felix	Allegator, Abraham		Work Product	Email discussing and outlining work product prepared at the direction of attorneys in anticipation of litigation with Fish.
PRIV010007	PRIV010006	2.1	WIDGET 000006	5/15/2022	Allegator, Abraham			Work Product	Memos prepared at the direction of counsel in anticipation of litigation with Fish and forwarded by email from Fox, Felix to Allegator, Abraham for review.
PRIV010008	PRIV010008	3	WIDGET 000007	5/17/2022	Hen, Henner*	Tiger, Tercas*		Attorney/Client Privilege; Work Product	Email forwarding third complaint against Fish and providing legal advice about and in connection with litigation.
PRIV010009	PRIV010009	4	WIDGET 000005	5/8/2022	Tiger, Tercas*	Doc, Olivia; Lion, Leony; Rhino, Rhino; Reuy, Reuy; Rhino, Rey;		Attorney/Client Privilege	Text message to leadership team providing legal advice regarding Kenie delivery delays.
PRIV010010	PRIV010009	4.1	WIDGET 000005	5/8/2022	Rhino, Rey	Doc, Olivia; Tiger, Tercas*; Allegator, Abe		Attorney/Client Privilege	Text message to leadership team seeking legal advice regarding Kenie delivery delays.
PRIV010011	PRIV010009	4.2	WIDGET 000005	5/8/2022	Allegator, Abraham	Doc, Olivia; Tiger, Tercas*; Lion, Leony; Reuy, Reuy; Rhino, Rey;		Attorney/Client Privilege	Text message to leadership team seeking legal advice regarding Kenie delivery delays.
PRIV010012	PRIV010012	3	WIDGET 000011	5/17/2022	Doc, Darryl	Tiger, Tercas*		Work Product	Email from General Counsel forwarding spreadsheet prepared at the request of outside counsel and in anticipation of litigation with Fish.
PRIV010013	PRIV010012	3.1	WIDGET 000011	5/17/2022	Tiger, Tercas*	Doc, Darryl	Allegator, Abraham	Work Product	Email to General Counsel forwarding spreadsheet in anticipation of litigation with Fish.
PRIV010014	PRIV010012	6	WIDGET 000011	5/17/2022				Work Product	Spreadsheet prepared by Doc, Darryl, accountant, attorney request of outside counsel and in anticipation of litigation with Fish.
PRIV010015	PRIV010015	7	WIDGET 000014	12/12/2021	Tiger, Tercas*	Procurement Team		Attorney/Client Privilege	Legal memorandum drafted by Tiger, Tercas* providing legal advice and analysis regarding liquidated damages clause in contract with Fish.

A-2 CATEGORICAL PRIVILEGE LOG EXEMPLAR

[Click here to view the Categorical Privilege Log in its native .xlsx format.](#)

Log Category	Date Start	Date End	Participants	Documents Withheld	Basis for Claim	Description
A	6/22/2022	6/22/2022	Attorneys: Hen, Harriet, Tiger, Teresa	1	Attorney-Client Privilege; Work Product	Communications between Widget and outside counsel concerning strategy related to the Fish lawsuit after the complaint was filed
B	5/17/2022	7/8/2022	Attorneys: Giraffe, Garret, Tiger, Teresa Clients: Penguin, Penny, Alligator, Abraham; Rhino, Ray, Lion, Lenny, Owl, Olivia; Sparrow, Sam; Meercat, Mason; Cat, Cathy; Dalmatian, Dawson; Bear, Bee	11	Attorney-Client Privilege; Work Product	Communications between leadership team and in house counsel requesting or providing legal advice regarding deliveries and accounts
C	6/2/2022	7/8/2022	Attorneys: Tiger, Teresa Clients: Penguin, Penny, Alligator, Abraham; Rhino, Ray, Lion, Lenny, Owl, Olivia; Fox, Felix	6	Attorney-Client Privilege	Text messages and Teams chats between leadership team and in house counsel requesting or providing legal advice regarding deliveries and accounts
D	5/16/2022	5/19/2022	Attorneys: Giraffe, Garret, Tiger, Teresa Clients: Penguin, Penny, Alligator, Abraham; Rhino, Ray, Lion, Lenny, Owl, Olivia; Sparrow, Sam; Meercat, Mason; Cat, Cathy; Dalmatian, Dawson; Bear, Bee;	10	Attorney-Client Privilege; Work Product	Documents created and communications requesting or providing assistance at counsel's request in reasonable anticipation of litigation
E	12/12/2021	12/14/2021	Qualified Third Party: Dog, Darryl Attorneys: Hen, Harriet, Tiger, Teresa	6	Attorney-Client Privilege; Work Product	Documents providing legal advice related to Fish contract.

A-3 METADATA PRIVILEGE LOG EXEMPLAR

[Click here to view the Metadata Privilege Log in its native .xlsx format.](#)

Privilege ID	Family ID	Prohibit Doc #	Doc Date	Doc Time	From / Author	To	CC	Basis for Claim	Subject / Filename	File Ext	Parent or Attachment
PRIVD-0001	PRIVD-0001	WIDGET-000001	5/17/2022	1:43PM	Alligator, Abraham	Fish, Fox		Attorney-Client Privilege; Work Product	FW: Customer Fish Part DueMsg	MSG	Parent
PRIVD-0002	PRIVD-0001	WIDGET-000004	5/17/2022	1:00PM	Alligator, Abraham			Work Product	Def: Fish Timeline for Counsel.docx	DOCX	Attachment
PRIVD-0003	PRIVD-0001	WIDGET-000001	5/17/2022	8:57AM	Hen, Harriet	Lon, Leonard; Tiger, Teresa	Owl, Olivia, Gracie, Garrett, Sparrow, Sam, Meerkat, Mason, Alligator, Abraham	Attorney-Client Privilege; Work Product	Re:Customer Fish Part DueMsg	MSG	N/A
PRIVD-0004	PRIVD-0001	WIDGET-000001	5/16/2022	10:43 PM	Tiger, Teresa	Lon, Leonard	Owl, Olivia, Hen, Harriet	Attorney-Client Privilege	Re:Customer Fish Part Due msg	MSG	N/A
PRIVD-0005	PRIVD-0001	WIDGET-000001	5/16/2022	10:37PM	Lon, Leonard	Tiger, Teresa	Owl, Olivia	Attorney-Client Privilege	Customer Fish Part Due msg	MSG	N/A
PRIVD-0005	PRIVD-0006	WIDGET-000005	5/19/2022	4:42PM	Fox, Felix	Alligator, Abraham		Work Product	Def: Fish Timeline for Counsel.VZ.docx	DOCX	Attachment
PRIVD-0007	PRIVD-0006	WIDGET-000006	5/19/2022	4:40PM	Alligator, Abraham			Work Product	Def: Fish Timeline for Counsel.VZ.docx	DOCX	Attachment
PRIVD-0008	PRIVD-0008	WIDGET-000007	6/22/2022	3:35PM	Hen, Harriet	Tiger, Teresa		Attorney-Client Privilege; Work Product	Fish ComplainsMsg	MSG	Parent
PRIVD-0009	PRIVD-0009	WIDGET-000009	7/8/2022	7:30AM	Tiger, Teresa	Owl, Olivia; Tiger, Teresa; Lon, Lenny; Penguin, Penny; Rhino, Ray; Alligator, Abe		Attorney-Client Privilege	[Text Message]	SMS	N/A
PRIVD-0010	PRIVD-0009	WIDGET-000009	7/8/2022	7:45AM	Rhino, Ray	Owl, Olivia; Tiger, Teresa; Lon, Lenny; Penguin, Penny; Alligator, Abe		Attorney-Client Privilege	[Text Message]	SMS	N/A
PRIVD-0011	PRIVD-0009	WIDGET-000009	7/8/2022	7:47AM	Alligator, Abraham	Owl, Olivia; Tiger, Teresa; Lon, Lenny; Penguin, Penny; Rhino, Ray;		Attorney-Client Privilege	[Text Message]	SMS	N/A
PRIVD-0012	PRIVD-0012	WIDGET-000012	5/17/2022	4:46PM	Dog, Daryl	Tiger, Teresa; Alligator, Abe		Work Product	Fish Account Data.msg	MSG	Parent
PRIVD-0013	PRIVD-0012	WIDGET-000012	5/17/2022	10:33AM	Tiger, Teresa	Dog, Daryl		Work Product	Fish Account Data.msg	MSG	N/A
PRIVD-0013	PRIVD-0012	WIDGET-000013	5/17/2022	4:15PM			Alligator, Abraham	Work Product	Fish Account.xlsx	XLSX	Attachment

A-4 METADATA-PLUS-TOPIC EXEMPLAR PRIVILEGE LOG

[Click here to view the Metadata-Plus-Topic Privilege Log in its native .xlsx format.](#)

Product ID	Family ID	Profile Doc #	Doc Date	Doc Time	From / Author	To	CC	Batch for Claim	Subject / Reference	* Retained or Withheld	File Ext	* Percent of Attachment	Topic of Privileged Communication or Work Product
PRN/DO001	PRND-0001	WIDGET-00001	5/17/2022	1:42PM	A Signor, Abraham	Felix, Felix		Attorney-Client Privilege Work Product	Fish Customer Fish Post During Dual Fish Timeline for Connected	Withheld	M55	Parent	Fish Contract Issues / Fish Litigation
PRN/DO002	PRND-0001	WIDGET-00004	5/17/2022	1:00PM	A Signor, Abraham			Work Product	Dual Fish Timeline for Connected	Withheld	DOCX	Attachment	Fish Litigation
PRN/DO003	PRND-0001	WIDGET-00001	5/17/2022	8:57AM	Hen, Harriet	Leon Leonard, Tiger, Teresa	Om, Olivia, Gracie, Garrett, Sam, Michael, Maurice, Aligator, Abraham	Attorney-Client Privilege Work Product	Re Customer Fish Post During	Withheld	M55	N/A	Fish Contract Issues / Fish Litigation
PRN/DO004	PRND-0001	WIDGET-00001	5/16/2022	10:43 PM	Tiger, Teresa	Leon Leonard	Om, Olivia, Gracie, Garrett, Sam, Michael, Maurice, Aligator, Abraham	Attorney-Client Privilege Work Product	Re Customer Fish Post During	Withheld	M55	N/A	Fish Contract Issues / Fish Litigation
PRN/DO005	PRND-0001	WIDGET-00001	5/16/2022	10:37PM	Leon Leonard	Tiger, Teresa	Om, Olivia	Attorney-Client Privilege Work Product	Customer Fish Post During	Withheld	M55	N/A	Fish Contract Issues / Fish Litigation
PRN/DO006	PRND-0006	WIDGET-00005	5/19/2022	4:42PM	Felix, Felix	Aligator, Abraham		Work Product	Fish Timeline for Connected, 2000	Withheld	M55	Parent	Fish Litigation
PRN/DO007	PRND-0006	WIDGET-00006	5/19/2022	4:40PM	A Signor, Abraham			Work Product	Dual Fish Timeline for Connected, 2000	Withheld	DOCX	Attachment	Fish Litigation
PRN/DO008	PRND-0008	WIDGET-00007	6/22/2022	3:35PM	Hen, Harriet	Tiger, Teresa		Attorney-Client Privilege Work Product	Fish Complainting	Withheld	M55	Parent	Fish Litigation
PRN/DO009	PRND-0009	WIDGET-00009	7/8/2022	7:30AM	Tiger, Teresa	Om, Olivia, Tiger, Teresa, Leon Leonard, Penelope, Perry, Rhina, Bry, Aligator, Abe		Attorney-Client Privilege Work Product	Ton Message	Withheld	5MS	N/A	Widget Contract and Account Receivable Dispute
PRN/DO010	PRND-0009	WIDGET-00009	7/8/2022	7:45AM	Rhina, Bry	Om, Olivia, Tiger, Teresa, Leon Leonard, Penelope, Perry, Rhina, Bry, Aligator, Abe		Attorney-Client Privilege Work Product	Ton Message	Withheld	5MS	N/A	Widget Contract and Account Receivable Dispute
PRN/DO011	PRND-0009	WIDGET-00009	7/8/2022	7:47AM	A Signor, Abraham	Om, Olivia, Tiger, Teresa, Leon Leonard, Penelope, Perry, Rhina, Bry, Aligator, Abe		Attorney-Client Privilege Work Product	Ton Message	Withheld	5MS	N/A	Widget Contract and Account Receivable Dispute
PRN/DO012	PRND-0012	WIDGET-00012	5/17/2022	4:46PM	Dog, Darryl	Tiger, Teresa, Aligator, Abe		Work Product	Fish Account During	Withheld	M55	Parent	Fish Contract Issues / Fish Litigation
PRN/DO013	PRND-0012	WIDGET-00012	5/17/2022	10:31AM	Tiger, Teresa	Tiger, Teresa, Aligator, Abe		Work Product	Fish Account During	Withheld	M55	N/A	Fish Contract Issues / Fish Litigation
PRN/DO014	PRND-0012	WIDGET-00013	5/17/2022	1:15PM	Tiger, Teresa	Tiger, Teresa, Aligator, Abe		Work Product	Fish Account During	Withheld	M55	Attachment	Fish Contract Issues / Fish Litigation
PRN/DO015	PRND-0015	WIDGET-00014	12/12/2021	5:20PM	Tiger, Teresa			Attorney-Client Privilege Work Product	Legal Analysis of Liquidated Damages Clause in Contract with Fish, Bob	Withheld	DOCX	N/A	Fish Contract Issues

APPENDIX B: DESCRIPTIONS OF PRIVILEGE LOG FIELDS

**Field Descriptions Frequently Found
in Traditional Privilege Logs**

Field Name	Definition
Privilege ID #	<p>A unique number assigned to each entry on the log to help the parties and the court identify a specific entry.</p> <p>Comment: It is not recommended to use an internal document ID number from, for example, a review database, because it may reveal other information about the data set, like overall volume. To avoid confusion, if additional or supplemental logs are produced, they should <i>continue</i> the numbering and <i>not restart</i> with the same first number from the first log.</p>
ProdBeg Doc #	<p>The beginning Bates number for a document, typically only for a produced document.</p> <p>Comment: Some practitioners do not assign a Bates number to a document withheld in its entirety on the basis of privilege, work product, etc. Others will assign a Bates number to a single page “slip sheet” to help with tracking the document. If used, some parties may also include a ProdEnd Doc # (the ending Bates number for a document).</p>

Field Name	Definition
Date	<p>The date when a communication was sent. In the case of a document, often the date it was last modified.</p> <p>Comment: For privilege logs where the parties have agreed to populate the fields from metadata, practitioners may choose to use one from multiple date fields, including date last modified, date sent, master family date.</p> <p>Because multiple date fields are available, parties should discuss which date they intend to use.</p> <p>For documents without metadata, practitioners may choose to use the date reflected on the face of the document (assuming the parties have agreed to produce it).</p>
From/ Author	<p>This field is designed to capture who originated the communication or document. “From” is meant for communications like emails, whereas “Author” is for documents.</p> <p>Comment: It is common to combine these into a single field to save space on a log.</p> <p>For this field, and To, CC, BCC, parties should discuss whether name normalization will be used.</p>
To	<p>This field reflects who the communication or document (e.g., memorandum) was sent to.</p>

Field Name	Definition
*Copy or CC	<p>This field reflects anyone copied on the communication or document (e.g., memorandum).</p> <p>Comment: Some practitioners will group everyone who received a communication into a single field/column – for example, in the case of an email, all of the To / CC / BCC will be grouped into a single “Recipients” field.</p>
*Blind Copy or BCC	<p>This field reflects anyone blind copied on an email (or communication where such a function is available).</p> <p>Comment: It is common to exclude this field when none of the documents on the log include any BCC information.</p>
Basis for Claim	<p>This field identifies each legal basis for withholding the information at issue (e.g., attorney-client privilege, work product, common-interest doctrine, marital privilege, etc.).</p> <p>Comment: Each and every applicable basis should be asserted to avoid a contention by the opposing party that it has been waived.</p>

Field Name	Definition
Family Relationship	<p>A privilege log should identify whether a document is a parent or a child (attachment), so that the receiving party can understand the context and connection between multiple documents on the privilege log. Parties use various ways to do this.</p> <p>Comment: The “Traditional Log” exemplar shows three potential options, though practitioners may use alternative methods:</p> <ol style="list-style-type: none">(1) Using a “Family Identifier” field (see description in Metadata table below) – can be automated.(2) Using a suffix in the PrivLog ID # (e.g., parent email is 3 and the child/attachment is 3.1) (note that a second attachment would be 3.2) – this is a manual population.(3) Using a detailed “attachment description” to identify that the document is an attachment and to note which individuals received or sent the attachment (e.g., the first attachment description on the log).

Field Name	Definition
Narrative Description	<p>If Subject and/or Filename is included, and sufficiently particularized, then some practitioners may provide less detail in the Narrative Description.</p> <p>Comment: Note the two versions of a Narrative Description for an attachment on the “Traditional Log” at PrivLog ID # 4a and 4b. Practitioners may include all of the names from the parent email (or email string) of those who sent or received the attachment, to better explain why the attachment remains protected. Others may not include names for various reasons, including: (1) the parent email was also withheld and is located immediately above the attachment entry, and those names will be visible there; (2) the parent email has been produced, which allows the requesting party to view the names in the produced parent email; and/or (3) the litigant’s position is that including names in attachment descriptions is not required. The level of detail for this description may depend on the document itself and the needs of the case.</p>

Field Name	Definition
*Redacted or Withheld	<p>This field identifies whether a document has been withheld in its entirety or only redacted.</p> <p>Comment: Not all practitioners do this; some, as an alternative, state in the Description itself whether a document has been redacted. Others may produce two separate logs, one for withheld documents and another for redacted ones.</p> <p>This <i>Commentary</i> supports not logging redacted documents at all in the first instance (<i>see</i> Section III.A), which moots this field altogether. Accordingly, the sample logs do not include this column.</p>

**Additional Field Descriptions Frequently Found
in Metadata or Metadata-Plus Privilege Logs**

Field Name	Definition
File Extension/ Doc Type	<p>Identifies the file type and format of a document, or the application in which the document was created.</p> <p>Comment: For example, “.doc, .xlsx, PowerPoint, etc.”</p>
Family Identifier (Family ID)	<p>Identifies the family relationship of the privileged document so the receiving party can identify family members either on the privilege log or within the producing party’s production.</p> <p>Comment: The Family Identifier uses either: (1) the beginning Bates number of the parent email for withheld/redacted documents assigned a Bates number; or (2) the Privilege Identifier of the parent email within fully withheld families that are not assigned a Bates number.</p>
*Time	<p>The time a document was created, sent, modified, etc.</p> <p>Comment: Some practitioners may choose to include this as a separate standalone field; others may combine it with the date field.</p>
*Custodian/ Custodians	<p>The individual or source from whom the document was collected.</p> <p>Comment: This field may be pulled from the metadata of the document, if available.</p>

Field Name	Definition
*Last Author	<p>The name or ID of the person who last created the document.</p> <p>Comment: This field may be pulled from the metadata of the document, if available.</p>
*Last Edited By	<p>The name or ID of the person who last revised the document.</p> <p>Comment: This field may be pulled from the metadata of the document, if available.</p>
*Email Thread ID	<p>Constitutes an ID value that indicates which conversation an email belongs to and where in that conversation it occurred.</p>
*Hash Value	<p>Reflects a unique value for a given set of data, similar to a digital fingerprint, representing the binary content of the data to assist in subsequently ensuring that data has not been modified.</p>
*Additional Communicants	<p>The names of other individuals who appeared as a sender or recipient in earlier portions of an email chain that are redacted or withheld, but who are not present from the metadata of the most inclusive part of the email chain.</p> <p>Comment: This field is generally manually populated by the reviewer. Thus, the inclusion of this field is subject to negotiation.</p> <p>Names of senders/recipients for portions of the email that are being produced would not need to be included in this field.</p>

Field Name	Definition
*Other Legal Persons	<p>Reflects other attorneys that may be present in the withheld document, or otherwise create the privilege, that are not reflected in the metadata of the document.</p> <p>Comment: Because this needs to be manually populated, it cannot be pulled from metadata alone. It may be provided in a metadata-plus log.</p>

Field Name	Definition
*Subject / Filename	<p>This field reflects the email “Subject” line and the metadata “Filename” for a document, which may be presented as a single field or two separate fields.</p> <p><i>The Sedona Glossary</i> further defines “filename” as a name used to identify a specific file in order to differentiate it from other files, typically comprised of a series of characters, a dot, and a file extension (e.g., sample.doc). <i>The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition</i>, 21 SEDONA CONF. J. 263, 311.</p> <p>Comment: Practitioners may include this field because they believe it helps provide information about the document. Practitioners may exclude this field because, for example, it may contain privileged or work-product material and thus requires additional review. Depending on the type of log, this field may or may not be helpful. For example, if a traditional log includes a robust description, then this field may not be useful; but if doing a metadata or metadata-plus-topic log, it may be needed. The sample traditional privilege log does not include a “Subject/Filename” field because the descriptions are detailed.</p>

**Additional Field Descriptions Frequently Found in
Categorical Privilege Logs**

Field Name	Definition
Log Category #	A grouping number for each set of documents assigned a particular category.
Date Start/Date End	The beginning and ending date range for the documents associated with a particular category.
Description	A narrative sentence providing the topic of the legal advice sought/provided.
Participants	The names and roles of the individuals participating as communicants in the documents withheld in that category. Comment: Includes all senders, recipients, and copyees.
Documents Withheld	A count of the documents withheld in that category.

APPENDIX C: FACT PATTERN FOR WIDGETS EXEMPLARS AND EXEMPLAR DOCUMENTS

Fact Pattern

The sample documents that follow relate to three hypothetical legal issues/disputes involving Widgets, Inc. (a distributor of widgets), Acme, Inc. (a manufacturer/supplier of widgets), and Fish, Inc. (a consumer of widgets). The first issue is a payment dispute. On January 1, 2022, Fish contracted to purchase 100,000 widgets from Widgets, monthly, at a purchase price of \$1.00 per widget. The terms of the contract included a provision that states: “A late fee of 1% of the unpaid invoice will be due on any payment not made within ten (10) business days of shipment in accordance with this Agreement, and Widgets reserves the right to cure the default in a Court of Law without necessity of notice.” Widgets made their monthly shipment to Fish on February 1, 2022, and Widgets Sales Agent, Felix Fox, promptly sent Fish a notice of shipment and an invoice for \$100,000. Felix received confirmation of delivery on February 3, 2022. Payment was not received, and Felix notified Fish of its outstanding balance on February 20, 2022. In May 2022, Widgets CEO, Lenny Lion, began discussing the overdue Fish account and possible legal recourse with Widgets CFO, Olivia Owl, and Widgets General Counsel, Teresa Tiger. Outside counsel got involved. As they began preparation for a collections action, counsel requested preparation of a spreadsheet of outstanding amounts, a timeline of events, and a memorandum regarding the availability of liquidated damages. Outside counsel filed suit on June 22, 2022.

The second legal issue reflected in the sample documents arises out of Widgets’ supplier Acme’s inability to transport shipments of widgets to Widgets’ customers due to supply chain issues in spring and early summer 2022. Acme has been unable find truckers willing to drive from Acme’s facilities in

Chicago to the southern parts of the country as gas prices have soared and made it infeasible to transport widgets more than 500 miles. Some customers are threatening to find another supplier of widgets, and Widgets is contemplating legal action against Acme.

See next page for the Cast of Characters and their Roles.

Cast of Characters and Roles

NAME	ROLE
Abe Alligator	VP of Sales
Teresa Tiger	In- House Counsel 1
Olivia Owl	CFO
Lenny Lion	CEO
Harriet Hen	Outside Litigation Counsel 1
Mason Meercat	Paralegal
Sam Sparrow	Outside Litigation Counsel 2
Felix Fox	Sales Assistant
Ray Rhino	VP of Logistics
Penny Penguin	VP of Marketing
Garrett Giraffe	In- House Counsel 2; Board Secretary
Beatrice Bee	Board Treasurer
Cathy Cat	Board Chair
Dawson Dalmatian	Board Vice Chair
Garrett Giraffe	Board Secretary
Darryl Dog	Outside Accountant
Frank Fish	Owner of Fish Company, Customer of Widgets, Inc.

See the following pages for the exemplar documents, which form the basis for the entries on the exemplar logs in Appendix A.

From: Alligator, Abraham
Sent: Wednesday, May 18, 2022 1:42 PM
To: Fox, Felix
Subject: FW: Customer Fish Past Due
Attachments: Fish Account.xls; Draft Fish Timeline for Counsel.docx

Felix,

Please see below from counsel. Can you continue preparing the timeline for counsel (attached) with the info we discussed and I also now recall that internal memo you and I worked on regarding this problem for another account and since it may be helpful to the attorneys, please see if you can locate it. For reference, I have also attached the Fish payment history spreadsheet report from accounting.

Let's discuss more ahead of our meeting with counsel next week.

Abe

Abe Alligator
Vice President, Sales
Widgets, Inc.

From: Hen, Harriet
Sent: Tuesday, May 17, 2022 8:57 AM
To: Lion, Leonard; Tiger, Teresa
Cc: Owl, Olivia; Giraffe, Garrett; Sparrow, Sam; Meercat, Mason; Alligator, Abraham
Subject: Re: Customer Fish Past Due

Teresa,

I agree that it is time to sue regarding the Fish account. To help me prepare the complaint, can you have the VP of Sales get his team to prepare a spreadsheet showing all amounts owed, dates, etc...?

Thank you,
Harriet

Harriet Hen, Esq.
Partner
Hen & Sparrow, LLC

From: Tiger, Teresa
Sent: Monday, May 16, 2022 10:43 PM
To: Lion, Leonard
Cc: Owl, Olivia; Hen, Harriet
Subject: Re: Customer Fish Past Due

Lenny, I think we have reached the stage where our normal collection efforts have been exhausted. It might be time to file suit so I am copying our outside counsel Harriet for her recommendation.

Teresa Tiger
General Counsel

From: Lion, Leonard
Sent: Monday, May 16, 2022 10:37 PM
To: Tiger, Teresa
Cc: Owl, Olivia
Subject: Customer Fish Past Due

Teresa,

What is the status of collecting the overdue accounts receivable from Frank Fish? If this continues, what legal recourse do you suggest we take?

v/r

Lenny

Leonard Lion
CEO
Widgets, Inc.

PLACEHOLDER
Fish Account.xls

WIDGET-000003

PLACEHOLDER

**Fish Timeline for
Counsel.docx**

WIDGET-000004

From: Fox, Felix
Sent: Wednesday, May 19, 2022 4:42 PM
To: Alligator, Abraham
Subject: Fish Timeline
Attachments: Draft Fish Timeline for Counsel.v2.docx

Abe,

As requested, please see the attached updated timeline regarding the Fish, Inc. account for our attorneys. I have made comments regarding certain ongoing issues.

Also, I'm not sure if [its](#) helpful, but, as noted in the timeline, Fish Inc.'s representative commented directly to me on 2/20 that she couldn't believe they haven't paid us yet and that they're "a bunch of deadbeats." Not sure if that helps.

Best regards,

FF

Felix Fox
Sales Agent
Widgets, Inc.

PLACEHOLDER
**Draft Fish Timeline
for Counsel.v2.docx**

From: Hen, Harriet
Sent: Wednesday, June 22, 2022 3:35PM
To: Tiger, Teresa
Subject: Fish Complaint
Attachments: Fish Complaint-Filed.PDF

Teresa,

As we discussed, we filed [the](#) complaint against Fish this morning. I attach a stamped copy [for](#) your records. We hope to have Fish served by the end of the week. In the meantime, if your team receives any contact from Fish about the account, please let me know.

Best,

Harriet

Harriet Hen, Esq.
Partner
Hen & Sparrow, LLC

PLACEHOLDER
Fish Complaint –
Filed.PDF

WIDGET-000008

Text Message Thread between Teresa Tiger, Ray Rhino, Olivia Owl, Lenny Lion, Penny Penguin, Abe Alligator.

July 8, 2022

7:30 a.m., Teresa Tiger: Folks, I am preparing notes for our meeting and whether we risk breaching our contract with Acme. I am still waiting on responses to my questions to finish my analysis - where do things stand?

7:45 a.m., Ray Rhino: Just got a call from AJ. They still don't have drivers for some of our deliveries. Need to add to agenda for leadership meeting this AM to figure out how to handle with our customers.

7:47 a.m., Abe Alligator: Still?? Customers are already making threats. Need to line up other suppliers. Can we do that under the contract with Acme?

7:57 a.m., Olivia Owl: Running late. Interstate's a parking lot.

WIDGET-000009

PLACEHOLDER
2023 Widget Sales
Projection.xls

WIDGET-000010

PLACEHOLDER
2023 Widget
Projection.pptx

WIDGET-000011

From: Dog, Darryl
Sent: Tuesday May 17, 2022, 4:46 PM
To: Tiger, Teresa; Alligator, Abe
Subject: Re: Fish Account Data
Attachments: Fish Account.xlsx

Teresa and Abe,

Happy to help. See attached spreadsheet. Let me know if I can do anything else for you.

Best Regards,

Darryl Dog, CPA
Canine CPAs and Business Advisors
Director, Accounting Services

From: Tiger, Teresa
Sent: Tuesday May 17, 2022, 10:33 AM
To: Dog, Darryl
Cc: Alligator, Abe
Subject: Fish Account Data

Darryl,

I hope you and your family are well. Its been a little while since we've worked together. Abe told me that you are handling accounting for sales while Alex is out on leave. We are having collection issues on the Frank Fish account. Can you send us a spreadsheet showing all amounts owed with the dates payment became due so we can forward to our outside counsel? If you could get it to me by the end of the day, that would be great.

Teresa

~~Jessie~~
Teresa Tiger
General Counsel
Widgets, Inc.

WIDGET-000012

THIS DOCUMENT WAS PRODUCED NATIVELY

WIDGET-000013

Invoice Tracker

Invoice #	Date	Payment Due	Customer Name	Amount	Lite Fee	Total Paid	Date Paid	Outstanding
2001	12/5/21	12/15/21 Pth		\$ 100,000.00	\$ 1,000.00	\$ 100,000.00	12/24/22	\$ 1,000.00
2002	1/9/22	2/14/22 Pth		\$ 100,000.00	\$ 1,000.00	\$ 100,000.00	1/29/22	\$ 1,000.00
2003	2/17/23	4/15/23 Pth		\$ 100,000.00	\$ 1,000.00	\$ 100,000.00		\$ 101,000.00
Total				\$ 300,000.00	\$	\$ 300,000.00		\$ 101,000.00

WIDGET-000013

ATTORNEY-CLIENT PRIVILEGED

Memorandum

To: Procurement Team
From: Teresa Tiger, Esq.
Date: December 12, 2021
Re: Legal Analysis of Liquidated Damages Clause in Contract with Fish

After reviewing Section 8.3 of the contract proposed by Fish for the purchase of 100,000 widgets, Widgets, Inc. ("Widgets") can seek liquidated damages in the event Fish breaches the contract.

Zootopia contract law provides that parties may include liquidated damages in contract provisions so long as the contract is negotiated at arms' length and there is consideration for the promise in the contract. *See Rhino, Inc. v. Unicorn, LLC*, 138 ANT 478, at 484 (Zoo. S.C. 2017).

Here, Fish and Widgets proposed ~~entering into~~ a valid contract whereby Widgets will deliver 100,000 widgets to Fish in exchange for payment of \$100,000. Based on the facts associated with the transaction, it is my legal opinion that the parties can include a liquidated damages clause and Widgets may pursue liquidated damages in the event Fish breaches the contract.

WIDGET-000014