CLEF

Educating, Empowering,
& Advocating for Plaintiffs
in E-Discovery

100 S. Washington Avenue, #2200
Minneapolis, MN 55401
info@complexlitigatione-discovery.com

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VIA ELECTRONIC MAIL
Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the Unites States Courts
One Columbus Circle, NE
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

Dear Ms. Womeldorf:

The Complex Litigation eDiscovery Forum (CLEF) appreciates this opportunity to respond to the questions posed by the Judicial Conference Advisory Committee on Civil Rules ("Committee").

CLEF is a non-profit educational and advocacy organization dedicated to advancing knowledge of, and best practices in, eDiscovery among practitioners and the courts. CLEF addresses the unique educational needs and perspectives of plaintiffs'-side practitioners, whose interests are frequently underrepresented and underrecognized by other national eDiscovery organizations. The members of CLEF's Board of Directors are nationally recognized for their expertise in complex litigation and eDiscovery:

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CLEF participants include some of the most prominent plaintiffs'-side law firms and lawyers litigating many of the nation's largest, most complex matters, including class actions and mass tort litigation across all practice areas. They have extensive experience in negotiating privilege log protocols early in litigation, preparing

privilege logs, evaluating logs produced by opposing and third-parties, and challenging improper claims of privilege and work-product protection.[1] That expertise informs our comments today.

I. Summary

Amendments to Federal Rule of Civil Procedure 26(b)(5)(A) would be premature and pose a serious risk of undermining the purpose of the Rule itself. While amendment of Rules 26(f)(D) and 16(f) may be helpful, we believe that practitioners in large document/ESI cases already address and negotiate privilege issues at early stages of the litigation.

Although the Committee recognizes that "the nature of a rule change to solve a problem" depends upon what that problem is, several of the possible amendments the Committee offers for discussion purposes presume the nature of the problem is, in fact, that document-by-document privilege logs are unduly burdensome. But proponents of that view have demonstrated neither that traditional logs are the source of any privilege log burden nor that any substitutes to traditional logs would reduce the burden (if it exists) while advancing the objectives of the Rule. As we discuss below, problems complying with Federal Rules lie not with parties' ability to comply with the demands of Rule 26(b)(5) but rather with their discovery obligations to withhold only relevant documents protected by privilege or the work-product doctrine. To the extent there is a burden of document-by-document logging, we suggest it is more likely attributable to over-inclusive privilege screens and extensive over-designation of documents for which there is no colorable claim of privilege, resulting in unnecessary costs to the producing party. If interest in amending Rule 26(b)(5) concerns "compliance," the Committee's attention may be better focused on tools available to the judiciary to disincentivize over-designation to reduce costs imposed on both receiving parties and the courts from over-designation.

More importantly, two proposals contemplated by the Committee—one normalizing and sanctioning categorical logs and the other limiting the disclosure obligation to *only* categories of documents withheld—pose serious problems.

First, these proposals would permit disclosure by "category" (and thus categorical or summary logs) without any parameters on what disclosure by category actually means or any basis to believe categorical disclosures reduce the burdens of logging. Parties must still conduct a document-by-document review to satisfy their Rule 26(g) obligations to determine whether the documents placed in that category are, in fact, privileged. And there is no common understanding, much less agreement, among the courts or the bar about what categorical logs are, what categories should consist of and how broad or narrow they can be, how they should be constructed, whether and

[1] For convenience, references to "privilege" herein encompass both attorney-client privileged communications and documents protected by the work-product doctrine.

how they reduce logging burdens, or whether they permit parties to assess the claim of privilege. Any amendment that seeks to avoid undermining the goals of the Rule requires careful advance examination of, and answers to, these questions. We suggest that investment in such a massive undertaking is unwarranted when the purported burden of traditional logs has not been substantiated (particularly in light of modern technology) nor the case made that categorical logs lessen that burden.

Second, the possible amendments would subvert the very purpose of Rule 26(b)(5)(A) by encouraging non-compliance with discovery obligations and undermining the goal of the Rule's disclosure obligations. Both amendments presume that disclosure by category—whatever that may mean—permits courts and parties to assess a claim of privilege. But our collective experience is that categorical disclosures frustrate rather than facilitate that assessment.

"Categorical" logs, as used today:

- are unproven and unhelpful in assessing claims of privilege;
- result in more, not fewer, disputes among parties;
- increase, rather than lessen, the burden on the judiciary; and
- obstruct, rather than advance, the goals of the Rule.

This is because the "categories" in categorical logs are nearly always common descriptions explaining the basis for the withholding as to all documents, without any information about the individual documents within those categories that would allow the receiving party to test the validity of the descriptions for any particular document. Advocates of categorical logs beg the question: They presume that the description of the category accurately characterizes each document in that category, obviating the need for information about each document to substantiate the claim, when the accuracy of the description is the very thing a log is intended to test.

Moreover, categorical logs exclude document-by-document information that is readily available through modern, nearly universally embraced eDiscovery tools. Modern privilege logs are ordinarily assembled from document-by-document exportable metadata that identifies senders, recipients, dates, etc., for each document. Some categorical logs are produced by collecting and merging all of this individual metadata for each document in a category to conceal pertinent information for each document, requiring *extra* steps to create the categorical log. And regardless of how categorical logs are assembled, all exclude this readily available document-by-document information and instead combine all senders, recipients, authors, and document types for all documents in the category. This practice makes it impossible to determine whether an attorney was even involved in a given communication, the information was disclosed to third parties, or an attachment to a privileged communication was independently privileged. Permitting categorical logs allows the

producer to obscure electronically generated information, which poses no burden to assemble, from production without any valid purpose.

And because it is impossible to assess the privilege based on categories, in practice, categorical logs result in more motions challenging the sufficiency of the logs themselves and more *in camera* review. Since the claim as to individual documents cannot be challenged informally among the parties on the basis of the log itself without need for court intervention, challenges to the sufficiency of entire log or as to all documents within a category must be brought to the court for resolution.

And as unhelpful and error ridden as critics claim they are, document-by-document logs are indisputably the only means (outside of *in camera* review) of identifying invalid privilege claims. It is only through disclosure of the "who, what, where, when, and why" of each document that receiving parties can distinguish legitimate claims from invalid ones. Indeed, after receipt of document-by-document logs and informal challenges to specific documents, it is commonplace for parties to voluntarily withdraw privilege claims for large numbers of documents. This often happens without need for court intervention.

This is not to say that a "categorical" approach to disclosure can never permit an assessment of a claim. But there is no basis for building a presumption into the Rule that categorical logs necessarily do. Whether a categorical approach to disclosure can be designed in a manner that permits assessment will depend upon on a number of factors including: the nature of the claims in the case, the parties' agreement regarding the nature of any categories of documents to be logged, the nature of the parties and the role of key players whose documents might be logged categorically, and the technology and review mechanisms employed to assemble the log. But the Federal Rules cannot supply the answers to these case-by-case questions.

A third suggested amendment would enumerate in the Rule itself categories of documents that need not be identified. But whether, when, and what, if any, categories are properly excluded, will always be case-specific. For example, in certain cases it may be reasonable to presume that communications with outside litigation counsel relating to the subject matter of the litigation after the filing of a complaint are so likely to be privileged that communications occurring or documents created by or on behalf of attorneys after litigation commences need not be logged. And, as discussed below, parties frequently agree to exclude such communications from the logging obligation. But where outside litigation counsel wear multiple hats or when the conduct in question is ongoing beyond commencement of the litigation, that presumption will not hold. Appropriate exclusions cannot be identified by a general rule.

A fourth proposed revision would amend Rule 26(f)(3)(D) and Rule 16 to provide that the parties discuss the means of complying with Rule 26(b)(5)(A) as part of their

discovery plans and that courts include provisions regarding the same in their scheduling orders. While such an amendment may be helpful in encouraging early discussions that may avoid later disputes, Rule 26(f)(3)(D) already provides for discussion of issues associated with privilege (which includes privilege logs) and, as discussed below, particularly in large ESI cases and complex matters, the parties commonly agree to privilege log "protocols" early in the litigation and prior to production. It may not always be the case, however, that the parties will have sufficient information early in the litigation, before documents are collected (or searched and reviewed for responsiveness and privilege) to know what type of privilege logs are appropriate and when they should be produced. Presupposing that informed determinations of appropriate compliance mechanisms for Rule 26(b)(5) can always be made at inception of the litigation may introduce inefficiencies and disputes where none might otherwise arise.

Finally, we urge the Committee to reject suggestions to import Rule 26(b)(1)'s proportionality standard into Rule 26(b)(5)(A). Proportionality requires assessing (among other factors) the burden of discovery when balanced against the parties' relative access to relevant information, the importance of the discovery in resolving the issues, and the benefit of the discovery sought. Although a proportionality analysis may assist courts in assessing the proper scope of discovery when specific *requests* for discovery are at issue, it is ill-suited to analyzing the value of *disclosure* over non-disclosure (or limited disclosure) under Rule 26(b)(5)(A). And it is not clear why such an analysis is appropriate in the first place: documents to be logged are, *by definition*, responsive to requests that have already been deemed proportionate to the needs of the case.

Any inquiry into the value of disclosure that focuses on the value of the documents withheld would be non-sensical when the very nature of the withheld documents and their contents is unknown and unknowable to the requesting party and the court. The result would be a singular focus on the cost of disclosing without any informed basis on which to balance the cost against the benefits of disclosure. It is the producing party's burden to demonstrate that protection applies. A proportionality analysis would effectively flip that burden to the requesting party to explain the value of the disclosure required by the Rule without any basis to do so. This is so though the Rule itself already presumes the value of disclosure; it is unclear why a requesting party should need to demonstrate it in a given case. One would hardly expect courts to entertain a proportionality analysis for other types of disclosures of unknown information (for example, initial disclosures) on grounds that the reasonable inquiry required to make such disclosures was just too burdensome. If a producing party finds privilege logging too burdensome, it may seek a Rule 502(d) order to scale back its review and reduce the burden of producing a log, or forego a privilege review, relying instead on a clawback agreement.

II. Over-Designation and the Value of Traditional Logs in Detecting It.

As the Discovery Subcommittee noted in its recent report, Rule 26(b)(5) was adopted because receiving parties cannot determine what responsive documents are withheld when privilege objections are asserted and "suspicions that sometimes parties were overly aggressive in their privilege claims." Advisory Committee on Civil Rules, Apr. 23, 2021 Agenda Packet at 174. That suspicion has proven well-founded.

A. Significant Over-Designation is Commonplace.

In our experience, dramatic over-designation of documents is all too common. Whatever its cause, the practice of over-withholding not only results in unnecessary logging burdens on the producing party, but also effectively shifts the burdens to receiving parties, at enormous cost in attorney hours and other direct costs, who must review excessive logs to challenge improperly withheld documents that are, in many cases, subsequently voluntarily withdrawn. Legal databases and court dockets do not reflect the extent of over-designation because, when document-by-document logs are provided, receiving parties launch informal challenges and producing parties voluntarily withdraw claims for many documents without need for involvement of the courts.

Below are just a few recent examples of over-designation from matters in which CLEF members were directly involved and that illustrates how important document-level logs are in exposing over-designation.

1. *In re Domestic Airline Travel Antitrust Litig.*, No. 15-mc-1404 (D.D.C.)

A recent decision in *In re Domestic Airline Travel Antitrust Litigation* provides a useful case study in over-designation and the value of document-by-document logs in assessing the claims of privilege.

There, a defendant provided a traditional privilege log with 41,259 entries.[2] Following review of each log entry over the course of six weeks, involving dozens of attorneys and nearly 2,000 hours in attorney time, Plaintiffs informally challenged more than 22,000 claims of privilege, providing reasons for each challenge based on the participants in the communication, the description and nature of the document, dates, and other information in the log. Their challenges included that the communications and documents appeared to involve business or public relations (not legal) advice; were disclosed to third parties; did not involve any attorneys; were prepared for the purpose of release to others, not legal advice or litigation, and so forth.

[2] Much of the history presented here is recounted in briefing submitted to the Special Master but not filed on the docket.

Following the challenge, the producing party undertook to "re-review" its log, revising it three times (requiring re-review by the receiving party), and withdrawing more than 17,000 of the 22,000 challenged documents—some 3,000 because they were determined to be nonresponsive and some 14,000 because they were logged in error. That is, the producing party unnecessarily logged, and the plaintiffs unnecessarily reviewed, over 75% of the challenged entries. The producing party did not re-review entries that the plaintiffs did not challenge, leaving unknown how many of those were improperly withheld. Of the remaining 5,000 documents originally challenged, Plaintiffs moved to compel nearly 2,100 of them.

Following months of *in camera* review by the Special Master at a cost to the parties approaching $300,000 (split between the producing party and plaintiffs), the Report and Recommendation found that of the documents challenged by the motion, nearly 80% were not privileged either in whole or in part.[3]

The Master compared the log with the documents produced *in camera* and identified patent over-designation as well as errors in the log that, if correctly presented, would have made the improper claim even more apparent (e.g., inaccurate sender and recipient information, omission of third parties as recipients or authors, erroneous inclusion of attorneys as participants in communications).[4]

The R&R also highlighted "questionable claims of privilege" for email threads that even the volume of documents could not justify, observing that "'Respondent's [] privilege claims with respect to these particular documents—each of which were logged and withheld as separate communications—cast[] doubt upon Respondent's claims as a whole.'" [5] Notably, there is no specific recourse or sanction in the Federal Rules which addresses the problem of persistent over-designation.

Plaintiffs challenged a host of documents for which log data suggested no legal advice was at issue despite the claim in the description. The R&R noted the producing party's practice of including attorneys on ordinary business communications, finding:

> [B]usiness personnel infrequently raised legal questions or concerns, and [the] internal review process infrequently resulted in counsel providing legal advice or engaging in discussions that tended to reveal the substance of a client confidence. Instead, this review process tended to result in in-house counsel providing stylistic, editorial, and other non-legal feedback.[6]

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[3] *In re Domestic Airline Travel Antitrust Litig.*, No. 15-mc-1404, 2020 WL 3496748 (D.D.C. Feb. 25, 2020), *adopted,* 2020 WL 3496448 (D.D.C. May 11, 2020).

[4] *E.g.*, *id.*, Ex. 1 at 52, 63, 96,106, 140, 240, 302, 431, 720.

[5] Id. at *12 (quoting *In re Veiga*, 746 F. Supp. 2d 27, 43-44 (D.D.C. 2010)).

[6] *Id.* at *13.

In our experience as practitioners, this type of over-designation of communications that reflect merely ordinary business matters in which an attorney may have been included is commonplace.

The detailed 800+ page exhibit to the R&R revealed a range of serious errors in the characterization of the documents and the privilege—errors that only the document-by-document log could have flagged by permitting an assessment of the description against the log detail.[7] The R&R used the following terms and phrases in reference to the assertions in the log and the opposition briefing more than 160 times: "cannot reasonably support," "not supported," "unsupported," "does not support," "no support," "inaccurate(ly)," "not accurate(ly)," "not true," "not so," "no basis," "misleading," "in error," "incorrect," "inconsistent" (with respect to claims, descriptions, arguments, and assertions in the Log and opposition), and "fail[ure] to identify" (with respect to information such as senders, recipients, attorneys, authors, emails, and so forth). It noted repeatedly where documents could not reasonably be construed as legal advice or work-product.[8]

2. *In re Blue Cross Blue Shield Antitrust Litig.*, No. 13-cv-20000-(N.D. Ala.)

Over-designation and burden shifting was equally pervasive in *In re Blue Cross Blue Shield Antitrust Litigation*. There, the parties agreed that, to reduce defendants' claimed burden in producing privilege logs, any party withholding documents need only provide a metadata privilege log for withheld documents. That is, objective metadata for each document was provided in lieu of manually created entries.

At the end of discovery, defendants produced their metadata privilege logs containing more than 700,000 documents. The court appointed a Privilege Master and outlined a process for challenging log entries.[9] First, defendants were required to certify that all documents on the privilege log had been reviewed by an attorney and were actually privileged. Second, plaintiffs reviewed all 700,000+ entries to select a sample of 1,974 documents for *in camera* review by the Master. Third, the Master reviewed the samples and issued rolling Reports & Recommendations on whether or not the documents were actually privileged. Fourth, plaintiffs were then required to re-evaluate Defendants' metadata logs to try to identify whether other documents were similar to those deemed non-privileged by the Master and ask defendants to de-designate those documents. And finally, to the extent documents remained, plaintiffs could move to compel their production.

This process took more than a year, and resulted in the de-designation, in whole or in part, of 66.33% of defendants' privilege logs—an astounding 465,291 documents

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[7] In many cases the description was simply inaccurate. *See, e.g., id*. Ex. 1 at 99, 169, 241, 302, 389, 403, 552, etc.

[8] *Id.* at 64, 108 173, 207,230 313, 327, 366, 305, 406-407, 413, 455, 581, 582, 615.

[9] ECF No. 1667.

removed from the logs, even after defendants had certified that every document on their logs was privileged.[10] Thirty of the thirty-six defendants de-designated more than 60% of their logs. The defendant with the largest privilege log, at 127,151 entries, ended the sampling process with just 21,482 entries—de-designating 83% of documents it had initially withheld as privileged. The nearly $90,000 in Master fees was split equally between plaintiffs and defendants, with the more than 30 defendants splitting their half among themselves, at *de minimis* cost to them but significant cost to plaintiffs.

The late production of previously withheld documents after close of discovery deprived plaintiffs of the opportunity to use relevant documents in depositions and at summary judgment on key issues in the case.

B. Traditional Privilege Logs Advance the Goals of the Rule.

These case studies are, unfortunately, merely examples of the over-designation that commonly occurs in both complex and standard litigation and bloats the cost of preparing privilege logs. Legal databases are replete with opinions analyzing privilege challenges that could only have been brought after review of document-level logs.[11] And, as noted, because many improperly withheld documents are voluntarily produced after informal challenges, the databases understate the degree of over-designation.

Despite common shortcomings of document-by-document privilege logs (e.g., inadequate information or vague descriptions), the foregoing demonstrates that such logs further the goals of the Rule. In neither of these cases would the receiving party have been able to unearth the improperly withheld documents had the log not provided information at the document level. Indeed, information at a document level is the only means of testing whether a document description or claim of privilege or work-product is valid. For example, if work product is claimed, is there any indication in the log that an attorney prepared or directed preparation of the document and, if

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[10] ECF No. 2377.

[11] For example, in *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, No. 12-cv-526, 2017 WL 3535293 (D.N.M. Aug. 16, 2017), the plaintiff objected to 2,831 documents on a 4,143-entry log. Following a re-review, the defendant voluntarily produced nearly 2,000 documents. No. 12-cv-526, 2017 WL 3535293, at *9-10 (D.N.M. Aug. 16, 2017). Following that dramatic de-designation of nearly 70 percent of the documents challenged, Plaintiffs challenged the remaining entries. That challenge resulted in a re-review and the voluntary production of nearly 900 additional documents, and ultimately an order to produce another nearly 200 documents. *Id.*

Similarly, in *Dolby Laboratories Licensing Corp. v. Adobe Inc.*, a defendant withheld more than 4,000 documents that included no lawyers in the communication. 402 F. Supp. 3d 855 (N.D. Cal. 2019). The court ordered the defendant to review the non-attorney communication to remove inappropriate assertions, after which, the plaintiff selected a sample of 15 documents from the revised log for *in camera* review. The defendant then withdrew its claims for 2 of the 15 and of the remaining 13, the court found six to be unprotected in whole or part. That is, of the 15 sample documents *more than half* were improperly withheld. The court ordered the defendant to conduct a further re-review of its log consistent with the ruling.

not, that it was ever sent to or from an attorney? If there is a claim that legal advice was sought, was any attorney a recipient, and if so, was that attorney merely cc'd or one among many recipients? These types of red flags are only apparent when the receiving party has information at the document, not category, level—on subject matter, dates, senders, recipients, copyees, and authors, among other information. It is unsurprising, then, that many courts presumptively require standard logs.

As one court observed:

> [E]xaggerated and improper claims of attorney-client privilege continue to impermissibly affect discovery specifically and the adversarial process generally. Unfortunately, such claims are too often indiscriminately applied to documents that do not truly qualify for protection. Often, the excessive and improper claims are later abandoned when a party is challenged and is required to properly support the claims. But that is too little too late, when viewed from the deterrent purposes of sanctions.
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> Both [attorney-client privilege and the work product doctrine] operate in derogation of the search for the truth and run counter to the public's right to every person's evidence. Accordingly, courts have always construed the privilege narrowly, unless to do so will serve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. The party hoping to withhold evidence from the proceedings - and, to degrees that vary from case to case, thwart the fact-finders' efforts at uncovering the truth - necessarily has the burden of establishing the applicability of the privilege it asserts on a document-by-document basis.[12]

Despite protections against waiver from "under-withholding" via Federal Rule of Evidence 502(d), over-designation and excessively broad privilege screens remain the norm. Rule 502(d) was designed to lessen the burden of review and logging by permitting courts to find privilege or work-product protection is not waived by disclosure in *any* proceeding. It reduces the risk of subject matter waiver from an appropriately narrowly tailored privilege screen and review, and the lessens the need to over-withhold documents on the borderline, reducing logging burdens. Yet sadly, even where the parties agree to 502(d) provisions and clawback agreements, vast

[12] *Urb. 8 Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC*, 334 F.R.D. 149, 154, 156 (N.D. Ill. 2020) (cleaned up).

over-designation occurs. Indeed, in the case studies above, Rule 502(d) orders had been agreed to by the parties and entered by the court.

We urge the Committee to consider whether the burden of privilege logs is not the result of the logging process itself, but instead a consequence of parties stretching attorney-client privilege and the work-product doctrine far beyond their bounds.

III. Categorical Logs Do Not Permit Parties or Courts to Assess the Claim and Result in More, Not Fewer, Privilege Disputes.

Categorical logs, by their very nature, fail to provide sufficient information to assess claims of privilege. Before considering any Rule amendment that would suggest, encourage, or limit the disclosure to categories of withheld documents, we urge the Committee to consider (A) what it means to disclose by "category," (B) whether and, if so, *how if at all*, disclosure by category lessens the logging burden given how categorical logs are typically assembled (using available document-by-document information); (C) how logs that *consolidate* information about individual documents into generic categories would solve the problem of purportedly "generic" or "boilerplate" descriptions that amendment-proponents assert render traditional logs useless; and (D) whether, and, if so, how they allow parties to assess the claims.

A. Categorical Logs Remain Undefined.

There is no common understanding about (1) what categorical logs are; (2) how they should be constructed; (3) what appropriate "categories" are (e.g., by description, by type of communication, by document type, by the participants in the communication, etc. ?); (4) how narrow or broad the categories should be; (5) the appropriate time-span for a category (a week, a month, a year, 10 years?); (6) how many documents may fall into a category before the validity of the category itself becomes questionable (dozens, hundreds, thousands?); or (7) what information they must contain to permit assessment of the claim, among many other questions.

Before the Committee considers permitting disclosure by category or limiting disclosure to *only* categories, these questions must be answered. Yet there is little agreement among the bar, not to mention courts, about those answers much less that categorical logs are sufficient and, if so, what constitutes an adequate one.[13]

[13] To the extent some point to inconsistency among jurisdictions as justification for an amendment permitting categorical logs to create uniformity, only the most prescriptive Rule amendment could do so. Courts would remain free to determine what sufficient categorical disclosure consists of just as they now interpret what Rule 26(b)(5)(A) requires. And different approaches by jurisdiction are no more problematic here than with other local rules of procedure. Litigants are accustomed to and accommodate different approaches to the Rules of Civil Procedure.

B. Categorical Logs Group Large Numbers of Documents Under Broad Descriptions.

Where parties produce categorical logs, they nearly universally "categorize" by a description of the documents, often by broad subject matter, encompassing dozens, hundreds, or sometimes thousands of documents in a single category.

Consider the following excerpted entry from the New York City Bar Association's "model categorical log":[14]

Model Categorical Privilege Log

Category No.	Date Range[1]	Document Type	Sender(s)/Recipient(s)/Copyee(s)	Category Description	Privilege Justification	Documents Withheld (Total Documents: 454)[2]	Documents Withheld, Including Families[3]
1	3/11/2012 - 6/30/2012	Email, PDF	**Attorneys:** K. Currie, Esq.; S. Salem, Esq.; E. Mendola, Esq.; F. Fernandez, Esq.; J. Driscoll, Esq.; T. Duxbury, Esq (Smith and Kline LLP).; K. Currie, Esq. **Client:** M. Salem; K. O'Shea; J. Martin; C. Dew; F. Zeigler; M. Moore; E. Andrews; A. Skar; A. Chen; J. Ginter; F. Treglia;B. Parks; R. Thomas; V. Anderson; H. Dickey; C. Vega; M. McIntosh; B. Carrol; E. Schmidt; B. Newburn; S. Turner; J. Rose; C. Whalen; C. Acton; D. Holmes; K. Stewart; J. Ginter; F. Treglia **Qualified Third-Parties:** H. Smith (Accountants LLP), D. Jones (Consultant)	Communications with outside counsel providing, requesting or reflecting legal advice regarding easement and operating agreement negotiations with Heights Building Ltd.	Attorney-Client Privilege; Attorney Work Product	325	415

In this model entry, over the course of more than three months, 325 emails and pdfs were exchanged among some or all of seven attorneys, some or all of two third parties, and some or all of twenty-eight employees. All are purported to be: "communications with outside counsel providing, requesting, or reflecting legal advice regarding easement and operating agreement negotiations." How is the receiving party to assess whether that description is accurate? All senders, recipients, and copyees, are logged together in a single cell, making it impossible to determine whether each of the 325 documents either requested, provided, or reflected legal advice. Even if all senders and all recipients were separately identified for all documents in that category, and assuming the subject matter is accurate, the receiving party still could not know:

- How many documents are emails, attachments, or loose documents;
- Whether attachments are independently privileged even if the email is;

[14] NYCBA, Model Categorical Privilege Log, https://www2.nycbar.org/pdf/report/uploads/20072891-GuidanceandaModelforCategoricalPrivilegeLogs.pdf. Documents Withheld represents the number of documents to which privilege applies in each category; Documents Withheld, Including Families includes these documents with families, which may not be privileged.

- How many of the documents purportedly "reflect" legal advice (as opposed to seeking it or containing legal advice),[15] who authored them, to whom were they sent, and the type of document (e.g., presentation, memo, speech, press release, etc.);
- Of the unprivileged family members to documents withheld, which were produced and how to identify them to assess the withheld family member; or
- Of the emails:
    - how many emails included attorneys as senders or recipients;
    - how many attorneys were merely cc'd on emails to non-attorneys;
    - how many attorneys were included in none of the communications; and
    - how many are threads that include attorneys in fewer than all emails.

Unfortunately, the "model log" is not atypical of categorical logs produced today, which combine documents under such broad descriptions with nothing to test the accuracy of the description for documents in that category. Some provide far less information or far broader categories spanning hundreds or thousands of documents.

Categorization by description is plainly insufficient. Invalid claims are most often revealed not by a description alone (because attorneys do not ordinarily provide descriptions that make clear no privilege attaches), but instead by the accompanying information about senders, recipients, dates, and attachments that call that description into question. For example, emails described as seeking, rendering, or reflecting legal advice (a) between non-attorneys, (b) merely cc'ing an attorney, (c) involving many individuals, or (d) involving third parties all raise questions about the validity of the claim. Categorical logs obscure this information and thus make it impossible to assess the claims.

Additionally, categorical logs make it impossible to determine into which categories documents that are redacted but produced fall. In a document-level log, redacted documents are identified by their Bates numbers so the receiving party can match the log entry with the document produced to evaluate the document against the privilege log information. In a categorical log, redacted documents are combined with documents that are wholly withheld and, like all documents in categorical logs, cannot be individually identified, preventing the receiving party from assessing the redacted document against the log information.

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[15] Parties frequently and erroneously claim privilege over documents that have incorporated revisions following legal review as "reflecting" legal advice though the document itself contains no advice and any advice resulting in revision is not discernable. *See, e.g.*, Discovery Order, *Epic Games v. Apple*, No. 20-cv-05640 (N.D. Cal. Apr. 28, 2021) ("Lots of documents are reviewed and revised by attorneys and therefore reflect legal advice they provided to business . . . . The attorney-client privilege protects the communications between attorney and client involved in the drafting of those documents, such as emails with redlined documents reflecting legal advice or oral conversations giving legal advice. But that's it. Apple does not contend that [the document] is itself a communication between attorney and client (it obviously is not), or even that the reader could glean from this document what the legal advice or edits were (you can't), so it is not privileged.").

To the extent the justification for discarding the time-tested approach to logging in favor of an untested one is that traditional logs frequently provide insufficient information to assess the privilege,[16] CLEF is hard pressed to see how that problem is ameliorated by encouraging logs that provide *even less* information and encourage even more "robotic" descriptions (e.g., "documents providing, requesting, or reflecting, legal advice regarding" on a particular subject matter). And given that producing parties are already prone to over-designate, it is hard to see how permitting them to withhold information that could be used to challenge their claims will do anything other than encourage more, not less, improper withholding.

C. Categorical Logs Are Often Constructed from Available Document-by-Document Information that is Obscured to Create Categorical Logs.

Based on our understanding and experience, prior to construction of many (if not most) categorical logs for ESI, detailed information is available on a document-by-document basis and could be produced to the receiving party but is obscured when the categorical log is constructed, often requiring more, not fewer, steps in the logging process.

Privilege reviews of ESI are conducted on electronic review platforms and production of privilege logs has become substantially automated, reducing the burden of logging. Documents identified as potentially privileged by privilege screens (usually using broad search terms or sometimes analytics) are reviewed by "coders." The electronic coding pane provides tags for coders to mark documents as attorney-client privileged, work-product, redacted, or withheld, and generally provides for an "attorney notes" field that can be used to indicate the basis for the claim, provide a description, or make other notes. In some cases, privilege descriptions are *pre-determined* before documents are reviewed for privilege[17] and electronic coding tags are provided to coders to select a pre-set description for each document. Email addresses for senders, recipients, cc, bcc, are often normalized (i.e., jdoe@abcco.com, Jane Doe, J. Doe, Jane A. Doe, jdoe@gmail.com become "Jane Doe").[18]

Following review, most document-by-document privilege logs are initially constructed by exporting from the review platform an Excel spreadsheet or .csv file containing

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[16] E.g., Oct. 15, 2020 Letter from Jonathan Redgrave to the Rules Committee at 2 ("The challenge to create extensive document-by-document logs while protecting privilege often yields robotic and insufficient log entries that fail to elucidate enough information to assess the claims.").

[17] *See, e.g.,* Digital WarRoom, 8 Crucial Tips to Improve Your Privilege Log Workflow ("When selecting an e-discovery review tool, look for the ability to create a list or library of privilege text annotations. These can be crafted by Counsel at the outset of the matter, and should be available to reviewers for selection and association to a document, during the document review phase, and to Privilege and QC Reviewers on subsequent tiers of review."), https://www.digitalwarroom.com/blog/privilege-log-workflow-8-tips.

[18] Many electronic review platforms allow for automated name normalization in constructing privilege logs. *See, e.g.*, Privilege Logs using Relativity Name Normalization, https://www.relativity.com/ediscovery-training/self-paced/privilege-logs-using-name-normalization/.

certain metadata fields (sender, recipient, cc, bcc, author, date, subject line, or "filename," description, etc.) for each individual document that has been tagged for withholding or redaction.[19] That provides the foundation for a document-level log. Most traditional logs are assembled using electronic tools that perform these functions.[20] The days of manual production of privilege logs are long gone. In some appropriate cases, as discussed below, the receiving party will agree to accept the objective metadata, streamlining the log production.

When a "categorical" approach is used, in many cases, the field for the pre-set categorical descriptions of withheld documents are included in the Excel or .csv metadata export for each document. The rows for each document are then sorted by description, and the individual metadata (senders, recipients, etc.) for each document tagged for the same category *are merged* into a single cell, obscuring all of the information previously available on a document-by-document basis. That is, if 100 documents share a category, the 100 rows containing metadata identifying senders of each document separately are merged into a single "senders" cell for all 100 documents combined. Thus, there is one field for *all* senders of all 100 documents, one field for *all* recipients of all 100 documents, and so forth, with no means of distinguishing who sent what to whom. Worse, as with the NYCBA model log, some categorical logs may further merge all the already-consolidated sender, recipient, cc, and bcc information into a single cell for the category. That is, the categorical log production in this manner involves *additional* steps. Available document-by-document information that could be provided to the receiving party to test whether the description is accurate is withheld and replaced with consolidated information that makes doing so impossible.

To the extent categorical logs are constructed in any other manner, we have difficulty understanding how their construction would not *increase* the logging burden, assuming the documents are actually reviewed for privilege (as they must be), the categories are thoughtfully and narrowly constructed, and the descriptions provide sufficient detail and accurately describe the document.

D. Categorical Logs Increase, Rather than Decrease, Disputes.

Where categorical logs are used, they increase rather than lessen disputes and increase reliance, and thus burden, on the courts for resolution. This is because the logs make it impossible to challenge, at a document level, whether the privilege claim

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[19] *See, e.g.*, Relativity – Privilege Logs, Relativity - Privilege Logs.pdf (epiqsystems.com); Ricoh, eDiscovery On Demand, Creating a Privilege Log, eDiscovery On Demand Creating a Privilege Log - Bing video; Disco, How to create a Privilege log with CS Disco E discovery software | ediscovery training - Bing video; KLDiscovery, LDiscovery's PrivLog Builder, https://investors.kldiscovery.com/news/news-details/2014/LDiscoverys-PrivLog-Builder-Now-Compatible-With-Relativity/default.aspx.

[20] *See, e.g.*, Consider it a Privilege? H5 Announces New Privilege Log Design Module (announcing analytics for privilege review), https://complexdiscovery.com/consider-it-a-privilege-h5-announces-new-privilege-log-design-module/.

is valid, necessitating challenges to the sufficiency of the log or to entire categories of documents and reliance on *in camera* review to assess the privilege since little can be gleaned from the log. Moreover, categorical logs frequently result in "do-overs" after the insufficiency of the log becomes apparent to the court.

This will also increase the burden on both parties. As requesting parties challenge whole categories, producing parties must often re-review every document in that category to determine which if any of the included documents are appropriately categorized. This will take longer than if the producing party was just re-reviewing carefully selected entries challenged by the requesting party. To the extent revised logs are then produced, the receiving party must re-review them. The categorical approach thus only lengthens the conferral process before disputes are brought to the courts for resolution.

Below are just a few examples that illustrate these problems from matters in which CLEF members were directly involved and of which they have personal knowledge. In addition to demonstrating how dispute-prone categorical logs are, these cases make clear that categorical logs do not result in logs prepared with greater assiduity. Descriptions are more, not less, vague and boilerplate. And over-designation still occurs; it is simply harder to detect. And that outcome creates perverse incentives that undermine the purposes of the Rule.

1. *In re Disposable Contact Lens Antitrust Litig.*, No. 15-md-2626 (D. Fla.).

In *Contact Lenses* the court ordered, over the objection of the receiving party, categorical logs that provided the dates, authors, recipients, category description, privilege justification, and number of documents withheld in each category. The result was four rounds of motion practice over the sufficiency of the logs and improper withholding spanning more than three years.

In the first motion, plaintiffs challenged categorial logs they asserted made it impossible to assess the claims of privilege. The logs lumped more than 16,000 documents into 116 categories, with some categories covering thousands of documents with little more than a conclusory assertion of privilege.[21] Many categories contained communications with a dozen or more third parties, with no factual description of the communications. For example, ten categories had more than 500 documents each, three had more than 1,000 documents each; 67 of the categories had thirty or more individuals listed, twenty-six categories had more than 100 individuals listed, and one category had more than 350 individuals listed. Six categories spanned a date range of three or more years.

Plaintiffs moved to compel production of all documents in entire categories where, for example, third parties were present, breaking the privilege for that category or the communications appeared to include hundreds of individuals, negating an intent to

[21] ECF No. 420.

maintain confidentiality.[22] Plaintiffs ultimately challenged more than 15,000 documents on several grounds but acknowledged that the "number of documents at issue may well be much lower than Plaintiffs estimate, as not every document in each category necessarily fits into one of the areas of challenge." That is, because of the categorical approach, Plaintiffs could challenge *only* entire categories of documents because they could not tell which among the documents in the category were not privileged, such as where third parties were identified as among the participants.

The producing party conceded this problem—that a producing party cannot identify which documents in a category are subject to challenge—is "inherent in a categorical approach."[23] They nonetheless faulted the plaintiffs for challenging all documents in a category though it was impossible to discern which documents in a category were not privileged. For example, the defendant complained that the receiving party challenged entire categories of documents because of the presence of some third parties in a category's senders or recipients, noting that "within a given category, any individual that is listed as a sender or recipient on any document is listed within that category; that does not indicate that different individuals appeared on the same underlying document as opposed to separate documents." And the producing defendant admitted that the plaintiffs could "not know how many documents on [the] privilege logs have any third parties copied." Where the plaintiffs challenged claims of work-product protection for a category because a portion of the date range for the category pre-dated the litigation, the defendant opposed the motion because "the fact that some documents included in a [work-product] category may predate the filing of litigation does not mean that all documents in a category began on that date." Of course, the Plaintiffs could not tell which did and which didn't.

Following *in camera* review of a sample of the withheld documents across categories, the court ordered the defendant to produce a new log with more specific descriptions, a greater number of categories spanning fewer documents and participants in each, and ordered the party to describe the steps taken to identify the documents, including whether each document was reviewed or merely sampling was conducted. After the order, the defendant subsequently revised its log twice, providing document level information and voluntarily producing more than 9,000 documents previously withheld—or nearly 60% of those initially logged.[24]

The revised log narrowed the categories and increased their number (to more than 380) and provided document-level metadata. With this information, Plaintiffs moved a second time to compel production of more than 3,000 of the documents remaining on the log. The court reviewed a sample of the documents, finding that many did not

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[22] *Id.* Sections of briefing from *In re Contacts* quoted herein have not been sealed.

[23] ECF No. 425.

[24] ECF No. 587.

Following the court's resolution of the first motion and order for more detail, a different party conducted a "re-review" of its categorical logs and withdrew its claims regarding some 2,500 of 11,000 withheld documents, or nearly 25% of the documents on its categorical logs. *See* ECF No 759.

appear to contain legal advice and involved no lawyers, ordering the party to again re-evaluate its privilege claims.[25]

Yet another motion challenged a categorical log, which had been subject to multiple meet and confers and subsequent revisions, for failure to include redacted documents in its log. The court ordered the log be further revised and to identify by Bates number, the redacted documents being withheld for each category.[26]

2. *Chen-Oster, et al. v. Goldman, Sachs & Co.*, No. 10-cv-6950 (S.D.N.Y)

In *Chen Oster*, Plaintiffs complained that the defendant's categorical logs provided insufficient information to assess the claim.[27] They lacked basic information necessary to assess the claim of privilege, including: document type; author; addressees; other recipients; the relationship of author, addressees, and recipients to each other; and sufficiently detailed descriptions. The categorical logs also lumped together many years of documents (in some cases up to eight years' worth of documents) covering multiple categories, without identifying who created them, who sent and/or received which documents, the number of documents being logged, or anything beyond generic descriptions. Additionally, plaintiffs complained the withholdings were facially overbroad; for example, many entries withheld e-mail attachments, while only purporting to justify privilege for the e-mail and not the underlying attachment.

The Court ordered Goldman Sachs to review and revise its privilege logs to "comply with their obligation to adequately provide the information necessary to evaluate claims of privilege."[28] It ordered the Defendants to provide additional information supporting its privilege claims and verify that all documents within the category or group are in fact subject to a good faith claim of privilege and to describe in more detail the nature, type and subject matter of the documents contained in the group or category.

In the months that followed, Goldman Sachs produced revised logs with continued deficiencies. This resulted in further briefing, and a second order: (1) requiring Goldman Sachs to provide information about listservs and email subject lines for selected documents on the logs; and (2) permitting Plaintiffs to identify 50 documents for *in camera* review, to assess the claim of privilege.[29] Following Plaintiffs' document selection, Goldman Sachs withdrew the privilege designations for approximately 25%

[25] ECF No. 992.

[26] ECF. No. 825.

[27] ECF Nos. 771 & 781.

[28] ECF No. 796.

[29] ECF No. 888.

of the sample documents.[30] The Court agreed that this was "a substantial percentage - from a relatively small sample," and concluded that there was "good reason to believe that there are additional documents among the thousands remaining on Goldman's privilege logs that should have been produced in whole or in part."[31] The Court therefore ordered a second re-review of the logs, and ordered Goldman to identify all other improperly or errantly withheld documents from its privilege logs and to certify the efforts it undertook, as well as the results.

Goldman's review of just a sample of its logs resulted in de-designation of more than 33% of the documents withheld in that sample.[32] In light of this high error rate, the Court ordered another re-review of Goldman Sachs' logs, in their entirety and production of revised logs. In the end, thousands of documents previously withheld and categorically logged were ultimately produced.

E. The Case Law Reflects Abuse of Categorical Logs.

Though some courts have permitted categorical logs, the case law reflects that they are ripe for abuse and frequently result in production of document-level logs when their insufficiency becomes apparent. The following examples illustrate precisely why categorical logs pose such a threat to the purposes of Rule 26(b)(5)(A), how differently categorical logs are constructed, and why sanctioning their use is ill-advised.

- In *Chevron Corp. v. Salazar*, No. 11 Civ. 3718, 2011 WL 4388326, (S.D.N.Y. Sept. 20, 2011), the court found, after *in camera* review of a sample of documents logged categorically, that the plaintiff's categorization process "obscures rather than illuminates the nature of the materials withheld" and ordered a new log identifying each document. It observed that a category of documents described as "documents assembled, obtained, gathered, or compiled as part of a fact investigation at the direction of counsel and in anticipation of litigation or in preparation for trial, the assembling, obtaining, gathering, or compiling of which reflect the thoughts, impressions, legal theories, or litigation strategies of counsel regarding discovery proceedings" would have been more accurately described as "press releases and news stories." This type of description is all too common in categorical logs.

- In *Franco-Gonzalez v. Holder*, No. 10-cv-2211, 2013 WL 8116823 (C.D. Cal. May 3, 2013), the court found that the defendants' categorical privilege logs were deficient because the plaintiff could not determine whether the documents on the log were widely shared (vitiating the privilege) or whether legal advice was being requested or obtained for some of the documents. The court ordered the

[30] ECF No. 909.

[31] ECF No. 912.

[32] ECF No. 937.

defendants to, among other things, "supplement their categorical privilege logs to include an identification of the time periods encompassed by the withheld documents, an identification by name of the author and recipient(s) of the withheld documents, and for each privilege log, . . . specific and detailed declarations supporting the claim of privilege.

- In *Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n*, No. 15-CV-01300, 2016 WL 6539344 (D.S.C. Nov. 3, 2016), one of the categories in the log contained 646 documents spanning three years involving no fewer than 72 different people (including third parties). The court ordered the plaintiff to, among other things, produce a metadata log for all withheld and redacted documents and affidavit(s) from the person(s) with knowledge regarding the basis for withholding documents shared with third parties.

- In *In re Aenergy, S.A.*, No. 19-MC-542, 2020 WL 1659834 (S.D.N.Y. Apr. 3, 2020), the court found that the categorical privilege logs had "significant shortcomings," including (1) "vague and repetitive" descriptions such as "internal documents between . . .employees and in-house counsel 'seeking or conveying legal advice' about the 'on-sale contracts . . . .'"; and (2) large categories containing hundreds of document families involving "numerous authors and recipients." To remedy these issues, the court ordered the violating party to re-review the withheld documents and produce a document-by-document log.

- In *Norton v. Town of Islip*, No. CV043079, 2017 WL 943927, at *8 (E.D.N.Y. Mar. 9, 2017), the court found the defendant's three-page categorical privilege log deficient because the descriptions were vague and ordered the defendant to produce an individualized log.

- In *First Horizon Nat'l Corp. v. Houston Cas. Co.*, No. 2:15-CV-2235, 2016 WL 5867268, *4-6 (W.D. Tenn. Oct. 5, 2016), the court granted a motion for a document-by-document log after plaintiff's categorical privilege log "grouped thousands of documents created over the course of five years" into nine categories and "include[d] dozens of authors and recipients and lump[ed] together documents concerning many matters into broad categories." It concluded that "in the absence of a document-by-document log, the court or the Defendants cannot assess whether the privilege claim is well grounded." It observed that the documents listed in the categories may not involve lawyers or may involve lawyers but not privileged communications, or may have been related to business not legal matters.

IV. Parties Can and Are Cooperatively Addressing Privilege Issues and Burdens Specific to the Needs of the Case.

The Committee posits potential amendments to Rules 16 and 26(f) directing the parties to discuss the method for complying with Rule 26(b)(5). While this may be helpful in some cases, in the complex cases CLEF participants prosecute (which are typically those with extensive privilege logs), it is already standard operating procedure to engage in such a discussion early in the litigation. Rule 26(f)(3)(D) which requires that the discovery plan address "any issues about claims of privilege or of protection as trial-preparation materials" provides the directive for these discussions.

Early in our cases, generally before discovery commences, the parties generally cooperate and negotiate "privilege protocols" for both the format, timing, and manner of production of privilege logs and procedures for raising privilege challenges. These protocols forestall disputes down the road on format, content, and timing issues and work to balance the need for information to assess the claim and the burden of compliance with Rule 26(b)(5).

Whether or not these agreements can be reached early in the case may, however, be highly case dependent and not susceptible to application in all cases. A Rule amendment specifying universal application of any of these procedures would not advance the goals of the Rule: the appropriateness and need for their application is case specific.

- *Rule 502(d) Agreements:* It is standard in the large complex matters that CLEF participants prosecute, which involve large ESI productions, for the parties to propose to the court a stipulated order entering a 502(d) agreement, with procedures for clawback of privileged documents and challenges to those clawbacks.

- *Exclusions for Logging Obligations*: In many complex cases, the parties will agree to exclude from the privilege logging obligation documents so likely to be privileged that a log is unnecessary. This generally results in agreements to exclude work-product by (or directed by), and communications with, outside litigation counsel regarding the litigation after commencement of the action. This type of exclusion can be appropriate where (1) the parties have an informed understanding of the role of outside litigation counsel; and (2) the commencement of the action can be expected to terminate ordinary communications about the underlying subject matter of the litigation (for example, when unlawful conduct is alleged and one expects that communications evidencing unlawful conduct likely ceased, such as RICO, antitrust, fraud, and discrimination cases). Sometimes these exclusions may apply to in-house counsel where the in-house counsel's role is limited exclusively to litigation rather than business matters. Sometimes these exclusions will apply prior to inception of the litigation, for example, when there

has been a federal or state enforcement action prior to the civil litigation. And sometimes, depending on the facts of the case, may agree to exclude all privileged material created after a certain date.

Such exclusions, however, are not appropriate in every case and should only be made on an informed basis. For example, the presumption that communications with outside counsel are excludable may not hold when outside counsel (or their firms) wears multiple hats (business advisor, lobbyist or government relations advisor, public relations advisor, and so forth) or is representing the client on matters related to the litigation but which are not necessarily privileged (for example, contract negotiations with third parties). The parties may not have sufficient information early in the case—such as the role of in-house or outside counsel—to assess whether an exclusion is appropriate.

Whether and what information is appropriately excluded from a privilege log is often fact-dependent and case-specific. A rule amendment directing exclusion of these or similar categories across all cases is thus inappropriate and would subvert the purposes of Rule 26(b)(5)(A).

- *Timing of Privilege Log Productions:* The parties will frequently negotiate the time frame for producing privilege logs, such as whether they will occur after production is complete or on a rolling basis. The timing of privilege log production, however, can sometimes depend on information that is not known early in the case before discovery commences and may depend heavily on the discovery schedule, and the parties may defer, until later in the case, discussions on deadlines for logs.

- *Content and Format of Privilege Logs:* We frequently negotiate the specific fields of information that privilege logs must contain, their format, whether alternative approaches are appropriate, and other provisions to address privilege log burdens.

  For example, protocols increasingly permit a producing party to produce a metadata log in lieu of a traditional log for all ESI withheld. These logs export objective metadata from the review platform for each document (dates sent/received, email addresses for senders, recipients, copyees, author, subject line, file name, custodian, document type (e.g., .msg, .pdf, .doc, etc.) redacted, family document ids, etc.) and present it in Excel format. Often the parties will agree that a key will be provided to identify attorneys and individuals associated with email addresses. In some cases, the parties will agree that a description will be provided; in others, the parties may agree to forego the description. These metadata logs substantially alleviate any burdens associated with constructing privilege logs.

  But metadata logs are not necessarily appropriate for all document types or in all cases. They increase the burden on the receiving party to discern the identity of

those in the log from email addresses (unless the parties agree that names will be normalized). They also provide little information for non-email document types which frequently have limited or inaccurate metadata. In some cases, the parties may agree to a metadata log only for emails and their attachments, rather than all documents. Further, because metadata exists only for the last email in the thread, they do not provide any information to determine if all, or just some, emails in a wholly withheld thread are privileged. Parties have negotiated "work arounds" for these problems in their privilege protocols. For example, to eliminate the burden of logging all emails in the thread, the parties may agree that wholly withheld threads will be logged only with metadata, but the entire thread will be produced in a manner that redacts all content but reveals the senders, recipients, and dates. The solutions the parties agree upon to reduce logging burdens while still ensuring sufficient information to assess the claim will depend upon the particular case and the needs and interests of the parties.

Some protocols will even set forth categories of documents that the parties agree may be logged together. Whether this is appropriate depends upon the needs of the case, the categories at issue, and whether categories can be designed on a transparent, informed basis. Others will provide that a party may apply the same description to multiple documents that are individually logged such that the party may export their log from their review platform with metadata for pre-set privilege designations.

- *Challenge Procedures*: Most privilege protocols set forth a procedure for privilege challenges, both informal, prior to court involvement, and formal when court resolution is necessary. Although some parties may agree to sampling procedures for formal challenges, whether such procedures are appropriate, and if so, what they are, may be unknowable until the logs are produced.

In sum, the Rules provide flexibility to parties in cases where there may be voluminous privilege claims to design procedures that are appropriate for their specific matters.

CLEF appreciates this opportunity to provide our input and are available should the Committee have questions.

Respectfully,

/s/ Dana Smith

Dana Smith
Executive Director, Complex Litigation eDiscovery Forum
danas@complexlitigatione-discovery.com

cc: Rebekah Bailey, Nichols Kaster, PLLP

Lea Bays, Robbins Geller Rudman & Dowd
James (Jacksie) Bilsborrow, Seeger Weiss LLP
Brian Clark (Chairperson), Lockridge Grindal Nauen PLLP
Jeannine Kenney, Hausfeld LLP
Annika Martin, Lieff Cabraser Heimann & Bernstein
Zachary Wool, Barrios Kingsdorf & Casteix LLP