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THE CATEGORICAL IMPERATIVE: IN SEARCH OF THE MYTHICAL PERFECT PRIVILEGE LOG SO DEVOUTLY TO BE WISHED

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ABSTRACT

Though evidentiary privilege is amongst the most perplexing fields of the law, privilege logs are assuredly amongst the most vexing. With vastly increased discovery in the age of electronically stored information, the burdens incurred by individually articulating claims of privilege on every document have grown gargantuan. In desperate search of efficiencies, many commentators and courts have looked to "categorical" privilege logs that assert claims over generic groups of similar material rather than over each item seriatim. Disputes, however, have remained distressingly acrimonious, as these new categorical logs have proven no cure-all for the fundamental divergence of interests between litigants in pitched battle. Nonetheless, the furious debate over the merits and demerits of categorization offers glimmers of hope for a less rancorous and more fruitful future for privilege logs, if not for discovery practice as a whole.

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I. INTRODUCTION

It is human nature to root for the underdog.[1] This is particularly so for the scrappy contender with maligned or unrecognized virtue, for when such an underdog ekes out a well-deserved victory, its proponents may justly revel in their wise if countermajoritarian recognition of what soon comes to be common wisdom—and proving that merit translates to success, and the world is a fair judge.[2] Moreover, everyone likes to "get in on the ground floor," ahead of the crowd, demonstrating their rare discernment and reaping the rewards of prescience.[3]

There are few bogeymen of the law more ripe for overthrow than the reviled privilege log. "No one went to law school dreaming of one day preparing a privilege log, much less one with hundreds or thousands of entries," write two New York litigators in pursuit of reform.[4] Another practitioner sermonizing to young advocates in Delaware chancery offers a piece of sage wisdom straight from the chancellery: "The reality is that, unfortunately, privilege logs are one of the sewers of litigation practice."[5] And lest tyros think that

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[1] *See* Howard Schuman & John Harding, *Sympathetic Identification with the Underdog*, 27 PUB. OP. Q. 230 (1963).

[2] *See The Year of the Underdogs*, THE ECONOMIST (Dec. 20, 2022), https://www.economist.com/culture/2022/12/20/the-year-of-the-underdogs ("It is not just the ride from the bottom to the top, wilder and more exhilarating than shorter ascents, that makes these stories so rousing. . . . They suggest life is not predetermined. They make their own fate."); *see also* William Safire, Op-Ed, *Bush the Underdog*, N.Y. TIMES, May 19, 1988, at A31 ("Underdoggedness, meanwhile, confers the aura of Trumanesque scrappiness. George Bush's finest hour since he was a combat hero came when he lost in Iowa and fought his way back to victory in New Hampshire. As long shot, the Vice President demonstrated what not many suspected: Like the racehorse Silky Sullivan, he has a kick in the homestretch."). George H.W. Bush was elected President of the U.S. six months later.

[3] *See* MALCOLM GLADWELL, DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS 6 (Little, Brown 2013) ("[M]uch of what we consider valuable in this world arises out of these kind of lopsided conflicts, because the act of facing overwhelming odds produces greatness and beauty. And second, we consistently get these kind of conflicts wrong. We misread them. We misinterpret them. Giants are not what we think they are. The same qualities that appear to give them strength are often the sources of great weakness. And the fact of being an underdog can *change* people in ways that we often fail to appreciate.").

[4] H. Christopher Boehning & Daniel J. Toal, *Court Applies Proportionality in Determining Privilege Log Burden*, N.Y. L.J., Dec. 7, 2021, at 1.

[5] Elizabeth Taylor, *Privilege Log Compliance and the Delaware Court of Chancery*, AM. BAR ASS'N (May 15, 2020)

privilege logs are a noble if underappreciated pursuit, courts are quick to disabuse them of the notion; in the words of Magistrate Judge John Facciola (more on whom later[6]): "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."[7] These are not exactly sentiments to stir the weary souls of the first-year associates consigned to sift through millions of documents to catalogue tens of thousands of privilege assertions.[8]

For as long as privilege logs have existed—which is as long as they have been excoriated—hopeful reformers have offered theories for how the practice of privilege might be bettered. In recent times, however, the complaints have grown more plangent, criticisms more pitched, and the demands for better answers more shrill. In many ways, this modern era of discovery truly began only a few decades ago as a result of a not wholly unrelated pair of epochal developments, as observed in 1995: "the low-cost photocopy machine, which has resulted in more copies, and liberal discovery rules, which have given adversaries access to files to which they would not have had access previously."[9] Since then, the explosion of electronically stored information has supercharged discovery still further.[10] Not

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https://www.americanbar.org/groups/litigation/committees/young-advocates/articles/2020/spring2020-privilege-log-compliance-and-the-delaware-court-of-chancery/#:~:text=Unless%20the%20parties%20in%20the%20litigation%20have%20agreed,at%20%2A8%20%28Del.%20Ch.%20Ct.%20Sept.%2025%2C%202015%29 (quoting Stilwell Assocs., L.P. v. Hopfed Bancorp, Inc., C.A. No. 2017-0343-JTL, at 113 (Del. Ch. Ct. Aug. 28, 2017) (transcript)).

[6] *See infra* notes 66-76 and accompanying text.

[7] Chevron Corp. v. Weinberg Group, 286 F.R.D. 95, 99 (D.D.C. 2012) (Facciola, Mag.).

[8] *See* Patrick L. Oot, *The Protective Order Toolkit: Protecting Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237, 238 (2009) ("Document review became the traditional hazing of first-year associates as they protected their client's claim of privilege by mind-numbingly pulling and logging privileged documents from a discreet production set of banker's boxes.").

[9] John T. Hundley, *"Inadvertent Waiver" of Evidentiary Privileges: Can Reformulating the Issue Lead to More Sensible Decisions?*, 19 S. ILL. U. L.J. 263, 264 (1995).

[10] Jared S. Sunshine, *Failing to Keep the Cat in the Bag: A Decennial Assessment of Federal Rule of Evidence 502's Impact on Forfeiture of Legal Privilege under Customary Waiver Doctrine*, 68 CLEV. ST. L. REV. 637, 685 (2020) ("By the turn of the millennium, the proliferation of email and electronic records had transcended the reach of the photocopier into new multitudes.").

coincidentally, a streamlined format of index generally known as a "categorical" privilege log has gained in currency over the same time period—and many have hied to promote this fresh new underdog, vying to oust the traditionalist insistence upon mindlessly comprehensive indices.[11]

This Article explores in Part II the development of both traditional and categorical privilege logs in the modern era, before ultimately reaching the recent deliberations of the Judicial Conference as to potential refinements in Part III. Part IV surveys the reactions of courts themselves to the advent of categorical logging, whilst Part V recurs to the underlying yearning for a qualitatively better regime regulating the resolution of privilege disputes than that which has developed in fits and starts over the past few decades, retarded by the unquenchable quarrelsomeness of adversaries in discovery. It seems that as long as litigants are at the helm, disputes are inescapable. In conclusion, the Article asks whether and what further advancements may be possible and plausible beyond the incremental adoption of categorical approaches. If the answers on offer are less than heartening, one can take solace that an inconvenient truth is better than a comforting lie.[12] Underdogs do not usually prevail—that is why they are underdogs.[13]

II. A BRIEF HISTORY OF PRIVILEGE LOGS

It may be surprising to the modern practitioner that the now-ubiquitous privilege log was not a foreordained creation of primordial law, but of much later provenance: "Most courts seem to be unaware

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[11] *See infra* Part II-B.

[12] Jan van Eijck, *On Collective Rational Action*, at 202, *in* DISCOURSES ON SOCIAL SOFTWARE (Jan van Eijck & Rineke Verbrugge eds., Amsterdam Univ. Press 2009) ("Sociologist: . . . . It is only natural to prefer a comforting lie to an inconvenient truth. Logician: It may be natural, but it ain't rational.").

[13] *Cf.* R.W. Apple, Jr., *Bush's Trampoline Act: Less Bounce This Time*, N.Y. TIMES, July 28, 1992, at A10 ("But even the Republicans, who only a few months ago were talking about their lock on the Electoral College, now consider Mr. Bush the underdog. And it seems possible, if by no means yet probable, that 1992 may prove to be one of those pivotal years in American politics, like 1912, when Woodrow Wilson won a three-way race, and 1932, when Franklin D. Roosevelt won the first of four terms, and 1952, when Dwight D. Eisenhower won the first of two. Each time, a long partisan reign came to an end in a landslide."). President George H.W. Bush was defeated in his bid for reelection in November 1992, by an electoral vote of 168-370.

that privilege logs were once rare. They gradually came into use as a means of both asserting attorney-client privilege or work-product protection for a document and putting an adversary on notice that one had done so."[14] Prior to the final two decades of the twentieth century, privilege disputes seldom arose,[15] and there was not even a clear obligation to expressly make individual assertions rather than withhold materials under a "blanket claim" of privilege.[16] As late as 1997, the privilege scholar Grace M. Giesel could still observe that

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[14] 2 EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 1525 (6th ed. 2017).

[15] *Id.* at 1533 ("[O]nce upon a very recent time, as recent as the early 1980s, claims of privilege and work-product protection to shield documents from discovery were few and far between."); 1 *id.* at 2 ("Today, although privilege disputes are frequent where once they were rare, in most instances it is not new law that is being developed, but established law that is being applied to specific fact patterns . . . ."); *see also* Geoffrey C. Hazard Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1070 (1978) ("On the contrary, recognition of the privilege was slow and halting until after 1800. It was applied only with much hesitation, and exceptions concerning crime and wrong-doing by the client evolved simultaneously with the privilege itself.").

[16] *See* Eureka Fin. Corp. v. Hartford Accident & Indemnity Co., 136 F.R.D. 179, 182-83 (E.D. Cal. 1991) ("Whether a responding party states a general objection to an entire discovery document on the basis of privilege, or generally asserts a privilege objection within an individual discovery response, the resulting 'blanket objection' is decidedly improper. This fact should no longer be 'news' to a responding party. . . . Indeed, the well settled case law on the subject of specific identification of privileged materials is about to be codified as part of FED. R. CIV. P. 26(b)(5).") (citing with parentheticals Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541-42 (10th Cir. 1984) (holding that a blanket, non-specific attorney-client and work product privilege objection was insufficient and effected a waiver of the privilege); Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981) (blanket privilege objection is improper); Kansas-Nebraska Nat. Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 23-24 (D. Neb. 1983) (blanket objection based on privilege waives the privilege); and *In re* Shopping Carts Antitrust Litig., 95 F.R.D. 299, 305 (S.D.N.Y. 1982) (party asserting a privilege objection must specify the evidence to which the privilege applies)); Steven S. Gensler & Lee H. Rosenthal, *Breaking the Boilerplate Habit in Civil Discovery*, 51 AKRON L. REV. 683 (2017) ("But complaints about 'general' and 'blanket' assertions of privilege and work-product objections continued. In response, the Advisory Committee developed proposals that would require both parties responding to discovery requests and nonparties responding to subpoenas to expressly assert claims of privilege and work-product and to provide enough information for the requesting party to assess the sufficiency of the claims. The Committee first adopted an amendment for subpoenas in 1991 with the addition of Rule 45(d)(2), 24 and in 1993 extended it to party discovery responses with the addition of Rule 26(b)(5).").

"courts usually decide whether a document is privileged on the basis of the claimant's statements of applicability, supporting affidavits, and in camera review."[17] Early—which is to say, latter-twentieth-century—privilege logs were ad hoc creatures of local court rules and assembled on a case-by-case basis, but all that changed in 1993 with the Judicial Conference's promulgation of the Federal Rule of Civil Procedure 26(b)(5)(A).[18] That Rule simply states:

> 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

[17] Grace M. Giesel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations*, 48 MERCER L. REV. 1169, 1202 n.143 (1997) (initial majuscule reduced to minuscule) (citing as example Note Funding Corp. v. Bobian Inv. Co., N.V. No. 93 Civ. 7427 (DAB), 1995 WL 662402, at *1 (S.D.N.Y. Nov. 9, 1995) with the explanatory note that "claimant proffered affidavits, a 'privilege log' containing the bases for its claims of privilege, and relied upon in camera inspection").

[18] Yuqing Cui, Note, *Application of Zero-Knowledge Proof in Resolving Disputes of Privileged Documents in E-Discovery*, 32 HARV. J. L. & TECH. 633, 637 (2019) ("[P]rivilege logs were governed by local rules or by judge orders on a case-by-case basis prior to the enactment of Rule 26(b)(5) in 1993."); Gensler & Rosenthal, *supra* note 16, at 690 ("Until 1991, the rules did not specifically address how to raise claims of privilege or work-product protection. Many, but not all, courts filled that void with an ad hoc solution that required parties to make privilege and work-product objections specifically and to provide a log listing the items being withheld and why. This solution adopted the requirement known as a 'Vaughn Index,' developed in the context of FOIA requests, and applied it to discovery."); John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19, 23 (2010) ("Rule 26 has long governed the entire discovery process, including the scope and timing of document requests and interrogatories. However, prior to the enactment of Rule 26(b)(5) in 1993, privilege logs were governed by local rules or by orders from a judge in an individual case."); *id.* at 24 ("Against this backdrop and without a specific rule regarding privilege logs until 1993, the logging of withheld documents based on privilege was governed by local rules in some cases and by specific court orders or standing orders in others.").

> revealing information itself privileged or protected, will enable other parties to assess the claim.[19]

As is evident from its text, Rule 26 says nothing about *how* the express claim is to be conveyed or with what quantum of information, other than its outcome test that it enable an assessment—and the drafters were clear that the omission was intentional, to allow for whatever means proved most expedient.[20] But with ballooning volumes of electronically stored information deluging all manner of litigation, mass-produced privilege logs rapidly became the standard method to address the torrent.[21]

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[19] FED. R. CIV. P. 26(b)(5)(A).

[20] *See* Cui, *supra* note 18, at 637 n.18 ("'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.'") (quoting FED. R. CIV. P. 26 advisory committee's note to 1993 amendment); Facciola & Redgrave, *supra* note 18, at 27 ("Importantly, the Advisory Committee declined to identify exactly what information needed to be provided."); John E. Tyler III, *Analyzing New Protections for Intangible Work Product and Harmonizing That Protection with the Use of Privilege Logs*, 64 UMKC L. REV. 743, 748 (1996) ("The official comment to Rule 26(b)(5) recognizes a significant flexibility and discretion inherent in the Rule that prevents universal application in generalized circumstances. The Advisory Committee Notes to Rule 26(b)(5) expressly encourage a case by case application where trial court judges can exercise discretion to determine whether the parties have complied with the Rule and what sanction, if any, to impose for non-compliance.").

[21] *See* Boehning & Toal, *supra* note 4, at 1 ("But with the vast volumes of electronically stored information (ESI) common to modern litigation, and the high standard of care required to provide enough information to justify a claim of privilege on an otherwise discoverable document, many lawyers may find themselves devoting significant time to logging documents."); Douglas C. Rennie, *Why the Beginning Should Be the End: The Argument for Exempting Postcomplaint Materials from Rule 26(b)(5)(A)'s Privilege Log Requirement*, 85 TUL. L. REV. 109, 114-15 (2010); Oot, *supra* note 8, at 238 ("Prior to the advent of the personal computer, courts struck down blanket privilege protections and required litigants to zealously protect privileged communications by thoroughly reviewing and analyzing document collections prior to producing a final set to an opponent. . . . We can blame technology for the data deluge."); The Sedona Conference, *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 155 (John J. Rosenthal ed., 2016) ("Privilege logging is arguably the most burdensome and time consuming task a litigant faces during the document production process. Further, the deluge of information and rapid response times required by pressing dockets have forced attorneys into using mass-production techniques, resulting in logs with vague narrative descriptions."); *see also* Cui, *supra* note 18, at 633-34, 655 ("E-discovery has significantly increased the number of documents to be reviewed for production.

A. Traditional Document-by-Document Privilege Logs—

Thus despite this deliberate indeterminacy, courts nigh universally came to expect and demand that a "traditional" privilege log be submitted in satisfaction of Rule 26.[22] One Tennessee district court, pondering the modern practice in 2014's *Genesco v. Visa U.S.A.*, reflected philosophically that "although for most actions, this Court requires a privilege log, a study of the history of law reflects that most rules eventually give rise to exceptions where the facts warrant."[23] It went on to acknowledge that Rule 26 does not even expressly require a log as such but only information (in whatever form) sufficient to substantiate the claim.[24] To the extent a log is thought to be required, it seems at best a permissible—if ubiquitously drawn—inference from Rule 26(b)(5).[25]

1. The Stricter Approach to Privilege Logging

Indubitably, however, many courts have read the rule to strictly require a traditional privilege log *per se*, and view the absence of such a timely submission of objections on the basis of privilege to

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This in turn has increased the number of documents to be recorded on privilege logs, which has led to more privilege log disputes.").

[22] *See* Garcia v. E.J. Amusements of N.H., Inc., 89 F. Supp. 3d 211, 215 (D. Mass. 2015) ("The universally accepted means of claiming that documents are privileged is the production of a privilege log." (internal quotation marks omitted)); Caudle v. District 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."); SPX Corp. v. Bartec USA, LLC, 247 F.R.D. 516, 527 (E.D. Mich. 2008) ("[A] privilege log is customarily provided."); Cui, *supra* 18, at 637 n.17 (citing the aforementioned cases and noting that "it has become customary for the privilege-claiming party to comply with Rule 26(b)(5) by producing a privilege log for each document, containing enough information for the court or the opposing party to assess the claim of privilege").

[23] Genesco, Inc. v. Visa U.S.A., Inc., 302 F.R.D. 168, 191 (M.D. Tenn. 2014) (initial majuscule reduced to minuscule).

[24] *Id.* at 191-92.

[25] EPSTEIN, *supra* note 14, at 1525 ("Yet no generally applicable federal rule expressly requires the preparation of a privilege log when either the privilege or the protection is asserted. Courts infer the need for a privilege log from FED. R. CIV. P. 26(b)(5) . . . .").

potentially work waiver.[26] So too the essentially identical verbiage at Rule 45(d)(2) has been read to require a log to pose privilege objections to a subpoena, on pain of waiver.[27] And the sine qua non of a traditional privilege log, for those courts viewing the Rules as mandating one, is that it itemizes every document subject to privilege with particularity.[28] As the Utah Supreme Court reiterated: "We emphasize that a proper privilege log must provide sufficient

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[26] *E.g.*, Carfagno v. Jackson Nat'l Life Ins. Co., No. 5:99CV118, 2001 WL 34059032, at *2 (W.D. Mich. Feb. 13, 2001) ("As a result of 1993 amendments to Rule 26 of the Rules of Civil Procedure, documents withheld on a claim of privilege or immunity must be described in a privilege log. FED. R. CIV. P. 26(b)(5). Although Jackson National's brief makes vague statements concerning the possible privileged nature of documents called for in requests no. 6, 11 and 13, it has not submitted to this court a privilege log in support of its objections, as required by Rule 26(b)(5).") (citing United States v. Constr. Prod. Rsch., Inc., 73 F.3d 464, 473–74 (2d Cir. 1996) and Smith v. Dow Chemical Co., 173 F.R.D. 54, 57–58 (W.D.N.Y. 1997)); *accord* FG Hemisphere Assocs., L.L.C. v. Republique Du Congo, No. 01 CIV.8700SASHBP, 2005 WL 545218, at *6 (S.D.N.Y. Mar. 8, 2005) ("[T]here is no dispute that it was not accompanied by an index of documents withheld on the ground of privilege. As other judges in this District and I have repeatedly held, the unjustified failure to list privileged documents on the required log of withheld documents in a timely and proper manner operates as a waiver of any applicable privilege."); *see, e.g.*, Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 264 (D. Md. 2008).

[27] *In re* Grand Jury Subpoena, 274 F.3d 563, 575 (1st Cir. 2001) ("The operative language is mandatory and, although the rule 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.") (collecting cases); OneBeacon Ins. Co. v. Forman Int'l, Ltd., No. 04 CIV. 2271 (RWS), 2006 WL 3771010, at *7 (S.D.N.Y. Dec. 15, 2006) ("Courts in this Circuit have also refused to uphold a claim of privilege in response to a subpoena when no privilege log has been produced in compliance with Federal Rule of Civil Procedure 45(d)(2).") (citing *In re* Application for Subpoena to Kroll, 224 F.R.D. 326, 328-29 (E.D.N.Y. 2004)).

[28] Smith v. Dow Chem. Co., 173 F.R.D. 54, 57 (W.D.N.Y. 1997) ("Under this rule [26], the party asserting the privilege or protection must specifically identify each document or communication, and the type of privilege or protection being asserted, in a privilege log."); *accord* Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 589, 594 (W.D.N.Y. 1996) (same); *see* Facciola & Redgrave, *supra* note 18, at 31 ("Over time, however, courts across differing jurisdictions have articulated a somewhat common understanding of the requirements for a document-by-document log. Of course, the rote repetition of these requirements has often been interpreted as a nearly dogmatic preference for a 'document-by-document' log,"); Rennie, *supra* note 21, at 124 ("Parties most commonly satisfy the Rule by preparing a 'privilege log'—an item-by-item listing of the withheld materials with pertinent information about each item.").

foundational information for each withheld *document* or *item* to allow an individualized assessment as to the applicability of the claimed privilege."[29]

Beyond the basic requirement of enumerating each document, some courts meticulously detail baroque and ramified taxonomies of information which are to be provided for each document listed on such a log.[30] Apparently, even listing each and every document subject to a claim of privilege along with a description is not sufficient; more—often far more—is thought necessary by many courts.[31] Indeed, some tout the very onus and prolixity of such requirements as deterring meritless claims from being lodged in the first place,[32] as Epstein quips: "for courts exasperated over the filing of frivolous privilege claims, nothing is more certain to cut short the assertion of such claims

[29] Allred v. Saunders, 2014 UT 43, ¶ 27, 342 P.3d 204, 211 (Utah 2014).

[30] *E.g., In re* Syngenta AG MIR 162 Corn Litig., No. 14-MD-2591-JWL, 2017 WL 1106257, at *4-5 (D. Kan. Mar. 24, 2017) (listing nine categories of data); Olivia Marie, Inc. v. Travelers Cas. Ins. Co. of Am., No. CIV.A. 11-12394, 2011 WL 6739400, at *3 (E.D. Mich. Dec. 22, 2011); *In re* Currency Conversion Antitrust Litig., No. 05 CIV. 7116 WHP THK, 2010 WL 4365548, at *2 (S.D.N.Y. Nov. 3, 2010) ("For documents withheld on the basis of privilege, a party must produce a log identifying: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document, including, where appropriate, the author of the document, the addressees of the document, and any other recipients of the document, and, where not apparent, the relationship of the author to the addressees and recipients."); *In re* Universal Serv. Fund Tel. Billing Pracs. Litig., 232 F.R.D. 669, 673 (D. Kan. 2005) (listing ten categories of data); *Smith*, 173 F.R.D. at 57 ("[T]he privilege log should contain a brief description or summary of the contents of the document, the date the document was prepared, the person or persons who prepared the document, the person to whom the document was directed, or for whom the document was prepared, the purpose in preparing the document, the privilege or privileges asserted with respect to the document, and how each element of the privilege is met as to that document."); *Burns*, 164 F.R.D. at 594 (same).

[31] *See Olivia Marie*, 2011 WL 6739400, at *3 ("Defendant's privilege log identifies each document by bates number, date, description of the document, and privilege asserted. The privilege log is not specific enough to permit Plaintiff or the Court to determine whether a privilege exists as to the listed documents.") (citation omitted).

[32] *Universal Serv. Fund*, 232 F.R.D. at 673 ("[The court] is acutely sensitive to the fact that, as a practical matter, requiring each e-mail within a strand to be listed separately on a privilege log is a laborious, time-intensive task for counsel. And, of course, that task adds considerable expense for the clients involved; even for very well-financed corporate defendants such as those in the case at bar, this is a very significant drawback to modern commercial litigation. But the court finds that adherence to such a procedure is essential to ensuring that privilege is asserted only where necessary to achieve its purpose.").

than to require a fully detailed privilege log."[33]

Ostensibly laxer courts may allow effusively that "logs do not need to be precise to the point of pedantry"[34] and might accordingly espouse a more amorphous standard of sufficiency to assess the claim[35]—but require some sort of document-by-document index all the same.[36] One court incensed by the abject failure to produce *any* log declaimed that "[i]t should be clear to all attorneys" that the Federal Rules "are not starting points for a discussion concerning the handling of privileged documents nor are they merely suggested practice guidelines that attorneys are free to disregard. They are rules, and in the absence of a court [o]rder or stipulation providing otherwise, they must be obeyed."[37] The question begged, of course, is whether the rules really demand a traditional privilege log at all.[38]

But woe betide the imprudent or impudent proponent of privilege who declines to duly log a document over which privilege is claimed in the most exacting of courts! Wholesale waiver of the privilege claims not properly asserted is the ultimate penalty for failure,[39] though egregious fecklessness is usually prerequisite to such

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[33] EPSTEIN, *supra* note 14, at 1529.

[34] *In re* Grand Jury Subpoena, 274 F.3d 563, 576 (1st Cir. 2001).

[35] Helget v. City of Hays, No. 13-2228-KHV-KGG, 2014 WL 1308890, at *3 (D. Kan. Mar. 28, 2014) ("A privilege log must provide sufficient information to allow the other party to assess the claimed privilege") (cleaned up); *accord* Kear v. Kohl's Dept. Stores, Inc., No. 12–1235–JAR–KGG, 2013 WL 3088922, at *3 (D. Kan. June 18, 2013).

[36] *In re* Currency Conversion Antitrust Litig., No. 05 CIV. 7116 WHP THK, 2010 WL 4365548, at *11-12 (S.D.N.Y. Nov. 3, 2010).

[37] FG Hemisphere Assocs., L.L.C. v. Republique Du Congo, No. 01 CIV.8700SASHBP, 2005 WL 545218, at *5 (S.D.N.Y. Mar. 8, 2005).

[38] *See supra* notes 20-25 and accompanying text; *e.g.*, MJS Janitorial v. Kimco Corp., No. 03-2102MAV, 2004 WL 2905409, at *8 (W.D. Tenn. Apr. 19, 2004) ("After a careful review of MJS's letter to Kimco regarding the privilege log, the court finds that MJS's March 18, 2004 letter does not sufficiently describe the nature of the documents withheld. The letter merely states MJS's position that the scope of Kimco's request for a privilege log was so broad as to include communications between MJS and its attorneys and the work product of MJS's attorneys. (See id., Ex. A at 1.) Essentially, the letter begs the question of which documents are protected and which are not. The letter, therefore, does not comport with the requirements of Rule 26(b)(5), and Kimco's request for a privilege log is granted.").

[39] *Id.* at *6 ("As other judges in this District and I have repeatedly held, the unjustified failure to list privileged documents on the required log of withheld documents in a timely and proper manner operates as a waiver of any applicable privilege.") (collecting eleven cases); Haid v. Wal-Mart Stores, Inc., No. 99-4186-RDR, 2001 WL 964102, at *1 (D. Kan. June 25, 2001) ("The law is well settled that

a forfeit.[40] In one memorable case, the defendant gamely tried to explain how it had not waived privilege in documents it now claimed had been inadvertently produced, despite the fact that it had never produced a log documenting any privilege that would have shielded them from production.[41] Instead, the defendant claimed that no "privilege log is necessary in situations of inadvertent production," which the court thought a risible defense to both the lack of the log and the supposed inadvertence, and found privilege forfeited.[42] Yet even mere tardiness in submitting a log may lead to waiver,[43] and there is no clear rule on what constitutes timeliness.[44] Such courts have explained that "limiting the remedy to the belated preparation of a privilege log effectively tells practitioners they can flout the Court's Rules and incur no sanction other than an Order directing compliance with the rules. Such a result would only encourage disregard of the

failure to produce a privilege log or production of an inadequate privilege log may be deemed waiver of the privilege.").

[40] *See, e.g.*, Mechel Bluestone, Inc. v. James C. Just. Companies, Inc., No. CV 9218-VCL, 2014 WL 7011195, at *1 (Del. Ch. Dec. 12, 2014) ("The defendants contend that the plaintiffs' initial log was so flawed, and the plaintiffs' four subsequent efforts to provide an adequate log so feckless, that the appropriate remedy is to deem the privilege waived as to all documents listed on the log. This decision deems the privilege waived as to the items where the plaintiffs fell substantially short of the well-documented and easily identified requirements for supporting a claim of privilege.").

[41] Wunderlich-Malec Sys., Inc. v. Eisenmann Corp., No. 05 C 04343, 2006 WL 3370700, at *8 (N.D. Ill. Nov. 17, 2006).

[42] *Id.* ("Eisenmann's argument would suggest that a party need not provide a privilege log if it is planning on inadvertently producing the documents. This is nonsensical. In reality, if Eisenmann had planned on withholding the disputed documents, one would have expected Eisenmann to have provided some sort of privilege log. It did not. This Court holds that, by failing to provide a privilege log prior to disclosing the documents, Eisenmann has waived any claim it may have had to the documents at issue.").

[43] Taylor, *supra* note 5, at 12 (noting the Delaware court of chancery "has deemed waived the privilege of a party dilatory in producing its privilege log in at least three instances in the past two years"); *see In re* ExamWorks Grp., Inc. S'holder Appraisal Litig., No. CV 12688-VCL, 2018 WL 1008439, at *12 (Del. Ch. Feb. 21, 2018); Froot Family Ltd. P'ship v. Mainstreet Asset Mgmt., Inc., No. 2018-0114-KSJM, 2018 WL 6068437, at *1 (Del. Ch. Nov. 16, 2018).

[44] Tyler III, *supra* note 20, at 752 ("Even though the timely presentation of privilege logs under Rule 26(b)(5) can be critical, the proper time for presenting such logs is far from clear. Producing the log before an adversary files a motion to compel appears reasonably safe, but there is no case law either directly supporting or refuting this advice.").

Court's Rules and encourage motion practice."[45] Beyond waiver, courts may and do levy discovery costs and fees and impose sanctions upon parties who fail to file a privilege log timely or whose log is found to be wantonly defective.[46]

2. Zeal to Shield Privilege and Forgiveness of Human Frailty

Aspiring Dracos of the bench aside,[47] the rather more broadly prevailing sentiment in courts is to allow for human error when confronted with deficient or dilatory privilege logs and to order rectification of the error rather than forfeiture of the client's privilege, reaffirming that "blanket waiver is not a favored remedy for technical

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[45] PKF Int'l Corp. v. IBJ Schroder Leasing Corp., No. 93CIV.5375 (SAS)(HBP), 1996 WL 525862, at *4 (S.D.N.Y. Sept. 17, 1996), *aff'd sub nom.* Pkfinans Int'l Corp. v. IBJ Schroder Leasing Corp., No. 93 CIV. 5375 (SAS), 1996 WL 675772 (S.D.N.Y. Nov. 21, 1996) (initial majuscule reduced to minuscule); *accord* FG Hemisphere Assocs., L.L.C. v. Republique Du Congo, No. 01 CIV.8700SASHBP, 2005 WL 545218, at *6 n.1 (S.D.N.Y. Mar. 8, 2005); *see also* Facciola & Redgrave, *supra* note 18, at 34 ("A number of cases reflect numerous revisions to privilege logs that consume large amounts of resources of the parties and the court. Thus, one may sardonically argue that requiring additional privilege logs in such circumstances is like asking a drunk driver to get back in the car to 'try again.'").

[46] *E.g.*, Witmer v. Acument Glob. Techs., Inc., No. 2:08-CV-12795, 2010 WL 3806139, at *4-*5 (E.D. Mich. Sept. 23, 2010) ("I conclude there was a procedural lapse by which defendants' assertions of privilege were not asserted timely and/or properly. Therefore, plaintiffs are entitled to a Rule 37 award of attorney fees and costs associated with the preparation and argument of this motion. Furthermore, if there is a further deposition of Clark on this issue, defense counsel shall pay the court reporter fee.").

[47] *See* NLRB v. Jackson Hosp. Corp., 257 F.R.D. 302, 307 (D.D.C. 2009) (calling compelled waiver the "most draconian" option available); Cashman Equip. Corp. v. Rozel Operating Co., No. CIV.A. 08-363-C-M2, 2009 WL 2487984, at *2 n.4 (M.D. La. Aug. 11, 2009) ("'Unless there has been a bad-faith failure to comply with a reasonable identification effort, automatically finding a waiver of the privilege would be unduly harsh, as some courts have already recognized . . . draconian penalties should not readily be meted out to those found to have designated with inadequacy specificity unless the court concludes they have acted in bad faith.'") *(*quoting CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2016.1 (2d ed. 1994 & supp. 2007)); Maint. Enterprises, Inc. v. Dyno Nobel, Inc., No. 08-CV-170-B, 2009 WL 10670683, at *7 (D. Wyo. Nov. 13, 2009) (same).

inadequacies of a privilege log,"[48] nor even for failure to provide one entirely.[49] Most courts see at least a second chance as appropriate before waiver is exacted.[50] Even proponents of privilege who prove serially unable to file a proper log may receive continued indulgence so long as there is no insinuation of bad faith,[51] though trenchant tongue-lashings and rulings against privilege may ensue for those who cannot eventually frame a coherent claim.[52] One court reasoned:

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[48] Muro v. Target Corp., 250 F.R.D. 350, 360 (N.D. Ill. 2007) (citing Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc'y of U.S., 406 F.3d 867, 879 (7th Cir. 2005)); *accord* Naik v. Boehringer-Ingelheim Pharms., Inc., No. 07C3500, 2008 WL 4866015, at *3 (N.D. Ill. June 19, 2008); *see Cashman Equip.,* 2009 WL 2487984, at *2 ("[T]he majority approach by courts, when confronted by a privilege log that is technically deficient and that does not appear to have been prepared in bad faith, is to allow the party who submitted the log a short opportunity to amend the log prior to imposing the drastic remedy of waiver."); Trudeau v. N.Y. State Consumer Protection Bd., 237 F.R.D. 325, 334-35 (N.D.N.Y. 2006) (permitting rectification of even a "woefully inadequate" privilege log rather than ordering waiver because "adjudging these documents as waived would be too austere a remedy when the deficiencies can be readily rectified at this juncture of the litigation").

[49] *See* Sann v. Mastrian, No. 1:08-CV-1182-JMS-TAB, 2010 WL 4923900, at *1 (S.D. Ind. Nov. 29, 2010) ("The Court may order disclosure of privileged documents as a sanction for failure to provide a proper privilege log, but it is reluctant to do so."); *e.g.*, Estate of Manship v. United States, 232 F.R.D. 552, 561 (M.D. La. 2005) (ordering submission of privilege log rather than waiver where none was tendered).

[50] *See* Tyler III, *supra* note 20, at 750 ("A majority of courts have permitted non-complying parties a second chance. When a party has failed to provide any privilege log or has produced a deficient log, these courts have ordered preparation of a proper privilege log at the expressly stated risk of forfeiting any protection without the benefit of another opportunity to supplement the information provided.") (discussing such cases).

[51] *E.g.*, Pryor v. Target Corp., No. 20-CV-28, 2020 WL 6149569, at *8 (N.D. Ill. Oct. 20, 2020) ("Pryor urges the Court to find, in light of Target's deficient privilege log—one that followed two other deficient privilege logs—that Target has waived its privileges. However, because there is no evidence that Target or its counsel acted in bad faith, a finding of blanket waiver is inappropriate in this case.") (citing *Am. Nat'l Bank & Trust*, 406 F.3d at 879, and *Muro*, 250 F.R.D. at 360); *see* Sajda v. Brewton, 265 F.R.D. 334, 338–39 (N.D. Ind. 2009) ("Even where a privilege log is inadequate, the sanction of waiver for all purportedly privileged documents is severe. . . . Such sanctions are disfavored absent bad faith, willfulness, or fault."); *In re* Fluidmaster, Inc., No. 1:14-CV-05696, 2016 WL 6599947, at *8 (N.D. Ill. Nov. 8, 2016) (equivalent).

[52] *E.g.*, Mechel Bluestone, Inc. v. James C. Just. Companies, Inc., No. CV 9218-VCL, 2014 WL 7011195, at *1 (Del. Ch. Dec. 12, 2014) (quoted *supra* note 40); U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co., No. 97 CIV. 6124JGKTHK, 2002 WL 15652, at *4 n.4 (S.D.N.Y. Jan. 7, 2002) ("As an initial matter, the Court notes

> The Rules of Procedure are so deferential to the laudatory purpose of protecting recognized privileges that a party may actually recall inadvertently-produced privileged materials and, in effect, pretend that they had not been produced. If a party may maintain its claim of privilege even after actually producing privileged information to its opponent, I am not going to find waiver simply because I find that the party did not provide quite enough information in a privilege log. That is particularly true where, as here, there is no indication that the party acted in bad faith.[53]

Nevertheless, whether an errant attorney incurs blanket waiver or merely a scolding as the wergild for a faulty log is often wholly down to the predilection of the particular court, and thus counsel must "beware that the range of 'sticklishness' on the part of various courts on such matters is a wide-ranging one. An attorney may be before a court that is thoroughly exasperated by some of the privilege claims. Then again, he may be before a court more tolerant of lawyer frailty."[54]

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that Defendants have been more than a little careless, if not cavalier, about supplying this Court with information it would need to properly consider the question before it. . . . Similar carelessness prompted the earlier, hotly contested dispute in this litigation about whether Defendants had waived privilege by producing privileged documents to Plaintiffs. The Court then afforded Defendants the benefit of the doubt in concluding that the production had been inadvertent."); *id.* at *6 ("As noted above, Defendants have inexcusably failed to indicate what privilege they are asserting with respect to any of the materials in issue. Moreover, they have failed to make any distinction in their legal argument between waiver of the attorney-client privilege and of the protection for work product. This omission has placed the Court in the position of having to rule hypothetically on what it surmises Defendants might be claiming.").

[53] Progressive Cas. Ins. Co. v. F.D.I.C., 298 F.R.D. 417, 421 (N.D. Iowa 2014).

[54] EPSTEIN, *supra* note 14, at 1554; *accord* Tyler III, *supra* note 20, at 751 ("Because some courts support immediate disclosure whether the initial effort was in good faith or not and other courts allow a second chance at compliance, there is no definitive standard. The judge, the adversary, and the history of the case vis a vis other disputes will play determinative roles in each case."); *see, e.g.*, OneBeacon Ins. Co. v. Forman Int'l Ltd., No. 04 Civ. 2271 (RWS), 2006 WL 3771010, at *8 (S.D.N.Y. Dec. 15, 2006) ("Although it is within the Court's discretion to grant leniency as to documents which would be covered by the attorney-client privilege except for the waiver noted above, to assume such leniency is risky."). Epstein, always a delightful rhetorician, appears to have invented from whole cloth the whimsical term "sticklishness," which

Such idiosyncrasy and unpredictability of outcome, however, is no way to run a railroad,[55] let alone so purportedly vital a function as privilege performs within the judicial system, as the Supreme Court has regularly pronounced over dozens of decades.[56]

Zeal to provide some security for the precious privilege has perhaps counseled the more forgiving species of courts to admit further that a privilege log is only one manner of asserting the privilege, standing alongside venerable practice such as declarations, affidavits, and depositions to establish any lacking factual predicates in question.[57] That a court *may* require assertions in the form of an

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may be inferred to mean the degree to which someone is a stickler (here, for privilege logs).

[55] *Cf.* United States v. Ho, 94 F.3d 932, 939 (5th Cir. 1996) (Barksdale, J., dissenting) ("As oft stated, this is no way to run a railroad; nor is it any way to run our judicial system.").

[56] Jaffee v. Redmond, 518 U.S. 1, 11 (1996) ("Making the promise of confidentiality contingent upon a trial judge's later evaluation . . . would eviscerate the effectiveness of the privilege."); Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."); *see* Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998) ("Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege."); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."). *But see Upjohn*, 449 U.S. at 396-97 ("While such a 'case-by-case' basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules.").

[57] *E.g.*, Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 473-74 (S.D.N.Y. 1993) ("In requiring a party to prove the factual basis for its claims of privilege, the courts generally look to a showing based on affidavits or equivalent statements that address each document at issue. 'This approach need not invariably be taken, however, and particularly in cases involving large quantities of disputed documents, the court has broad discretion as to how to proceed.' Among the possible alternatives available to the court is the utilization of an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps. . . . Other required information, such as the relationship between the individuals listed in the log and the litigating parties, the maintenance of confidentiality and the reasons for any disclosures of the document to individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony.") (citations omitted).

itemized privilege log to supplement any such evidence is not to say that it *must* or even that it *ought*.[58] Yet modern courts' insistence on a traditional document-by-document log might seem natural, almost preordained, for anyone might initially be at a loss as to how else a privilege's proponent might assert privilege in a case involving thousands or millions of documents other than by a listing of those withheld and the particularities of the basis for doing so.[59]

But there have long been intimations of how privilege might be maintained absent a privilege log even in cases involving massive discovery. For example, the *Genesco* district court with which the discussion began eventually concluded that "this Court and other courts require a privilege log for most cases, but here given the international scope of this controversy and the circumstances of the retention of a consultant computer expert to assist Genesco's counsel in a complex computer investigation, this action fits squarely within

[58] *See id.*; United States v. Constr. Prod. Rsch., Inc., 73 F.3d 464, 473 (2d Cir. 1996) ("To facilitate its determination of privilege, a court may require 'an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps.'") (quoting *Bowne*, 150 F.R.D. at 474); Dole v. Milonas, 889 F.2d 885, 890 (9th Cir. 1989) ("A number of methods and procedures are available to protect confidential communications, while at the same time not frustrating the Secretary's legitimate inquiries. For example, the district court may adopt the 'privilege log' approach.").

[59] *Compare* Infinite Energy, Inc. v. Thai Heng Chang, No. l:07CV23-SPMIAK, 2008 WL 4098329, at *2 (N.D. Fla. Aug. 29, 2008) ("[This court] is of the opinion that Defendant should fully and specifically comply with the language of Rule 26(b)(5)(A) to enable Plaintiff (and possibly this Court) to assess the privilege asserted should issues arise. The Court does not accept Defendant's conclusory assertion that he would be unduly burdened by a document-by-document log because it would call for 'hundreds, if not thousands, of e-mails between Chang and his attorneys, and his attorneys and their staff.'"), *and* M & C Corp. v. Erwin Behr GmbH & Co., No. 91-CV-741 I0-DT, 2008 WL 3066143, at *2 (E.D. Mich. Aug. 4, 2008) ("[T]he parties have approached the question of the applicability of the work product doctrine to the disputed material in general terms rather than on a more detailed, document by document, level. Kemp Klein did not serve a privilege log listing each document withheld and describing each document as required by FED. R. CIV. P. 45(d)(2). Therefore, this Court cannot and will not decide whether any specific documents or categories of documents are protected by the work product doctrine."), *with* Hopson v. City of Balt., 232 F.R.D. 228, 243-44 (D. Md. 2005) (expressing doubt about proportionality of requiring document-by-document logging for discovery numbering in the millions); *see also* Facciola & Redgrave, *supra* note 18, at 36-37.

Upjohn."[60] In the seminal *Upjohn*, the government had ham-handedly sought "all files relative to an" internal compliance investigation conducted by the company's general counsel, who had instructed that responses be sent directly to him.[61] The Supreme Court held straightforwardly that the fact that "communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned."[62] Facing an internal investigation so directly apposite to *Upjohn*, albeit aided by an outside consultant, the *Genesco* court thought that enumerating each submission to counsel would likewise be busywork, and dispensed with any requirement of a log for that category of materials—whilst cautioning that documents not sent directly to counsel would stray from the *Upjohn* predicate and deserved itemized logging.[63]

What *Genesco* teaches via *Upjohn* is that where some well-defined category of documents falls within an established rule prescribing privilege, to repetitively assert an identical claim of privilege on every item in the category would be pointless. And that lesson illustrates a potentially practicable alternative to the autonomic drudgery of exhaustively indexed privilege logs.

B. —and Their Categorical Detractors

Many detractors of the traditional log thought that another format of privilege assertion was more efficient, justiciable, and just: the so-called "categorical privilege log."[64] In 2016, the Utah Bar

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[60] Genesco, Inc. v. Visa U.S.A., Inc., 302 F.R.D. 168, 193-94 (M.D. Tenn. 2014) (initial majuscule reduced to minuscule).

[61] Upjohn Co. v. United States, 449 U.S. 383, 387 (1981).

[62] *Id.* at 397.

[63] *Genesco*, 302 F.R.D. at 194 ("Given that this controversy involves Genesco's retail establishments through the world, the individual listing of each document to Genesco's counsel for determining privilege seems impracticable and unnecessary to decide this privilege issue in light of *Upjohn*. The Court, however, will require a privilege log for any document that was prepared by a Genesco employee, but was not addressed directly to Genesco's counsel as such factual circumstances fall outside of *Upjohn*.").

[64] The label of "categorical privilege log" may be something of a misnomer. Despite the similar nomenclature, a categorical privilege log is only related to a traditional privilege log in the way that a local neighborhood library is related to the Library of Congress. Both of the latter are repositories of publications intending to make them

Journal commented that the advisory committee note to Rule 26 itself recognized that providing the "who, what, when, and why of a privileged discussion . . . 'may be appropriate *if only a few items are withheld*,'" but that "it 'may be unduly burdensome' to require such detail if many documents are claimed as privileged."[65] As an alternative, recommended the journal, "counsel should follow the direction of the committee note and prepare a log that describes documents 'by categories,'" pointing to an article in 2010 by "eDiscovery cognoscenti" John Facciola and Jonathan Redgrave.[66]

1. Prescriptions from the Punditocracy

Magistrate Judge Facciola and Professor Redgrave indeed offered a full-throated defense of the use of categorical privilege logs—or, as they dub their approach more broadly, the Facciola-Redgrave Framework.[67] After persuasively limning the pervasive problems with traditional privilege logs and review under Rule 26 in an era of ever-increasing document discovery requirements, the authors turned to their proposed "way forward" in their fifth section.[68] Foundationally, they observe, "while the rules forbid blanket claims of privilege, there is nothing in the rules to forbid grouping documents together where the privilege claimed and the rationale behind that claim are the same."[69] To implement such a regime, they proposed an entire framework to replace the reviled document-by-document privilege log, beginning with a mandatory meet-and-confer to settle on

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available to the public, but their purpose and scope are very different. The corner library makes calculated decisions about narrow types of titles in which its patrons may be interested, and provides a decent but by no means exhaustive collection of such titles it believes will be in demand, to maximize the efficiency of its (often cruelly) limited budget in time and treasure. The Library of Congress demands the filing and registration of anything and everything published in the nation, irrespective of the interest of anyone, anywhere in ever actually reading it.

[65] Philip J. Favro, *Protecting Privilege Claims in Discovery*, 29 UTAH B.J. (2d ser.) 22, at 24 (2016) (quoting Fed. R. Civ. P 26(b)(5) advisory committee's note (emphasis added)).

[66] *Id.*

[67] *See generally* John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19 (2010).

[68] *Id.* at 23-39.

[69] *Id.* at 40.

a consensual process.[70] At its core is a ramified categorization of documents for privilege treatment: some categories could be excluded from discovery entirely as presumptively privileged; others would be collected but sequestered as very likely so; and the mine run would be arranged taxonomically and the basis for privilege logged by clade rather than specifically:

> The parties should identify categories into which the withheld documents can be arranged in order to understand (a) the basis for withholding the document, and (b) the general subject matter of the documents in the category. The categories can be any manner of reasoned organization. For example, they could be by subject matter, by date range, or by specific name or type of author, sender, or recipient. The categories can be of different types. Also, documents may appear in two or more categories. The object of this exercise is to create a set of natural differentiations among documents so the parties can say, once again with confidence, what is true of items within the category is true of the whole.[71]

This comprehensive categorization could be supplemented with "objective" metadata readily harvestable from the technology used to process the electronic documents,[72] as well as by some limited scope of document-by-document logging for exceptional documents that resist ready or efficient categorization.[73] And to encourage good faith, the receiving party could demand of right that any categorical assertion be accompanied by affidavits attesting to the factual

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[70] *Id.* at 44.

[71] *Id.* at 44-45.

[72] *Id.* at 46, 48 ("For the documents and ESI which need to be included in a category index, the producing party is only required to provide readily available nonprivileged information. This can be information that has been recorded by the party or information derived from the ESI (such as metadata).").

[73] *Id.* at 46 ("The parties should meet and confer in good faith to identify the documents, if any, which should be logged pursuant to the traditional document-by-document standards associated with Rule 26(b)(5)(B). These may be documents which do not fit within designated categories, or certain categories of documents which the parties believe should be logged because of content."), 48 (listing twelve data to be provided for categories subject to traditional logging).

predicates supporting privilege for the category.[74] Even if "cheaters" could not be extirpated entirely, at least the new framework incurred lesser costs and encouraged more efficient detection and punishment.[75]

All in all, Facciola and Redgrave mounted a powerful argument that "lawyers' notion that only document-by-document review will suffice is flatly wrong. Studies have established that manual document-by-document review alone may be one of the poorest ways to find what one is looking for in a large data set."[76] In perhaps the surest sign of the zeitgeist, also in 2010 a trio of big-law-firm lawyers penned a lengthy guest post on an e-discovery blog in defense of categorical logs set to the theme of Jakob Dylan (son of Bob), using the lyrics to criticize the traditional itemized log: "It's a bottomless well / It's a little overkill / It's the end of a dragon's tail / That's whipping around our heels."[77] Notwithstanding the fanciful conceit, the post presented a persuasive case.

Bloggers (and musicians) were not the only voices singing the praises of categorical logs; influential institutions too were waking to the prospect as a cure for both excessive discovery burdens and potential intrusion into the privilege. In late 2015, the Sedona Conference released its final report on electronic document retention and production, the product of a two-year drafting and comment process.[78] Amongst their recommendations, they suggested that

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[74] *Id.* at 46-47 ("This procedure is designed to avoid the problem seen in some categorization cases where the category description is no better than obscure document-by-document privilege log entries. It is our firm belief that forcing parties to put forward testimonial evidence in support of category claims at the outset will greatly limit exaggeration, over designation, or cheating . . . .").

[75] *Id.* at 52-53 ("At the end of the day, there is a certain amount of cheating and bad faith that has to be expected from parties in order to attempt to avoid 'just' outcomes, and the system must acknowledge that not everyone will be caught. The best we can hope for is a system that is effective at reducing the cost of discovery on the whole, and thus allows for outcomes based on the merits of a case more often than outcomes based on resource differentials.").

[76] *Id.* at 51 ("Accordingly, when we propose a different method, we have no concern that we are displacing a system that already works well.").

[77] Shannon Capone Kirk, Emily Cobb & Matthew Gens, *Welcome to Our Rockin' Priv Party on Categorical Logs*, E-DISCOVERY TEAM (Nov. 22, 2010), https://e-discoveryteam.com/2010/11/22/welcome-to-our-rockin-priv-party-on-categorical-privilege-logs/.

[78] *See generally* The Sedona Conference, *supra* note 21. In its own words, the Sedona Conference is "501(c)(3) research and educational institute that exists to

documents generated after litigation commenced be excluded from privilege logs in gross, or at least that only subcategories be included where shown to be necessary.[79] And, pointing to the earlier work of Facciola and Redgrave as laying the groundwork, the Conference broadly endorsed categorical privilege logs, advising that "in lieu of logging at least some portion of the privileged documents, parties would identify categories for privileged documents, provide sufficient information about the privilege claim as well as the general subject matter of the category, and then agree or not agree that such categories should be formally logged."[80] As early as 2004, the American Bar Association had encouraged the use of categorical privilege logs when "it would be overly burdensome, expensive and/or time-consuming to prepare a detailed listing of the information."[81] As one practitioner discussing the ABA standard observed, such an expediency was of particular importance "where a document-specific log would itself divulge work-product that would undermine the integrity of the adversarial process."[82]

Similar concerns as to piercing the privilege by the very act of defending it animated yet another 2010 article (a fecund year indeed) by one Douglas C. Rennie, who likewise advocated that privilege logs omit categorically any materials postdating the commencement of

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allow leading jurists, lawyers, experts, academics, and others, at the cutting edge of issues in the areas of antitrust law, complex litigation, and intellectual property rights, to come together in conferences and mini-think tanks called Working Groups to engage in true dialogue, not debate, in an effort to move the law forward in a reasoned and just way." *Id.* at 97.

[79] *Id.* at 162 ("Many documents generated after that date often fall within work-product protection as they relate to the prosecution or defense of the litigation. Some court rules expressly exclude these records from the privilege log obligation. Of course, each litigation varies and there may very well be categories of relevant information generated after the date of the commencement of the litigation that should be produced.").

[80] *Id.* at 164-65 ("Litigants might also consider excluding certain categories of documents from privilege logs.").

[81] J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & BUS. 911, 941 n.95 (2016) ("[T]he parties and the court should consider whether the information can be supplied in some other way or, given the demands and circumstances of the case, it can be reduced or eliminated for some or all of the documents or communications in question including whether: a. *a categorical or general description of the material in question would be sufficient* . . . .") (quoting CIVIL DISCOVERY STANDARDS, No. 27 (Am. Bar Ass'n 2004)) (emphasis in Glover).

[82] *Id.* at 940.

litigation.[83] Rennie explained that the details of attorney work product undertaken in the course of litigation almost automatically illuminate legal tactics: the "names of recipients of an attorney's communication may reveal the individuals that an attorney retained to conduct an investigation," or "the titles of documents may reveal the names of witnesses that the attorney considered significant," or even the "absence of a witness's name could indicate that a party's investigation was not thorough" in some regard.[84] If his recommended presumption against logging was rejected, Rennie thought the next best thing would be to amend Rule 26 to endorse the categorical assertion of privilege for the voluminous postcomplaint materials involving counsel, thus eliding any particularized disclosures of trial strategy.[85] These possibilities had been foreshadowed a decade before the ABA's 2004 standards in a "prescient" article by John E. Tyler III,[86] which advocated that no log ought to be required for investigatory work product, where itemizing the particulars of the withheld materials would itself reveal the strategy being pursued.[87] For example, "there should be no need to provide a privilege log to protect legal memoranda because there is no way to prepare a privilege log without revealing 'information itself

[83] Rennie, *supra* note 21, at 112 ("In this Article, I systematically evaluate the arguments for and against requiring parties to 'log,' (that is, describe in a privilege log) postcomplaint materials. I conclude that, consistent with the underlying rationales for the attorney-client privilege and work product doctrine, postcomplaint materials should be presumptively exempt from the privilege log requirement. In other words, the beginning of the lawsuit should mark the end of the privilege log requirement.").

[84] *Id.* at 127.

[85] *Id.* at 157-59 ("As a third alternative, Rule 26(b)(5)(A) could be amended to formally codify the *Thrasher* court's categorical approach to dealing with voluminous materials that may be difficult to log without revealing the privileged information.") (citing SEC v. Thrasher, No. 92 CIV 6987 (JFK), 1996 WL 125661, at *1-2 (S.D.N.Y Mar. 20, 1996)).

[86] *See id.* at 112 n.8 ("The most thorough discussion of the issue appears in John E. Tyler III's prescient article on intangible work product and the use of privilege logs. There, Tyler anticipated the tension between the privilege log requirement and the need to protect privileged information that the courts have been unable to resolve.").

[87] Tyler III, *supra* note 20, at 756-57.

privileged or protected.'"[88] As all agreed, 26(b)(5)(A) cannot be read to mandate the divulgence of information that is itself privileged.[89]

2. Innovation in Judicial Rules of Court

Local judicial rules have also taken note of the economy and practical benefits of categorical privilege logs. Epstein wrote in 2017 that "after years and untold cases requiring that privilege be asserted document-by-document in privilege logs, some courts are beginning to recognize that such a requirement is merely costly wheel spinning."[90] Most notably, she pointed to new standards adopted as of 2014 in the commercial division of the New York State Unified Court System,[91] which is, by its own lights, "a recognized leader in court system innovation, demonstrating an unparalleled creativity and flexibility in development of rules and practices."[92] The new rule codifies an express preference-cum-expectation that the parties employ categorical designations "to reduce the time and costs associated with preparing privilege logs," predicated on reaching a good faith consensus between the parties as to how the categories will be defined.[93] And if one party refuses to accept a categorical log, then the rule provides that the costs, including attorney fees, of preparing a traditional document-by-document privilege log may upon application

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[88] *Id.* at 757 (citing State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley, 898 S.W.2d 550, 554 (Mo. 1995) (en banc) and FED. R. CIV. P. 26(b)(5)) (initial majuscule reduced to minuscule); *see* Rennie, *supra* note 21, at 127 n.126 (adopting and citing Tyler's argument).

[89] FED. R. CIV. P. 26(b)(5)(A) (requiring disclosure only "without revealing information itself privileged or protected").

[90] EPSTEIN, *supra* note 14, at 1541.

[91] *Id.*

[92] 22 N.Y. Comp. Codes, Rules & Regs. § 202.70(g)(2) ("Since its inception, the Commercial Division has implemented rules, procedures and forms especially designed to address the unique problems of commercial practice. Such rules have addressed a wide range of matters such as proportionality in discovery [and] streamlined privilege logs . . . .").

[93] *Id.* § 202.70(g) R. 11-b(b)(1) ("The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs. The parties are expected to address such considerations in good faith as part of the meet and confer process (see paragraph (a) of this section) and to agree, where possible, to employ a categorical approach to privilege designations.").

be levied upon the resisting party,[94] providing the regime with real teeth.[95] To ensure good faith, the rule demands that the supervisory attorney responsible for the review and certifying the process be "actively involved."[96] Other sophisticated court systems, such as Delaware chancery,[97] and the metropolitan Southern and Eastern

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[94] *Id.* R. 11-b(b)(2) ("In the event the requesting party refuses to permit a categorical approach, and instead insists on a document-by-document listing on the privilege log, then unless the court deems it appropriate to issue a protective order pursuant to CPLR 3103 based upon the facts and circumstances before it, the requirements set forth in CPLR 3122 shall be followed. In that circumstance, however, the producing party, upon a showing of good cause, may apply to the court for the allocation of costs, including attorneys' fees, incurred with respect to preparing the document-by-document log. Upon good cause shown, the court may allocate the costs to the requesting party.").

[95] *See* Schmitman v. Hager, No. CV 17-5695-GW(JCX), 2017 WL 10378498, at *2 (C.D. Cal. Nov. 27, 2017) ("'The costs penalty . . . has real "teeth" because it allows recovery of attorney fees and is *immediately* recoverable.'") (quoting O'Connell & Stevenson, Rutter Grp. Prac. Guide: Fed. Civ. P. Before Trial, Cal. & 9th Cir. Ed. § 5:151 (2017) (emphasis in original)); Carruth v. Bentley, No. 7:17-CV-1445-LSC, 2018 WL 1993257, at *16 (N.D. Ala. Apr. 27, 2018) ("In order to give this federal rule 'teeth,' some circuits have determined that Rule 41(d) permits the awarding of attorneys' fees as part of costs."), *aff'd*, 942 F.3d 1047 (11th Cir. 2019); Voeks v. Pilot Travel Centers, 560 F. Supp. 2d 718, 724–25 (E.D. Wis. 2008) ("Of course, the process is given teeth by the award of costs and attorneys fees to the prevailing consumer."); *see also* Hedru v. Metro-N. Commuter R.R., 433 F. Supp. 2d 358, 361 (S.D.N.Y. 2006) ("[A]bsent awards of defendant's attorneys' fees and expert witness fees, Rule 68 has little teeth . . . .").

[96] 22 N.Y. Comp. Codes, Rules & Regs. § 202.70(g) R. 11-b(d) ("The attorney having supervisory responsibility over the privilege review shall be actively involved in establishing and monitoring the procedures used to collect and review documents to determine that reasonable, good faith efforts are undertaken to ensure that responsive, non-privileged documents are timely produced.").

[97] *See* Twitter, Inc. v. Musk, No. 2022-0613-KSJM, 2022 WL 4459574, at *1 (Del. Ch. Sept. 26, 2022) (McCormick, Ch.) ("Another possibility is that Defendants prepare a category log for the group of Zatko documents it objects to producing. As the [Delaware Court of Chancery] Guidelines [for the Collection and Review of Documents in Discovery] explain: 'It may be possible for parties to agree to log certain types of documents by category instead of on a document-by-document basis. 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.' It bears noting that, as a general matter, where the parties have not agreed in advance to prepare category logs as an alternative to traditional logs, a party relying on a category log risks waiver of privilege. But where the court has ordered it, that risk is eliminated. The benefit of category logs is that it reduces the burden to the producing party while assuring the requesting party that an attorney has reviewed

Districts of New York,[98] have pursued similar programs of modernized logging.

Shortly after the commercial division's innovation, a pair of New York litigators released a timely précis entitled straightforwardly "How Litigants Should Approach Categorical Privilege Logs."[99] After summarizing the new regime, Jennifer H. Rearden and Seema Gupta noted that the "preference for categorical privilege logs is not unprecedented," and as such "judicial interpretations of similar rules in other jurisdictions may be instructive," pointing to Delaware and the New York federal courts as exemplars.[100] Reviewing such decisions, the article cautioned that categorical logs were no talisman against inadequacy: courts could find and had found shoddy categorical logs insufficient to state claims of privilege as surely as traditional itemized logs.[101] Nevertheless, the authors were optimistic:

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each document and attested, as an officer of the court, to its privilege and that it falls within the excepted category subject to the minimized logging protocol. This sort of arrangement would allay my concerns. As is typical, I would ask a senior Delaware attorney on the team to spearhead and certify the effort.") (citations omitted).

[98] *See* Local Rules of the U.S. District Courts for the Southern and Eastern Districts of New York 26.2(c) (effective Oct. 29, 2018) ("[W]hen asserting privilege on the same basis with respect to multiple documents it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form.").

[99] Jennifer H. Rearden & Seema Gupta, *How Litigants Should Approach Categorical Privilege Logs*, N.Y. COM. LITIG. INSIDER (Sept. 22, 2014), https://www.gibsondunn.com/wp-content/uploads/documents/publications/RardenGupta-HowLitigantsShouldApproachCategoricalPrivilegeLogs.pdf#:~:text=The%20goal%20in%20utilizing%20a%20categorical%20approach%20is,employed%E2%80%9D%20and%2C%20if%20so%2C%20how%20it%20was%20conducted.

[100] *Id.* at 1-2 ("[I]t is no surprise that the Southern and Eastern Districts of New York and the Delaware Chancery Court—courts that are well known for handling complex commercial disputes—also recently have approved categorical approaches to privilege logs.").

[101] *Id.* at 2 ("On a number of occasions, judges in the Southern District have determined that the subject matter of the categories described on categorical privilege logs, as well as the descriptions of the privilege asserted, were insufficient.") (discussing SEC v. Yorkville Advisors, LLC, No. 12 Civ. 7728 (GBD)(HBP), 2014 WL 2208009, at *10-12 (S.D.N.Y. May 27, 2014) and McNamee v. Clemens, No. 09 Civ. 1647 (SJ), 2013 WL 6572899, at *3 (E.D.N.Y.

"If litigants take care in describing the connection between each category of documents and the applicable privilege, they may be able to survive objections from the opposing party while saving substantial costs in creating the privilege logs in the first place."[102]

In 2021, another pair of New York litigators, Christopher Boehning and Daniel J. Toal, raised as potentially providing relief the recent amendment in 2015 of Rules 26 and 37 to consider proportionality in the production and preservation of electronically stored information.[103] Noting that "since the 2015 amendments, courts have increasingly embraced the concept of proportionality and its impact on reducing the costs," the authors pointed to privilege logs as a prime example.[104] Recounting a few very early cases where courts had proven sympathetic to disproportionate burden and permitted categorical privilege logs,[105] the article identified a "growing trend" that "has seen parties attempt to alleviate some of the burden associated with privilege logs by moving away from traditional document-by-document logs in favor of such categorical privilege logs, where sets of similar documents are grouped together in log entries."[106] It offered a 2021 decision, *U.S. Bank National Association v. Triaxx Asset Management*, as further proof that the Southern District of New York was heeding its newly-adopted presumption of propriety for categorical logs and the new promise of proportionality, auguring more efficient discovery—at least in New York federal courts.[107]

Yet amidst all this percolating jurisprudential ferment, the

Sept. 18, 2013), and Wultz v. Bank of China Ltd., 979 F. Supp. 2d 479, 496-97 (S.D.N.Y. 2013)).

[102] *Id.*

[103] Boehning & Toal, *supra* note 4, at 1 ("Concerned that the concept was not receiving adequate attention, the 2015 amendments to the Federal Rules gave more prominence to the proportionality concepts long embedded in Rule 26; as of those amendments, the concept of proportionality was moved to the very start of Rule 26(b)(1), which describes the permissible scope of discovery. . . . Additionally, the Advisory Committee Note to updated Federal Rule 37(e), which addresses the failure to preserve ESI, was revised in 2015 to suggest a broader application of proportionality principles, stating 'Another factor in evaluating the reasonableness of preservation efforts is proportionality.'").

[104] *Id.* at 1-2 (initial majuscule reduced to minuscule).

[105] *Id.* at 2 (discussing S.E.C. v. Thrasher, 1996 WL 125661 (S.D.N.Y. 1996) and In re Imperial Corp. of Am., 174 F.R.D. 475 (S.D. Cal. 1997)).

[106] *Id.*

[107] *Id.* at 3 (discussing U.S. Bank Nat'l Assoc. v. Triaxx Asset Mgmt., 2021 WL 4973611 (S.D.N.Y. Oct. 25, 2021)).

prime mover of privilege logs in its promulgation of Rule 26(b)(5), the Judicial Conference of the United States, had remained as placidly impassive as the deceptively calm eye of a hurricane whilst the winds of change blew and the years ticked by.

III. THE JUDICIAL CONFERENCE: NOT JUST SITTING AROUND LIKE BUMPS ON A LOG

But it would be unfair withal to characterize the judges of the Judicial Conference as just sitting around like speed bumps on a privilege log.[108] In 2006, the Judicial Conference had amended Rule 26 to account for ever-increasing electronic discovery as well as to institute more regularity in conferring as to the process to be used for privilege.[109] In 2008, the new Federal Rule of Evidence 502 came into effect, intended to economize and rationalize document discovery by better regulating the dread possibility of waiver.[110] As this author has argued, Rule 502 had much potential to alleviate the burdens of privilege review in modern discovery, but has fallen considerably short of its lofty objectives in practice.[111] In any event, the rule did not take aim at the onus of privilege logs directly, only promising relief obliquely by reducing uncertainty about when waiver would result in the course of discovery.[112] So too did the 2015 revisions to Rules 26 and 37 regarding proportionality have some tangential potential for reducing the pain of privilege logs, as suggested by Boehning and

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[108] The pun is, alas, very much intended.

[109] *See* Facciola & Redgrave, *supra* note 18, at 29 (discussing 2006 amendments to FED. R. CIV. P. 26(b) and (f)).

[110] *See* Sunshine, *supra* note 10, at 692-96 (narrating adoption of FRE 502); Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Krauter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, XVII RICH. J.L. & TECH. 1, 3-12 (2011) (same); Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 213–17 (2006) (same); *see also* Facciola & Redgrave, *supra* note 18, at 29-30 (discussing FRE 502 in the context of categorical privilege logs).

[111] Sunshine, *supra* note 10, at 29 ("Measured thus far, FRE 502 may well have improved some aspects of the law of privilege, but has still left jurisprudence well short of the ideals envisioned by its framers.").

[112] Facciola & Redgrave, *supra* note 18, at 31 ("While Rule 502 provides many forms of blessed relief, it does not speak to counsel's obligation after having discovered privileged information to claim that it is exempt from disclosure by specifying why it is privileged. This is one of the root problems behind the expense and burden concerns highlighted by the rules committee.").

Toal.[113] Still, it was not until two decades of the twenty-first century had passed that the Judicial Conference bestirred itself to confront the problem of logs under Rule 26 directly. This lacuna is meaningful because commentators have only the ability to commentate, whereas the Judicial Conference is empowered to study and recommend modifications to the Federal Rules of Civil, Criminal, and Appellate Procedure,[114] pursuant to the Rules Enabling Act granting that power to the judiciary.[115]

A. An Unasked-For But Not Indecent Proposal

In August 2020, however, the Advisory Committee on Civil Rules to the Judicial Conference received an unsolicited formal Suggestion for Rulemaking submitted by the Lawyers for Civil Justice (LCJ),[116] a thinktank affiliated with the defense bar and corporate litigants, presumably inspired by the inordinate costs incurred by its membership in the submission of privilege logs.[117] Its proposal

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[113] *See supra* notes 103-107 and accompanying text.

[114] 28 U.S.C. § 331 ("The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law. The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such a review.").

[115] 28 U.S.C. §§ 2071-2072.

[116] Lawyers for Civil Justice, Suggestion for Rulemaking to the Advisory Committee on Civil Rules, *Privilege And Burden: The Need To Amend Rules 26(B)(5)(A) And 45(E)(2)To Replace "Document-By-Document" Privilege Logs With More Effective And Proportional Alternatives*, Aug. 4, 2020, https://www.uscourts.gov/sites/default/files/20-cv-r_suggestion_from_lawyers_for_civil_justice_-_rules_26_and_45_privilege_logs_0.pdf [hereinafter LCJ Suggestion for Rulemaking].

[117] *Id.* at 1 n.1 ("Lawyers for Civil Justice ('LCJ') is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness

reflected its worldview, opening with the truism that "'the modern privilege log [is] as expensive to produce as it is useless,'" and averring that the sentiment was "widely shared by judges, litigants, and litigators . . . based on common experience with producing, receiving, and ruling on 'document-by-document' privilege logs."[118] Rather like the Facciola-Redgrave Framework,[119] its proposals covered the waterfront, ranging from categorical logging, to presumptive exclusion of certain subsets of material from logs, to the treatment of email threads and privilege challenges, all unified by the aim "to provide greater procedural clarity and consistency and make them more useful, efficient, and proportional to the needs of the case."[120]

Indeed, LCJ acknowledged its debt to Facciola and Redgrave, presenting much the same case that the present regime was disproportionately expensive and burdensome to all parties and counterproductive in its tendency to conduce rather than resolve disputes over privilege.[121] The rapidly multiplying disparate guidelines adopted in a dozen individual court systems were made a prime exhibit of the need for a unifying hand.[122] And an iterative approach to identifying categories by which to justify privilege was, it appeared, the most attractive solution to which courts and practitioners were gravitating.[123] In peroration, LCJ argued that despite Rule 26 allowing for flexibility, document-by-document privilege logs had become an inflexible and ineffectual requirement, increasingly intermitted by a "swiss-cheese" exceptionalism practiced by courts fed up with the status quo—and only the Judicial Conference, it exhorted,

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in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.").

[118] *Id.* at 1 (quoting Chevron Corp. v. Weinberg Group, 286 F.R.D. 95, 99 (D.D.C 2012)).

[119] *See* Facciola & Redgrave, *supra* note 18, at 48-53 (detailing proposed practices for addressing email threads, attachments, duplicates, and procedural challenges to privilege).

[120] LCJ Suggestion for Rulemaking, *supra* note 116, at 2; *see id.* at 16-17 (text of proposed amendment to the federal rules).

[121] *Id.* at 3-6 n.7.

[122] *Id.* at 7-10 (citing local rules in place in D. Conn., S.D.N.Y., E.D.N.Y., D. Colo., S.D. Fla., D.N.M., D. Mass., D. Del., and N.D. Ohio, as well as for the N.Y. commercial division and N.J. complex business litigation program).

[123] *Id.* at 11-13.

could restore a beneficent regularity to privilege practice.[124]

Accepting the challenge, the Discovery Subcommittee of the Advisory Committee on Civil Rules issued an invitation for public comment on the suggested rulemaking, seeking any interested parties to make their views known by August 2021.[125] Albeit in rather less breathless rhetoric, the Committee briefly reiterated the problems raised by LCJ as background: that document-by-document privilege logs had become more or less incumbent despite the intended flexibility of Rule 26 and that such logs in "large-document" cases are not only burdensome but "often too 'generic' or rely on 'boilerplate' explanations."[126] It then sought comments from practitioners as to the real-life details of the burdens and efficacy of logs as they existed, raising a few possible rulemakings that were under consideration: clarifying Rule 26(b)(5) that a document-by-document log is "not routinely required," and perhaps even specifying that only categories need be identified; or revising Rules 26(f) and 16 to provide for discussion of the planned method for asserting privilege in the existing provisions for a discovery plan and scheduling order.[127] The

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[124] *Id.* at 15-16 ("Local districts have embraced alternatives resulting in a 'swiss-cheese' approach to privilege logging that defies the Rule's goal of uniformity. The status quo puts substantial burdens on the parties, non-parties, and the judiciary because expensive and ineffective logs create collateral disputes concerning the sufficiency of logs without providing the information necessary to resolve them. In light of the 2015 FRCP amendments and consistent with the spirit of those amendments, the time is ripe for the Committee to replace the default logging obligation with a modern approach such as the Proposed Amendments that encourages the parties to devise proportional and workable logging procedures while facilitating timely judicial management where necessary to avoiding later disputes.").

[125] Judicial Conference Advisory Committee on Civil Rules, Invitation for Comment on Privilege Log Practice, https://www.uscourts.gov/sites/default/files/invitation_for_comment_on_privilege_log_practice_0.pdf [hereinafter Invitation for Comment].

[126] *Id.* at 1-2.

[127] *Id.* at 2-3. The Invitation for Comment specifically contemplated:

> A revision to Rule 26(b)(5)(A) indicating that a document-by-document listing is not routinely required, perhaps referring in the rule to the possibility of describing categories of documents.
>
> A revision to Rule 26(f)(3)(D) directing the parties to discuss the method for complying with Rule 26(b)(5)(A) when preparing their discovery plan, and a revision to Rule 16 inviting the court to include provisions about that method in its scheduling order.

Subcommittee was careful to note, however, that its deliberations were still highly inchoate, and "no decision has been made about whether any rule change should be formally considered, and the eventual conclusion may be that no rule change is needed."[128]

B. The View from the Floor

As related in the interim report tendered to the subsequent meeting of the Advisory Committee on Civil Rules in October 2021, well over one hundred submissions were received in response to the call for comments, reflecting widespread public interest.[129] "Some," wrote the Discovery Subcommittee reporter laconically, "are lengthy."[130] Indeed, both the LCJ and the duo of Facciola and Redgrave had organized symposia to expound upon the issues in play in the months before the plenary Committee meeting, with Subcommittee members in attendance.[131] Given that even the reporter's summary of the comments spans three dozen pages,[132] it is

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> A revision to Rule 26(b)(5)(A) to specify that it only requires parties to identify "categories" of documents. Alternatively or additionally, a revision to the rule might enumerate "categories" of documents that need not be identified.

Id.

[128] *Id.* at 1; *see id*. at 3 ("The Discovery Subcommittee has not made any decision about whether any rule amendments should be seriously considered, much less what focus would be best if some amendments seem promising. The possibilities mentioned above are intended only to focus comment.").

[129] *See* Judicial Conference Advisory Committee on Civil Rules, Agenda Book, Oct. 5, 2021, at 186, *ll.*743-749, https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_1.pdf [hereinafter October 2021 Rules Committee Agenda] ("In May, the subcommittee concluded that it should seek more information about experience under the current rule. See infra notes of the May 24 videoconference. Accordingly, at the beginning of June, the invitation for comment included in this agenda book was posted. That invitation produced more than 100 thoughtful comments reflected in the summary included in this agenda book. In addition, the National Employment Lawyers Association organized an online discussion with its members for the subcommittee on July 6, 2021, which provided many valuable insights.").

[130] *Id.* at 211 ("The Rules Office assigned numbers to the comments (e.g., PRIV-0001, PRIV-0002). Since they are all the same except for the last two or three digits, only those numbers will be used in this summary. The entire set of comments should be posted online. Some are lengthy. One attaches a 116-page transcript of a court hearing, for example.").

[131] *Id.* at 187, *ll.*754-61.

[132] *Id.* at 211-43.

unfeasible to review them all in a mere Article, but it is worth alighting upon a representative handful of those commenters who argued against the innovation of categorical logging to illustrate the countervailing tide to those surveyed in Part II-B.[133] As the Subcommittee observed by way of introduction to the public comments, "there appears to be a recurrent and stark divide between the views of plaintiff counsel (who worry that a rule change could enable defendants to hide important evidence) and defense counsel (who stress the burdens of preparing privilege logs and say they are rarely of value)."[134]

A Minnesota sole practitioner, Austin Zuege, described himself as an intellectual property lawyer "represent[ing] individuals, small and medium sized businesses, and large businesses, though in litigation matters I have generally *not* represented extra-large businesses (though I have represented clients against such entities)."[135] Based on his experience, Zuege favored affirming that a document-by-document log was strictly required,[136] for otherwise "there would seem to be too much of an incentive to 'hide' something in a broad category that does not belong there—and there would be no practical way to know if an opposing party is inappropriately 'hiding' something in a broad category if there is no document-by-document log."[137] Nor was Zuege sympathetic to the costs incurred by "extra-

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[133] *See generally* Judicial Conference Advisory Committee on Civil Rules, Public Comments Submitted in Response to Invitation for Comments, https://www.uscourts.gov/sites/default/files/comments_on_privilege_log_practice.pdf [hereinafter Privilege Log Public Comments]; *cf. supra* note 130 (explaining pagination system for archive of public comments). For brevity's sake, this Article limits itself to a sole practitioner, a law firm, and a nonprofit institution to provide a diverse sampling of those opposing categorical logs.

[134] October 2021 Rules Committee Agenda, *supra* note 129, at 186, *ll.*750-753.

[135] Austin Zuege, *Comments on Privilege Log Practice*, July 16, 2021, at 1, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0013.

[136] *Id.* at 2 ("A document-by-document privilege log is <u>*crucial*</u> for the requesting party to evaluate privilege assertions, particularly because privilege assertions are often suspect or overbroad. In my experience, some of the most valuable information contained in produced documents tends to be found in internal company emails that contradict testimony or legal arguments by that party, for which a spurious privilege assertion is sometimes made in order to try to avoid revealing such damaging (nonprivileged) email materials."); *see id.* at 3 ("In general, a helpful revision to Rule 26(b)(5)(A) would be to include some explicit statement that a document-by-document log is normally required, and perhaps outlining the minimum requirements for log entries.").

[137] *Id.* at 3.

large" businesses who assume such burdens proportionally to their electing to accrue such size.[138] He did, however, allow that he had routinely agreed with opposing counsel to exclude postcomplaint documents from logging, recommending it as a potential default category for omission,[139] and even that categorical logging might be appropriate in "small cases."[140]

Lea Malani Bays, a partner specializing in electronic discovery management at Robins Geller Rudman & Dowd LLP, "one of the largest plaintiffs' law firms in the country," wrote at length to resist the idea that categorical privilege logs would improve practice, though she did approve of mandating early meet-and-confers to hash out procedure for privilege with opposing counsel.[141] Bays highlighted

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[138] *Id.* ("As an addendum to my comments above about problems encountered, it seems that extra-large businesses complain about discovery burdens that are a function of their size. But it is important to recognize that this is akin to 'coming to the nuisance'. That is, businesses that choose to become very large are on notice that this creates a set of difficulties associated with bigness that can be avoided by limiting or reducing corporate size, in much the same way that law firms becoming large creates avoidable conflict of interest difficulties. To the extent that such extra-large entities are the sort of parties more often involved in 'large document' cases the FRCP should not give them preferential treatment based on their choice to remain large.").

[139] *Id.* ("Unless there are unusual circumstances and a good faith showing of need is established (e.g., litigation misconduct becomes an issue), there seems to be no reason to log privileged materials that were created after litigation begins because there is usually a voluminous number of such communications related to the litigation but those materials often have little legitimate legal value to the requesting party. Such a default exception to document-by-document logging requirements might be considered in any rule amendments to lessen burdens."); *see id.* at 4 ("But as far as I understand the second part, it seems impossible on a practical level to enumerate categories of documents that need not be identified in such a way that would be workable across all the many different types of federal civil cases. Though postcommencement communications might be exempted from identification requirements (unless good cause is shown to require identification).").

[140] *Id.* ("[T]he parties can agree or the court may order more general descriptions of categories of documents (which may be useful in 'small' cases).").

[141] *See* Lea Malani Bays, Letter re: Invitation for Comment on Privilege Log Practice From the Committee on Rules of Practice and Procedure, July 29, 2021, at 1, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0045 ("Although it is already common practice in large-scale litigation, it is often beneficial to have early discussions with opposing counsel regarding privilege logs. If the Committee concludes that revisions to Federal Rule of Civil Procedure ('Rule') 26(f)(3)(D) would encourage this practice in more cases, then this would be a welcomed change. However, based on my experience, the other suggested changes related to categorical logs are unnecessary and would be counter-productive.").

that contemporary creation of traditional privilege logs was neither manual nor particularly burdensome with modern discovery technology.[142] By contrast, it was the untested novelty of categorical logs that were more onerous and uncertain, leading to "costly re-dos and unnecessary disputes."[143] As evidence, Bays pointed to her own experiences with categorical logs proving grossly insufficient to allow assessment of the privilege, leading to court-ordered itemizations after motion practice and mass disgorgement of improperly withheld materials.[144] If categorical privilege logs were to attenuate discovery disputes, it would only be because they failed to provide any reasoned basis by which to scrutinize the claims of privilege—and time savings like those would flout rather than facilitate Rule 26's command.[145]

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[142] *Id.* at 2 ("It is important to highlight the current predominate practice regarding privilege logs because, in doing so, it should become clear that the document-by-document privilege log is not actually burdensome, even when there are a large number of documents that need to be logged. In my early years as an associate at a large defense firm, I manually created privilege logs and understand the significant effort that such a task requires. But the process is no longer manual. In fact, it has become easier since electronically stored information has become more commonly produced in litigation. In my experience over the last ten years, it is common practice for the parties to come to an agreement on fields to be included in the privilege log that can be auto-populated with corresponding metadata extracted from the document.").

[143] *Id.* at 4 ("Any proposal to amend Rule 26(b)(5)(A) to encourage or require categorical logs in lieu of document-by-document logs, regardless of the nature of the case, is unfounded. Encouraging the use of categorical logs would likely result in costly re-dos and unnecessary disputes. In fact, the submissions to the Committee that prompted this recent interest in privilege logging do not ever articulate, much less substantiate, what exactly causes the burden of which they complain. Quite notably, LCJ's Introduction starts with a conclusion and then just moves on from there, presupposing the burden, without ever providing any meaningful specifics. The submission speaks of 'burdens' and 'inefficiencies' [sic] related to privilege logs and how they are 'expensive to produce' but never adequately articulates what exactly is so burdensome or expensive about this process.").

[144] *Id.* at 5-6 ("Not surprisingly, we did not find the categorical log to be sufficient, and the court agreed. The producing party then had to provide a document-by-document log. Notably, in the process of doing so, over 10,000 documents were removed from the log and subsequently produced as not privileged.").

[145] *Id.* at 6-7 ("While it is possible that categorical logs could result in fewer challenges to discrete issues of privilege on a document-by-document basis because there would be little basis for challenging the privilege of any specific document, this sort of opaque approach to privilege should not be entertained. Even if not introduced for improper purposes here, it may provide a tempting avenue for a sloppy approach to analyzing privilege or other inappropriate means of withholding relevant documents from production."); *see also id.* at 5 ("The thrust of their

And the Complex Litigation eDiscovery Forum (CLEF) submitted a twenty-four page memorandum dissecting the LCJ's proposal, providing the "unique . . . perspectives of plaintiffs'-side practitioners, whose interests are frequently underrepresented and underrecognized by other national eDiscovery organizations."[146] Its executive director Dana Smith explained that fundamentally the burden of Rule 26(b)(5) arose not from traditional privilege logs (and thus could not be attenuated by the use of categorical logs) but rather from the price of privilege itself: discriminating between documents eligible and ineligible for protection.[147] Categorical logs would still depend upon the underlying individual assessment of each document for privilege, and so all that could be saved would be scrivener's duties.[148] And with the metes of a proper category left undefined, constructing such logs would be fraught with error and likely unhelpful to anyone receiving it.[149] Even if categorical assertions

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arguments seems to be that because document-by-document logs fall short of providing information sufficient to meet the requirements of Rule 26(b)(5) they are useless and the bar should be set even lower—or removed entirely. This sort of logic is absurd. Indeed, a document-by-document log is often the most efficient way to provide the information necessary to assess the claim of privilege.").

[146] Dana Smith, Letter, Aug. 2, 2021, at 1-2, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0104 ("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. That expertise informs our comments today.").

[147] *Id.* at 2 ("[P]roblems 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.").

[148] *Id.* at 2-3 ("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.").

[149] *Id.* at 3 ("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."); *e.g., id.* at 11-15 (describing failure of categorical logs to structurally enable the assessment of privilege); *id.* at 15-19 (cataloguing instances

might sometimes suffice, only document-by-document assertions guaranteed that privilege could be properly assessed—and yet it was fruitless to try to predefine situations suitable to categorization, for they would differ with every case.[150] In closing, CLEF exhorted the committee to resist the normative urge to superimpose a standard of proportionality on privilege logs, a test which could rarely if ever be met by a requesting party ignorant *a priori* of the importance of withheld content.[151]

C. What the Subcommittee Recommended

Having considered all the public input pro and con, although the interim Subcommittee report was "not enthusiastic" about the idea of ratifying the prevailing insistence upon document-by-document listing,[152] it was also chary of endorsing categorical privilege logs, which it feared might lead to categories so broad they resembled the "Delphic" blanket assertions of privilege devoid of meaningful detail that Rule 26 was originally meant to prevent.[153] To combat such

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where categorical logs led to disputes in court); *id.* at 19-20 (cataloguing instances where courts found categorical laws inadequate).

[150] *Id.* at 3 ("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. . . . This is not to say that a 'categorical' approach to disclosure can never permit an assessment of a claim. . . . 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.").

[151] *Id.* at 4 ("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.").

[152] October 2021 Rules Committee Agenda, *supra* note 129, at 189, *ll.*851-54 ("We are told that many or most courts regard the current rule as requiring document-by-document listing. Some comments have urged that the rule be amended to state an explicit requirement of such a listing in every case. The subcommittee is not currently enthusiastic about that idea.").

[153] *Id.* at 190, *ll.*882-890 ("Consider a 'category' discussed during the subcommittee's Aug. 26 meeting: 'materials protected by the attorney-client

overbreadth, the Subcommittee also considered defining categories eligible for segregation from itemized privilege logs, such as communications with counsel postdating the litigation's commencement, but found even so straightforward a category rife with potential exceptions, concluding that "it looks very difficult to identify categories that could be 'baked into' the rule."[154] Even accepting that there may "fairly often be categorical methods to reduce the burden of satisfying the rule in light of the particulars of a given case," the Subcommittee failed to coalesce around any of the proffered alternatives to state as much.[155]

Unsurprisingly, there were no easy solutions on offer.[156] At the next plenary meeting of the Rules Committee, the Discovery Subcommittee submitted its final report and recommendations on the suggested rulemaking.[157] The report once again raised the sharply divergent views of the plaintiff and defense bars, as well as the great variety of cases in terms of subject matter and scope of discovery.[158] Finding that "the most pertinent point was that one size would not fit all cases," therefore "the Subcommittee concluded that trying to amend Rule 26(b)(5)(A) and prescribe an all-purpose solution to the

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privilege or as work product.' One could certainly say this is a category. But if it would suffice, it's difficult to see how it would differ from the pre-1993 'general objection' that 'respondent will not produce any materials privileged under the attorney-client privilege or protected as work product.' And one goal of the 1993 change was to move beyond that sort of Delphic general objection. On the other hand, the amended rule would still say that the description must 'enable other parties to assess the claim.' Perhaps that rule provision suffices to avoid a return to the pre-1993 situation. But if the description is only by category it is difficult to see how that protects against untoward results.").

[154] *Id.* at 191-92, *ll.*917-75.

[155] *Id.* at 189-90, *ll.*854-78 (discussing three alternatives); *see id.* at 187, *ll.*766-69 ("The subcommittee's discussion on August 26 focused on a variety of rule change possibilities. Various subcommittee members expressed differing attitudes toward these ideas (as reflected in the notes included in this agenda book), so none of them is presented as a subcommittee preference.").

[156] *See* Jeremy J. Greenbaum, Letter, July 26, 2021, at 2, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0030 ("Parties routinely fight over privilege designations even when it is clear that the document many have no relevance to the central issues in the case. These collateral disputes unnecessarily drive up the costs of litigation. There is no easy solution.").

[157] Judicial Conference Advisory Committee on Civil Rules, Agenda Book, Oct. 12, 2022, at 141-46, https://www.uscourts.gov/sites/default/files/civil_agenda_book_october_2022_final.pdf [hereinafter October 2022 Rules Committee Agenda].

[158] *Id.* at 142, *ll.*39-68.

variegated problems of claiming privileges with regard to variegated materials would not work."[159] Instead, the Subcommittee recommended that Rules 16 and 26 be amended only to prescribe early case conferences at which the parties would negotiate and inform the court of a mutually agreed-upon method for addressing privilege assertions suitable to the case at bar.[160] Even so, the Subcommittee did not wholly spurn the yen for *some* greater recognition of categorical logging methodologies, writing in the note to the proposed amendment to Rule 26:

> In some cases, it may be suitable to have the producing party deliver a document-by document listing with explanations of the grounds for withholding the listed materials. As suggested in the 1993 Committee Note, in some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many withheld documents. Suggestions have been made about various such approaches. For example, it may be that communications between a party and outside litigation counsel could be excluded from the listing, and in some cases a date range might be a suitable method of excluding some materials from the listing requirement. Depending on the particulars of a given action, these or other methods may enable counsel to reduce the burden and increase the effectiveness of complying with Rule 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the specifics of the action.[161]

Thus the whole multiyear divagation before the Advisory Committee to the Judicial Conference ended not too far from where it began: courts, counsel, and litigants would be told to go back to the drawing board themselves, and engineer their own bespoke solutions for the

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[159] *Id. ll.*69-78 ("Perhaps the most pertinent point was that one size would not fit all cases. Some cases involved only a limited number of withheld documents; for those cases a 'traditional' document by-document privilege log might work fine. Depending on the nature of the privileges likely to be asserted, the specifics necessary in one case might have little to do with the specifics important in another case. Often the type of materials involved and the manner of storage of those materials could bear on the information needed to evaluate a privilege claim.").
[160] *Id.* at 143, *ll.*79-85.
[161] *Id.* at 144-45, *ll.*145-55.

case at hand, more or less as they had been doing ever since the advent of Rule 26(b)(5)(A) in 1993.

IV. THE LOG FROM THE SEA OF COURTS[162]

> It is not enough to say that we cannot know or judge because all the information is not in. The process of gathering knowledge does not lead to knowing. A child's world spreads only a little beyond his understanding while that of a great scientist thrusts outward immeasurably. An answer is invariably the parent of a great family of new questions. So we draw worlds and fit them like tracings against the world about us, and crumple them when they do not fit and draw new ones.[163]

Yet if the Judicial Conference was not inclined to act on the suggestion for categorical logs, and academic pundits constrained to punditry, courts themselves had both the inherent and statutory power to prescribe their own rules not inconsistent with the Federal Rules.[164] No small number did. By the 2020s, numerous court systems had adopted rules or guidelines that endorsed the use of categorical privilege logs to a greater or lesser degree, as LCJ had detailed at some length in its submission to the Judicial Conference.[165] Courts in such jurisdictions were thus faced with such logs on a more regular basis. But even before and aside from these systemwide adoptions,

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[162] With apologies to John Steinbeck. *Cf.* JOHN STEINBECK, THE LOG FROM THE SEA OF CORTEZ (Viking Press 1951).

[163] *Id.* at 166 (chapter 16, March 25).

[164] *See* 28 U.S.C. § 2071(a) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title."); Wells v. Gilliam, 196 F. Supp. 792, 795 (E.D. Va. 1961) ("It is well established that all courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings and facilitate the administration of justice as they deem necessary."); United States v. Taylor, 25 F.R.D. 225, 228 (E.D.N.Y. 1960) ("Prior to the promulgation of the Rules, federal criminal procedure grew out of the inherent power of the courts to develop their own procedure. Sometimes this residual power was exercised by the enactment of local rules of court and sometimes by the process of adjudication.").

[165] *See supra* note 122.

individual judges had been called upon to adjudicate categorically asserted privilege claims for decades, and many had come to see the value of such a format, as various public commenters in support of categorical logs had helpfully observed.

A. The Two-Part *Thrasher* Test for Categorical Logs

Boehning and Toal recognized 1996's *SEC v. Thrasher* as one of the first cases to take up categorical privilege logs, only a few years after Rule 26(b)(5) had been adopted.[166] Despite consultation, the SEC and one defendant were at loggerheads as to the logging of the "voluminous" communications amongst counsel and the defendant group as a whole.[167] "Because of the stalemate between the parties," the court explained, the defendant "has asked the court to enter a protective order relieving him of the obligation to prepare the requested privilege log" for the category in question, whilst the SEC demanded either the documents or an itemized log.[168] The court conceded that the "pertinent rules" typically required a log identifying each document and its author, recipients, date, and general description, but concluded that "courts retain some discretion to permit less detailed disclosure in appropriate cases," citing Rule 26's disavowal of requiring identifying information itself privileged.[169] The same logic could be extended given that Rule 26 required only disclosure sufficient to assess the privilege:

> It is equally apparent that, in appropriate circumstances, the court may permit the holder of withheld documents to provide summaries of the documents by category or otherwise to limit the extent of his disclosure. This would certainly be the case if (a) a document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no

[166] Boehning & Toal, *supra* note 4, at 2 ("A few years later, a party asked a magistrate judge in the Southern District to allow him to prepare a categorical privilege log over the objection of the plaintiff government agency.") (citing SEC v. Thrasher, No. 92 CIV. 6987 (JFK), 1996 WL 125661 (S.D.N.Y. 1996)).
[167] SEC v. Thrasher, No. 92 CIV. 6987 (JFK), 1996 WL 125661, at *1 (S.D.N.Y. 1996).
[168] *Id.*
[169] *Id.*

> material benefit to the discovering party in assessing whether the privilege claim is well grounded.[170]

The instant case presented just such circumstances, for the category of documents sought were by definition facially subject to work product and very likely also the attorney-client privilege, whilst the SEC had offered no explanation for what benefit it might derive from an itemized log beyond reiterating its supposed entitlement to one.[171] The court ordered the defendant to produce certain additional data regarding the category germane to the privilege but otherwise permitted the categorical expediency.[172]

Courts adore a standard to which they can rally, and that standard enunciated in the succinct *Thrasher* proved popular enough to make it the "leading case" on the subject.[173] Categories accepted for logging purposes under the bipartite *Thrasher* test include counsel's communications with the client, drafts, research into prior art, and personal notes relating to a patent application;[174] "handwritten notes, and internal memoranda and correspondence . . . contain[ing] mental impressions, conclusions, opinions and legal theories of SEC attorneys and those working with them";[175] "all documents between plaintiffs' various counsels and plaintiffs themselves concerning this

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[170] *Id.*

[171] *Id.* at 1-2 ("In response the Commission makes no effort to explain what benefit it will gain from a detailed document-by-document log. Indeed, it offers no suggestion as to why it might need the requested details in order to determine whether the work-product rule or the attorney-client privilege is likely to be applicable to some or all of the withheld documents. In substance, all that it argues is that it is entitled to such a log.").

[172] *Id.* at 2 (requiring supplemental identification of the time period, authors and recipients, and the role of counsel for the category excepted from logging).

[173] *See* Mfrs. Collection Co., LLC v. Precision Airmotive, LLC, No. 3:12-cv-853-L, 2014 WL 2558888, at *3-4 (N.D. Tex. June 6, 2014) (calling *Thrasher* the "leading decision" and "find[ing] the *Thrasher* decision both informative and appropriate to follow in this case, as other courts have").

[174] Games2U, Inc. v. Game Truck Licensing, LLC, No. MC–13–00053–PHX–GMS, 2013 WL 4046655, at *6-7 (D. Ariz. Aug. 9, 2013) ("Like communications between defense counsel, the documents maintained by an attorney used in the context of patent prosecution are ordinarily privileged.").

[175] SEC v. Nacchio, C.A. No. 05–cv–00480–MSK–CBS, 2007 WL 219966, at *10 (D. Colo. Jan. 25, 2007) ("Such materials constitute classic 'opinion' work product. The work product doctrine is no less applicable to materials prepared in anticipation of litigation by SEC accountants working under the direction or at the behest of Commission attorneys.").

lawsuit";[176] and documents from a law firm's files spanning a decadelong litigation.[177] One court granted preemptive permission for a categorical log sight unseen, crediting the plaintiff's "good reasons why it should not have to individually log all pre-litigation correspondence" and finding the defendant's counterarguments "unpersuasive."[178] Another observed that "because Rule 26(b)(5) does not require a party to sacrifice work product protection in order to assert it, a category-by-category log was appropriate,"[179] echoing John E. Tyler III's reasoning.[180] Permissive courts following *Thrasher* have chided parties pleading inability to assess the privilege from

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[176] *In re* Imperial Corp. of Am., 174 F.R.D. 475, 477-78 (S.D. Cal. 1997).

[177] Mfrs. Collection Co., LLC v. Precision Airmotive, LLC, No. 3:12-cv-853-L, 2014 WL 2558888, at *4 (N.D. Tex. June 6, 2014) ("The Court finds that the document-by-document listing that Precision demands from AVCO would be unduly burdensome; that, with a few exceptions, the additional information to be gleaned from a more detailed log would be of no material benefit to Precision in assessing whether a privilege or work-product claim is well grounded; and that a document-by-document listing of an entire litigation file—or even only documents related the Pridgen settlement and settlement discussions, any assignments, and any documents that would affect MCC's, AVCO's, or AVCO's insurers' indemnity rights or standing—could potentially reveal some or part of the privileged or work-product information that AVCO seeks to protect.").

[178] Teledyne Instruments, Inc. v. Cairns, No. 6:12–cv–854–Orl–28TBS, 2013 WL 5781274, at *15-16 (M.D. Fla. Oct. 25, 2013) ("The Court finds that a categorical privilege log of documents created between March 13 and June 6, 2012, which have been withheld on the basis of privilege or protection, is sufficient. The log shall organize the documents into categories which provide sufficient information to permit Defendants to assess the validity of the claim of privilege or protection."); *see also* Fifty-Six Hope Rd. Music, Ltd. v. Mayah Collections, Inc., No. 205CV01059KJDGWF, 2007 WL 1726558, at *8 (D. Nev. June 11, 2007) ("That said, confidential email communications between Plaintiffs and their attorneys are generally protected by the attorney-client privilege. Additionally, email communications exchanged between Plaintiffs' counsel during this lawsuit or in anticipation of this lawsuit are generally entitled to protection from disclosure under the attorney work-product doctrine. If, as Plaintiffs claim, emails regarding such communications are in the hundreds or thousands, requiring Plaintiffs to provide a privilege log for each privileged email communication would be unduly burdensome and not serve the legitimate purposes of discovery under the FED. R. CIV. P. 26. Accordingly, the Court will not require Plaintiffs to produce a privilege log for each allegedly privileged email communication.").

[179] U.S. v. Gericare Med. Supply Inc., No. CIV.A.99-0366-CB-L, 2000 WL 33156442, at *4 (S.D. Ala. Dec. 11, 2000) (initial majuscule reduced to minuscule) (citing Seebeck v. General Motors Corp., No. 1:96-CV-449-WCO, 1996 WL 742914, at *3 (N.D. Ga. 1996)).

[180] *See supra* notes 86-89 and accompanying text.

categorical assertions without explaining exactly what was lacking, which, "at the risk of being uncharitable . . . essentially amounts to denying that a privilege log could ever take a categorical approach."[181]

One case applying *Thrasher* is particularly noteworthy in its own right: *Asghari-Kamrani v. United Services Automobile Association*.[182] Discovery between the plaintiffs and USAA had become acrimonious, and eventually the court was apprised of a dispute deriving from USAA's subpoena for "document requests seeking communications between Plaintiffs and their past and current counsel."[183] After first (and futilely) arguing that no log at all was required because the materials were available from a third party who would supply a log in their stead, the plaintiffs eventually tendered a log asserting privilege over eleven categories of the four-hundred-odd documents, to which USAA objected in the expectation of an itemized index.[184] Broadly, the court found that judges within the Fourth Circuit had regularly approved "a summary of specific facts to claim privilege for categories of documents,"[185] noting that the Fourth Circuit itself had taught that "the log need not be overly detailed, it merely must provide the requesting party with sufficient information

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[181] Manufacturers Collection Co., LLC v. Precision Airmotive, LLC, No. 3:12-cv-853-L, 2014 WL 2558888, at *4 (N.D. Tex. June 6, 2014); *accord* United States v. Gericare Med. Supply Inc., at *4 ("The defendants 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.").

[182] Asghari-Kamrani v. United Servs. Auto. Assoc., C.A. No. 2:15cv478, 2016 WL 8243171 (E.D. Va. Oct. 21, 2016).

[183] *Id.* at *1.

[184] *Id.* at *1-2 ("The categorical privilege log, rather than specifically listing each document, instead grouped a total of 439 documents into eleven categories by description, including document description, senders/recipients/copyees, document type and privilege claimed. . . . In its reply, USAA objected to the late production of the log, Plaintiffs' attempt to rely on a categorical privilege log instead of listing each document separately, and Plaintiffs' characterization of the agreement or understanding of the parties as to when production should have been made."). The court was appropriately dismissive of the plaintiffs' absurd contention that they could incorporate by reference the logs produced by other parties for documents in those parties' possession. *Id.* at *2.

[185] *Id.* at *2 (citing Westfield Ins. Co. v. Carpenter Reclamation, Inc., 301 F.R.D. 235, 247 (S.D. W. Va. 2014); Sky Angel U.S., LLC v. Discovery Commc'ns, LLC, 28 F. Supp. 3d 465, 483–84 (D. Md. 2014); Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 267 (D. Md. 2008); and Handy v. State Farm Mut. Auto. Ins. Co., No. 5:15cv1950, 2016 WL 146530, at *9 (S.D. W. Va. Jan. 12, 2016)).

to be able to assess the privilege claim."[186]

If these principles sound somewhat like the prongs identified in *Thrasher*, the court was indeed searching for "a specific test to determine if a categorical privilege log is sufficient," finding none in use in the Fourth Circuit.[187] Yet "although no district court within the Fourth Circuit has utilized the *Thrasher* test," Magistrate Judge Lawrence Leonard observed that "it has been adopted in primarily unpublished opinions by district courts within the Second, Fifth, Sixth, Ninth, Tenth, Eleventh, and DC Circuits."[188] Thus convinced of *Thrasher*'s cogency by the mounting consensus,[189] the court applied its test and found readily that the dozen partitions of the categorical log were amply detailed and that the plaintiffs had shown that itemizing the documents underlying the generic assertions "would be unduly burdensome for no meritorious purpose."[190] Issuing in 2016, *Asghari-Kamrani* well illustrated that the *Thrasher* test was no flash in the pan and had accrued widespread acceptance in the ensuing two decades—even if usually in unreported decisions, the ordinary vehicle for discovery disputes argued before a district court magistrate.[191]

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[186] *Id.* at *3 (citing N.L.R.B. v. Interbake Foods, LLC, 637 F.3d 492, 502 (4th Cir. 2011)).

[187] *Id.*

[188] *Id.* (citing Rosen v. Provident Life and Accident Ins. Co., 308 F.R.D. 670, 680 (N.D. Ala. 2015): U.S. S.E.C. v. LovesLines Overseas Mgmt., Ltd., No. 04–302, 2007 WL 581909, at *1 n.5 (D.D.C. Feb. 21, 2007); McNamee v. Clemens, No. 09cv1647, 2014 WL 1682025, at *2 (E.D.N.Y. April 28, 2014); Mfrs. Collection Co., LLC v. Precision Airmotive, LLC, No. 3:12cv853, 2014 WL 2558888, at *2–3 (N.D. Tex. June 6, 2014); SEC v. Somers, No. 3:11cv165, 2013 WL 4045295, at *2 n.2 (W.D. Ky. Aug. 8, 2013); Games 2U, Inc. v. Game Truck Licensing, LLC, No. MC–13–53, 2013 WL 4046655, at *7 (D. Ariz. Aug. 9, 2013); PostX Corp. v. Secure Data Motion, No. C O2–04483, 2004 WL 2623234, at *1 (N.D. Cal. June 9, 2004); and SEC v. Nacchio, No. 05cv480, 2007 WL 219966, at *9 (D. Colo. Jan. 25. 2007)).

[189] *Id.* ("The *Thrasher* test provides a reasonable measure for evaluating the categorical privilege log proffered by Plaintiffs.").

[190] *Id.* at *4 ("Inasmuch as the eleven categories Plaintiffs included sufficiently describe the documents so that USAA can assess the privilege claims, requiring Plaintiffs to create a separate listing for each document seems designed to accomplish nothing more than increasing attorneys' fees.").

[191] *Cf.* Pensacola Firefighters' Relief Pension Fund Bd. of Trs. v. Merrill Lynch Pierce Fenner & Smith, Inc., 265 F.R.D. 589, 592 (N.D. Fla. 2010) ("There is abundant district court case law, mostly unreported, holding that a party claiming privilege is obliged to produce a privilege log and its failure to do so means the privilege is waived.").

B. Beyond *Thrasher*: The Broader Trend in Favor

Nor have judges remained tethered to *Thrasher*'s test over the ensuing decades; many more have independently concluded that categorical logs are perfectly adequate when the burden appears disproportionate to the information gained by a document-by-document log. *Thrasher* even recognized as much, effectively holding only that meeting its test was sufficient but not necessary to permit categorical logging.[192] To be sure, a good number of these cluster in jurisdictions that had endorsed (or would eventually endorse) categorical logging systematically like the Southern and Eastern Districts of New York.[193] But even at the time of Rule 26(b)(5)'s adoption, courts already encountered categorical privilege logs—and found them sufficiently detailed to rule on whether the underlying documents did or did not enjoy privilege.[194] By the first decade of the

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[192] SEC v. Thrasher, No. 92 CIV. 6987 (JFK), 1996 WL 125661, at *1 (S.D.N.Y. 1996) (finding that "in appropriate circumstances, the court may permit the holder of withheld documents to provide summaries of the documents by category" as "would certainly be the case if" its two factors were met); *cf.* BoDeans Cone Co. v. Norse Dairy Sys., L.L.C., 678 F. Supp. 2d 883, 892 (N.D. Iowa 2009) ("An actual intention that the opposing party see the documents is *sufficient* but not *necessary* to effect a waiver of work-product privilege as to those documents.").

[193] *See, e.g.*, Aviles v. S&P Glob., Inc., 583 F. Supp. 3d 499, 504 (S.D.N.Y. 2022) ("find[ing] that identifying the author of each document and related Bates numbers to be burdensome" because "[w]hat Plaintiffs are arguing here upends the idea of a categorical privilege log and would require each document to be logged individually, or at best categorized by author," but ordering some other refinements to the categorical descriptions of date and authors); Rekor Sys., Inc. v. Loughlin, No. 19-CV-07767 (LJL), 2021 WL 5450366, at *1 (S.D.N.Y. Nov. 22, 2021); Orbit One Commc'ns, Inc. v. Numerex Corp., 255 F.R.D. 98, 109 (S.D.N.Y. 2008) (finding that the likely "large number" of attorney-client or work product privileged documents made is appropriate to "provide a categorical privilege log rather than a traditional, itemized privilege log" in order to ""lessen the burden"); E.B. v. N.Y.C. Bd. of Educ., No. CV 2002-5118(CPS)(MDG), 2007 WL 2874862, at *8 (E.D.N.Y. Sept. 27, 2007) (holding "that the Defendants need not separately identify every document on the privilege log and authoriz[ing] the grouping of similar documents"); United States v. Int'l Longshoremen's Ass'n, AFL-CIO, No. CV05-3212(ILG)(VVP), 2006 WL 2014093, at *2 (E.D.N.Y. July 18, 2006) (holding that the DOJ need not itemize on a privilege log categories of documents such legal drafts, attorney notes, and internal correspondence on the litigation).

[194] *See, e.g.*, Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co., 142 F.R.D. 471, 475-80 (D. Colo. 1992) (denying privilege to ten of eleven categories asserted without concern as to the ability to assess), *recons. denied*, 142 F.R.D. 471 (D. Colo. 1992); *id.* at 480-81 (upholding privilege on the eleventh category).

twenty-first century, broader acceptance of categorical logs could be found in courts nationwide.[195] More followed.[196] A 2007 Nevada

[195] *See, e.g.*, Treat v. Tom Kelley Buick Pontiac GMC, Inc., No. 1:08-CV-173, 2009 WL 1543651, at *6 (N.D. Ind. June 2, 2009) ("The Plaintiffs further contend that Kelley has failed to establish that the protections apply on a document-by-document basis. The Court disagrees, for even though Kelley's brief addresses the documents in convenient categories, each of the documents submitted for in camera inspection are accounted for in at least one of the explanatory categories Kelley set forth in the brief. Therefore, even though Kelley's brief did not march through the documents in sequential order, they have otherwise addressed their claims on a document-by-document basis.") (citation omitted); Republic Servs. Inc. v. Am. Int'l Specialty Lines Ins. Co., No. 07-21991-CIV, 2008 WL 4691836, at *3 (S.D. Fla. Oct. 21, 2008) (allowing categorical privilege log for five proposed categories); CC Aventura, Inc. v. Weitz Co., LLC, No. 06-21598-CIV, 2008 WL 828117, at *5 (S.D. Fla. Mar. 27, 2008) (endorsing a categorical log and suggesting as example of the specificity needed communications within given dates between counsel and insurance provider); *In re* Apollo Grp., Inc. Sec. Litig., No. CV-04-2147-PHX-JAT, 2007 WL 778653, at *8 (D.D.C. Mar. 12, 2007) (proposing that the burden of a privilege log could be minimized "by categorizing the documents in some way"); Schmidt v. Levi Strauss & Co., No. C04-01026RMWHRL, 2007 WL 628660, at *2 (N.D. Cal. Feb. 28, 2007) ("Plaintiffs contend that the log is insufficient because it describes documents by category rather than on an individual basis. Although a document-by-document description is generally preferred, the rules do not mandate a particular level of specificity. Upon review of Todrys' Privilege and Redaction Log, this court concludes that Todrys has sufficiently described the documents to enable an assessment of the applicability of the work product doctrine.") (citation omitted); United States v. Magnesium Corp. of Am., No. 2:01-CV-00040 DB, 2006 WL 1699608, at *6 (D. Utah June 14, 2006) (commending plaintiffs for permitting defendants to categorize privilege log entries by category given "compilation of a detailed privilege log identifying each document . . . would be an expensive undertaking since it is undisputed that these documents number in the thousands.").

[196] *See, e.g.*, King v. Gilbreath, No. CIV-13-0862 JCH/LAM, 2014 WL 12786916, at *5 (D.N.M. Oct. 29, 2014) ("Plaintiffs' claim that it would be unduly burdensome to list each communication is without merit because Plaintiffs can group similar e-mails into categories and provide the necessary information by group of e-mails in order to allow Defendant to assess whether they are privileged, without having to list each individual e-mail."); Bellingham v. BancInsure, Inc., No. CV 13-0900 (SRN/JJG), 2014 WL 12600277, at *3 (D. Minn. May 13, 2014) (ordering certain categories revised but allowing to stand those for "internal communications at Davenport Evans, internal communications at Lindquist & Vennum, and communications between Davenport Evans and Lindquist & Vennum" which "need not be discussed in further detail"); Shaw Grp., Inc. v. Zurich Am. Ins. Co., No. CIV.A. 12-257-JJB, 2014 WL 1784051, at *10-11 (M.D. La. May 5, 2014) (finding adequate a log providing six categorizations); U.S. *ex rel.* Keeler v. Eisai, Inc., No. 09-22302-CV, 2012 WL 12842995, at *3 (S.D. Fla. Sept. 27, 2012) ("The Court notes that individually logging years of privileged attorney communications would be burdensome and of little benefit. Therefore, the Court will permit the Relator to

judge went so far as to endorse the general categorization of "email communications between Plaintiffs and their counsel or between Plaintiffs' attorneys" so long as counsel was willing to aver under oath that its review had been diligent, that no non-privileged documents had been withheld, and that all categorized documents remained confidential between attorney and client—for claims involving third parties, the court ordered, itemization and explanation of each third party's presence would be necessary.[197]

At the same time, courts entertaining categorical logs tend to be wary. Some have shied away from free-form categories, approving categorical exemption only of correspondence with counsel dating after the commencement of litigation,[198] following the proposal of

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categorically group post-litigation attorney communications for which a privilege is asserted."); Vasudevan Software, Inc. v. Microstrategy Inc., No. 11–cv–06637–RS–PSG, 2012 WL 5637611, at *7 (N.D. Cal. Nov. 15, 2012) ("VSI's refusal to provide any log of responsive but privileged communications between it and its counsel is unreasonable. But Microstrategy's request for item-by-item logs is also unreasonable. VSI may provide categorical logs, essentially grouping documents by type and indicating how each of those categories is privileged.") (citing *Orbit One Commc'ns*, 255 F.R.D. 98).

[197] Fifty-Six Hope Rd. Music, Ltd. v. Mayah Collections, Inc., No. 205CV01059KJDGWF, 2007 WL 1726558, at *6 (D. Nev. June 11, 2007) ("(4) In the case of emails as to which the attorney-client privilege is claimed, the affidavit or declaration should include a verification that the emails were not provided to persons other than the client and attorney. If such communications were provided to non-clients, and the attorney-client privileged is still claimed, then a privilege log consistent with *Diamond State* for each such communication should be provided. (5) In the case of attorney-work product, the privilege may extend to persons other than the attorneys or the client, such as investigators. To the extent any attorney work-product emails have been provided to persons other than the attorneys or the client, an appropriate privilege log consistent with *Diamond State* should be produced for each such communication and an explanation provided as to why the work-product privilege applies.").

[198] *E.g.*, Benson v. Rosenthal, C.A. No. 15-782, 2016 WL 1046126, at *11 (E.D. La. Mar. 16, 2016) ("Benson and his counsel must provide defendants with a supplemental privilege log identifying materials generated or prepared at any time after December 5, 2014, that are being withheld from production on privilege or work product grounds of the sort mentioned in the examples provided above, at oral argument and in similar circumstances. Benson and his counsel are excused, however, from including on their supplemental log any correspondence, memoranda or other written or electronically generated materials prepared by, sent directly by and/or submitted directly to (but not merely 'cc'd' or 'bcc'd') on or after March 11, 2015, the date this lawsuit was filed, Benson's counsel of record in this case (Stone Pigman firm lawyers) and any agents or employees of that law firm concerning this lawsuit or in preparation for this trial."); First Horizon Nat'l Corp. v. Certain

Douglas C. Rennie in 2010.[199] Producing parties seeking indulgence have been spurned for failing to detail what *particular* undue burden would be incurred by the preparation of a traditional log: "Defendants cannot refuse to comply with Rule 26 simply because they find compliance with the Rule onerous."[200] Many courts have emphasized that properly drawn categories may call for the support of affidavits as to the factual predicates.[201] Overall, even those amenable to

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Underwriters at Lloyd's, No. 211-CV-02608-SHMDKV, 2013 WL 11090763, at *7 (W.D. Tenn. Feb. 27, 2013); In re Motor Fuel Temperature Sales Practices Litig., No. 07-MD-1840-KHV, 2009 WL 959491, at *3 (D. Kan. Apr. 3, 2009) (permitting categorical privilege log for post-commencement attorney communications because "individually logging thousands of privileged attorney communications would be immensely burdensome and have little, if any, benefit to plaintiffs"); Stern v. O'Quinn, 253 F.R.D. 663, 689 (S.D. Fla. 2008).

[199] *See* Teledyne Instruments, Inc. v. Cairns, No. 6:12–cv–854–Orl–28TBS, 2013 WL 5781274, at *15 (M.D. Fla. Oct. 25, 2013) (observing that some "courts have declined to require the logging of privileged, post-filing documents" and citing Rennie); *see also supra* notes 83-86 and accompanying text.

[200] Bethea v. Merchs. Com. Bank, No. 11-51, 2012 WL 5359536, at *2 (D.V.I. Oct. 31, 2012) ("Lastly, in this circuit, a categorical privilege log may be permissible only where the responding party has established undue burden with specificity. Here, Defendants failed to articulate explicitly why production of an itemized and descriptive privilege log is unduly burdensome.") (citations omitted) (citing Tyco Healthcare Grp. LP v. Mut. Pharm. Co, Inc., No. 07–1299, 2012 WL 1585335 (D.N.J. May 4, 2012) and Northwood Nursing & Convalescent Home, Inc. v. Continental Ins. Co., 161 F.R.D. 293 (E.D. Pa. 1995)); *accord* First Horizon Nat'l Corp. v. Hous. Cas. Co., No. 2:15-cv-2235-SHL-dkv, 2016 WL 5867268, at *6 (W.D. Tenn. Oct. 5, 2016). *But see* Fifty-Six Hope Rd. Music, Ltd. v. Mayah Collections, Inc., No. 205CV01059KJDGWF, 2007 WL 1726558, at *8 (D. Nev. June 11, 2007) (although stating that "[a]llowing a party to avoid its obligations under Rule 26(b)(5)(A), by simply stating that privileged email communications are too numerous to describe, would create the potential for avoiding the production of relevant information that is not entitled to protection under the attorney-client privilege or work-product doctrine," allowing categorical log because showing of disproportionate burden was made).

[201] *E.g.*, Mfrs. Collection Co., LLC v. Precision Airmotive, LLC, No. 3:12-cv-853-L, 2014 WL 2558888, at *2 (N.D. Tex. June 6, 2014) ("This is often accomplished through a privilege log, as the Court ordered AVCO to produce here. But it may also involve or require affidavits or declarations to make a showing of the items or categories withheld from production and the reason for their being withheld, with enough information for the requesting party to assess and the court to determine whether the withheld documents or information are privileged or are work product."); *Fifty-Six Hope Road Music*, 2007 WL 1726558, at *8 (allowing categorical logging "subject to Plaintiffs' counsel submitting an affidavit or declaration under oath which states and describes the following . . ."); Republic Servs. Inc. v. Am. Int'l Specialty Lines Ins. Co., No. 07-21991-CIV, 2008 WL

categorical logging have reiterated that the default standard must remain an itemized privilege log[202]—as in *Thrasher*, the validity of categorical assertions depends upon a showing that they will not prejudice the counterparty's assessment,[203] usually because the generic application of privilege in the stated circumstances is obvious and undeniable.[204]

4691836, at *3 (S.D. Fla. Oct. 21, 2008) (conditioning categorical log upon support by affidavits); 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) ("At any rate, Metheney's affidavit, served on the defendants several weeks after the privilege log and several weeks prior to oral argument, addresses distribution of the challenged documents with all the specificity the defendants have demanded."); *In re* Imperial Corp. of Am., 174 F.R.D. 475, 479 (S.D. Cal. 1997) (requiring affidavit substantiating basis for privilege).

[202] *E.g.*, *Imperial Corp.*, 174 F.R.D. at 478 (S.D. Cal. 1997) ("This court recognizes that one method of identifying documents to which claims of attorney-client privilege or work product are asserted is a document-by-document log. That format has been, undoubtedly will, and should remain, the traditional format. However, that paradigm is not rigid and inflexible. Just as in other areas of the law, cases and the rules themselves recognize that there are circumstances in which other solutions or approaches are also appropriate. This is one."); *see* Nationwide Mut. Fire Ins. Co. v. Kelt, Inc., No. 6:14-CV-749-ORL-41, 2015 WL 1470971, at *8 (M.D. Fla. Mar. 31, 2015) ("While document-by-document privilege logging is the norm, many courts, including this one, have endorsed the use of 'categorical privilege logging' in appropriate circumstances.").

[203] *Compare, e.g.*, Rekor Sys., Inc. v. Loughlin, No. 19-CV-07767 (LJL), 2021 WL 5450366, at *1 (S.D.N.Y. Nov. 22, 2021) ("[A] categorical privilege log is adequate if it provides information about the nature of the withheld documents sufficient to enable the receiving party to make an intelligent determination about the validity of the assertion of the privilege.") (citation omitted), *and* Teledyne Instruments, Inc. v. Cairns, No. 6:12–cv–854–Orl–28TBS, 2013 WL 5781274, at *16 (M.D. Fla. Oct. 25, 2013) ("The sufficiency of a categorical privilege log turns on whether the categories of information are sufficiently articulated to permit the opposing party to assess the claims of privilege or work product protection."), *with First Horizon Nat'l Corp.*, 2016 WL 5867268, at *6 ("Further, the Defendants have shown that a document-by-document log would be of material benefit to them in assessing whether the privilege claim is well grounded. The documents listed in the nine categories may not involve lawyers or may involve lawyers but contain non-privileged communications of fact."), *and In re* Rivastigmine Pat. Litig., 237 F.R.D. 69, 87 (S.D.N.Y. 2006) (applying the *Thrasher* test but finding that "in this case, a more detailed log would be not only of a material benefit to the defendants, but, in fact, it would be absolutely necessary for them to assess many of the plaintiffs' claims").

[204] *See* Franco-Gonzalez v. Holder, No. CV 10-2211-DMG DTBX, 2013 WL 8116823, at *7 (C.D. Cal. May 3, 2013) ("Unlike the situation in In re *Imperial*,

Courts have even accepted categorical privilege logs in the context of more esoteric protections than quotidian attorney-client privilege and work product. In *FDIC v. Crowe Horwath LLP*, the court allowed the FDIC to dispense with logging documents over which it claimed the bank examiner privilege, because the categories it identified "make clear that the documents at issue—internal work papers and notes, and internal communications—constitute the kinds of materials that at least some courts have held are 'clearly protect[ed] from disclosure.'"[205] And in *St. John v. Napolitano*, the court held that the "plaintiff may assert the psychotherapist-patient privilege in satisfaction of Rule 26(b)(5) by producing a categorical privilege log here," listing only the identity and credentials of the relevant professional, the "approximate" time period covered by the privilege, and the "general nature" of the communications, such as "marriage counseling records."[206] In both cases, courts adverted to the fact that these more unusual privileges made fastidiousness of detail even less important than in a mine-run privilege dispute.[207] On the other hand, judges have been unconvinced that the deliberative process privilege or doctor-patient privileges had been properly asserted in categorical form, stressing the details needed to substantiate their application.[208]

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defendants have made no showing that the majority of the documents were created in connection with litigation and, consequently, obviously subject to a privilege.").

[205] FDIC *ex rel.* Valley Bank v. Crowe Horwath LLP, No. 17 CV 04384, 2018 WL 3105987, at *6 (N.D. Ill. June 25, 2018) (quoting Principe v. Crossland Sav., FSB, 149 F.R.D. 444, 450 (E.D.N.Y. 1993)).

[206] St. John v. Napolitano, 274 F.R.D. 12, 21 (D.D.C. 2011).

[207] *Crowe Horwath LLP*, 2018 WL 3105987, at *6 ("The scope of the bank examination privilege, coupled with how the categories are described, render a detailed privilege log less important than the typical privilege dispute. What's more, the contested documents comprise the FDIC-C's internal communications, work papers, and notes, and thus are not the source of independent historical facts."); *St. John*, 274 F.R.D. at 21 ("While the Court could require the plaintiff to produce a document-by-document privilege log in appropriate circumstances, such a log is unnecessary to satisfy Rule 26(b)(5)(A) for documents subject to psychotherapist-patient privilege in this case.") (quoting magistrate judge).

[208] *E.g.*, Auto. Club of New York, Inc. v. Port Auth. of New York & New Jersey, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) ("Therefore, the adequacy of a privilege log—whether categorical or document-by-document—must be measured with respect to the privilege asserted. As applied to the deliberative process privilege, this requires that the log contain sufficient information such that the reviewing party can make an intelligent determination as to whether the withheld documents are 'predecisional' and 'deliberative.'"); *see, e.g.*, Coleman v. Schwarzenegger, No. C01-1351 TEH, 2008 WL 2732182, at *4 (E.D. Cal. July 8, 2008) ("Here, it is apparent that the

Suffice it to say that more outré privileges present a mixed bag.

C. Skeptics Hewing to Document-by-Document Logs

Likewise, even if myriad courts had approved of categorical privilege logs, the sentiment was far from universal[209]—particularly in the Seventh Circuit, which had long insisted upon document-by-document logging.[210] Many of the public commenters before the Judicial Conference had invoked judges that had categorically (ahem) rejected the notion of categorical logs as a serviceable replacement for the traditional variety.[211] Skeptical courts could accept their discretion

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magistrate judge did not err in concluding that defendants had not met their burden to show that the withheld documents were protected under the deliberative process privilege. While it is true that the number of documents at issue was large and this militates towards requiring less detail in the privilege logs and accompanying declarations, the detail offered cannot be so minimal as to prevent the court from evaluating the privilege claim."); Allen v. Woodford, No. CVF051104OWWLJO, 2007 WL 309943, at *3 (E.D. Cal. Jan. 30, 2007) (finding assertion of doctor-patient privilege inadequate because "it groups categories by as many as 11 years").

[209] *See, e.g.*, In re Pabst Licensing GmbH Pat. Litig., No. CIV. A. 99-MD-1298, 2001 WL 797315, at *22 (E.D. La. July 12, 2001) ("The court rejects the argument of the Papst Parties that a log of the type they have submitted listing withheld documents by broad category should be sufficient in this case. On more than one occasion, the U.S. Court of Appeals for the Fifth Circuit has stated that privileges 'must be specifically asserted with respect to particular documents,' and noted 'the unacceptability of blanket assertions of the attorney-client privilege . . . Such assertions disable the court and the adversary party from testing the merits of the claim of privilege.'") (quoting United States v. El Paso Co., 682 F.2d 530, 539 (5th Cir. 1982), and then United States v. Davis, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981)).

[210] *See, e.g.*, Novelty, Inc. v. Mountain View Mktg., Inc., 265 F.R.D. 370, 380 (S.D. Ind. 2009) ("A proper privilege log requires a document-by-document description of the privilege asserted and the facts supporting it.") (citing Hobley v. Burge, 433 F.3d 946, 947 (7th Cir. 2006) and *In re* Grand Jury Procs., 220 F.3d 568, 571 (7th Cir. 2000)), *clarified on denial of reconsideration*, No. 107CV01229SEBJMS, 2010 WL 11561280 (S.D. Ind. Jan. 29, 2010); *see also* Williams v. Duke Energy Corp., No. 1:08-CV-00046, 2014 WL 3895227, at *5 (S.D. Ohio Aug. 8, 2014) ("The party asserting the privilege has the burden of proving each element of the claim. The claim of privilege must be made question-by-question and document-by-document.") (citing United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983)). The Seventh Circuit was conspicuously absent from *Asghari-Kamrani*'s survey of receptive courts in 2016. *See supra* text accompanying note 188.

[211] *See, e.g.*, Dana Smith, Letter, Aug. 2, 2021, at 16-20, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0104; Jonathan D. Orent, Letter, Aug. 1, 2021, at 3-4, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0092; Ilyas

to demand less than a traditional log and that the "burden of preparing a document-by-document privilege log for the materials withheld would be great" but conclude nonetheless that a categorical log simply would not do.[212] This was not necessarily out of ignorance; by the time Facciola and Redgrave wrote in 2010, it would be difficult for any attentive court to have failed to notice growing adoption of the format.[213] Holdouts remained nonetheless; even as his colleagues in neighboring districts were accepting categorical logs,[214] a federal judge in Florida expressed unfamiliarity with and disapproval of the newfangled device:

> The Notice of Privilege does not comply with this rule in that no specific documents are identified or described. This Court is not familiar with a "categorical privilege log," as Defendant describes his log, and while it can appreciate that it may suffice in some cases, it is of the opinion that Defendant should fully and specifically comply with the language of Rule 26(b)(5)(A) to enable Plaintiff (and possibly this Court) to assess the privilege asserted should issues arise. The Court does not accept Defendant's conclusory assertion that he would be unduly burdened by a "document-by-document" log because it would call for

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Sayeg, Letter re: Invitation to Comment on Privilege Log Practice, July 29, 2021, at 3-6, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0048.

[212] United States v. KPMG, LLP, 237 F. Supp. 2d 35, 37-38 (D.D.C. 2002) ("The essential function of a privilege log is to permit the opposing party, and ultimately the court, to evaluate a claim of privilege. Allowing KPMG to prepare an even less detailed, category-by-category privilege log would not further this determination.").

[213] *See* Kirk, Cobb & Gens, *supra* note 77 ("A categorical privilege log is hardly a novel idea and we continue to be surprised at our adversaries who don't embrace them, or at least acknowledge them. There are a number of good articles on the subject that explore the concept and history in a fair amount of detail. For example, if you're living E-Discovery and you're not living under a rock, then you probably already know about Facciola and Redgrave's article.").

[214] *See* Republic Servs. Inc. v. Am. Int'l Specialty Lines Ins. Co., No. 07-21991-CIV, 2008 WL 4691836, at *3 (S.D. Fla. Oct. 21, 2008) (allowing categorical privilege log for five proposed categories); CC Aventura, Inc. v. Weitz Co., LLC, No. 06-21598-CIV, 2008 WL 828117, at *5 (S.D. Fla. Mar. 27, 2008); Stern v. O'Quinn, 253 F.R.D. 663, 689 (S.D. Fla. 2008).

> "hundreds, if not thousands, of emails between Chang and his attorneys, and his attorneys and their staff."[215]

More courts, however, have been more receptive in theory to the concept of categorical logs—perhaps because they operated in court systems that endorsed the format—but found individual specimens grossly inadequate to permit assessment of the privilege claims.[216] This occasionally occurred after a judge had authorized the use of a categorical log, discovering upon delivery that the categories proved insufficient to defend the allegedly privileged material from production.[217] In the far more typical case, however, one party or another had unilaterally chosen to assert its claims categorically, and the court found the generic listing wanting under Rule 26 on its individual (lack of) merits.[218] Despite all the opinions, however, there

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[215] Infinite Energy, Inc. v. Thai Heng Chang, No. l:07CV23-SPMIAK, 2008 WL 4098329, at *2 (N.D. Fla. Aug. 29, 2008).

[216] *E.g.*, Norton v. Town of Islip, No. CV043079, 2017 WL 943927, at *8 (E.D.N.Y. Mar. 9, 2017) ("Both the Federal and Local Rules permit categorical privilege logs.") (citing Local Rule 26.2(c) as permitting assertion categorically); Auto. Club of New York, Inc. v. Port Auth. of New York & New Jersey, 297 F.R.D. 55, 59 (S.D.N.Y. 2013) ("Local Civil Rule 26.2 also authorizes the use of a categorical privilege log."); McNamee v. Clemens, No. 09 CV 1647 SJ, 2013 WL 6572899, at *3 (E.D.N.Y. Sept. 18, 2013) ("[D]efendant is correct that a traditional, document-by-document privilege log is not always required by Local Rule 26.2.").

[217] *E.g.*, *In re* Rivastigmine Pat. Litig., 237 F.R.D. 69, 87 (S.D.N.Y. 2006) ("I previously granted the plaintiffs' request to submit a categorical log for the foreign prosecutions documents, but I specifically ruled that if I were to find any categorical justification inadequate, all documents within that category would be ordered produced. . . . The vast majority of the categorical justifications provided by the plaintiffs are inadequate, and, as explained below, all corresponding documents must be produced in their entirety.").

[218] *E.g.*, Bobo v. Frost, PLLC, No. 1:17-CV-227-HSO-JCG, 2019 WL 5685692, at *2 (S.D. Miss. Sept. 11, 2019) ("The Court agrees with Frost that Bobo has not attempted to explain what the 300 pages of documents are. Bobo must identify each document within the 300 pages. An allegation of categorical privilege as to an unspecified number of documents does not comply with the Court's Order . . . ."); United States v. Cameron-Ehlen Grp., Inc., No. 13-CV-3003 (WMW/DTS), 2019 WL 1453063, at *4 (D. Minn. Apr. 2, 2019) ("The Government's broad categories do not provide sufficient information that allows Defendants to assess the asserted privileges. This was made apparent in the recent status conference, when the parties discussed with the Court the disclosure of certain surreptitious audio recordings made by the Relator. The Government had initially withheld these recordings as privileged and categorized them as 'Audio recordings of discussions with witnesses, primarily in connection with the criminal investigation.' This broad category could also include recorded interviews with witnesses conducted by the FBI or U.S.

Attorney's Office. Indeed, the average reader of the log would likely not even consider surreptitious recordings as falling into that category. And that is exactly why the log as provided does not enable Defendants to assess any privilege claim for the documents within the categories, as they are entitled to under Rule 26(b)."), *aff'd sub nom.* United States *ex rel.* Fesenmaier v. Cameron-Ehlen Grp., Inc., No. 13-CV-3003 (WMW/DTS), 2019 WL 3245003 (D. Minn. July 19, 2019); Hopkins v. Bd. of Cnty. Commissioners of Wilson Cnty., Kansas, No. 15-CV-2072-CM-TJJ, 2018 WL 3536247, at *6 (D. Kan. July 23, 2018) (finding insufficient "general descriptions of categories of documents being withheld, e.g., "[s]ummaries of interviews with ACH or ACH employees prepared by undersigned counsel or undersigned counsel's employees"); *Norton*, 2017 WL 943927, at *8 ("Moreover, the substance of the Categorical Privilege Log is deficient. Specifically, although the log touches upon legal matters by listing subject matter of documents as '[d]rafts of legal papers' and 'scheduling and preparation of deposition,' there are also vague references to 'notes,' 'memoranda,' and 'correspondence and other communications.'"); Meade v. Gen. Motors, LLC, 250 F. Supp. 3d 1387, 1394 (N.D. Ga. 2017) ("Defendant generally characterizes the documents as fitting into the following five categories: (1) 'attorney-client communication regarding employer-related obligations and employee requirements under certain federal laws, including the ADA and FMLA;' (2) 'attorney-client communication regarding employment history of certain employees and employer obligations with respect to same;' (3) 'attorney-client communication regarding employment history of certain employees and internal investigation regarding same;' (4) 'attorney-client communication regarding initiation of attorney engagement and fact-gathering process;' and (5) 'attorney-client communication and memorandum regarding claims analysis.'"); Companion Property and Cas. Ins. Co. v. U.S. Bank Nat'l Assoc., C.A. No. 3:15-cv-01300-JMC, 2016 WL 6539344, at *3 (D.S.C. Nov. 3, 2016) (providing as a "prime example of how Plaintiff's Categorical Privilege Log does not allow a realistic determination of the applicability of a privilege or protection because the 'category holds 646 documents, spans three years, and names no less than 72 different people: 48 "client/employees" at...[Plaintiff]; 11 attorneys from three different law firms and...[Plaintiff] itself; and 14 individuals from seven so-called "qualified third parties."'") (quoting defense's brief); Nationwide Mut. Fire Ins. Co. v. Kelt, Inc., No. 6:14-CV-749-ORL-41, 2015 WL 1470971, at *8 (M.D. Fla. Mar. 31, 2015) (finding use of categorical logging unjustified and the two categories overbroad); Neelon v. Krueger, No. 12-CV-11198-IT, 2015 WL 1037992, at *3 (D. Mass. Mar. 10, 2015) ("Examples of the privilege log's lack of detail include the following: (1) the log identifies the categories of withheld documents in broad strokes, (2) the log only approximates relevant time periods, (3) the log makes no attempt to quantify the number of documents in any subcategory, 4) the log fails to describe the nature or type of communication with specificity, (5) at times, the log fails explain how the privilege would apply to the involved parties, (6) at other times the log fails to specify the claimed privilege with particularity or to specifically identify the communicators involved."); Bellingham v. BancInsure, Inc., No. CV 13-0900 (SRN/JJG), 2014 WL 12600277, at *3 (D. Minn. May 13, 2014) (finding insufficient a log of only "five categories: (1) internal communications at Davenport Evans law firm, (2) internal communications at Lindquist & Vennum law firm, (3)

communications between Davenport Evans and representatives of the Bank, including Kiel Zinter, (4) communications between Lindquist & Vennum and the Bank, including Kiel Zinter, and (5) communications between Davenport Evans and Lindquist & Vennum") (citation omitted); Auto. Club of New York, Inc. v. Port Auth. of New York & New Jersey, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) (addressing in detail the information lacking in a categorical log); McNamee v. Clemens, No. 09 CV 1647 SJ, 2013 WL 6572899, at *3 (E.D.N.Y. Sept. 18, 2013) ("While it may, in some cases, be appropriate to identify purportedly privileged documents by category, 'broad classes of documents' with 'exceedingly general and unhelpful' descriptions will not satisfy defendant's obligations."); Franco-Gonzalez v. Holder, No. 10-cv-2211, 2013 WL 8116823, at *7 (C.D. Cal. May 3, 2013) ("In the present case, even if defendants believed that a document-by-document explanation was unfeasible, most of defendants' privilege logs fail to provide even the most basic information to permit plaintiffs or the Court to evaluate defendants' assertions of privilege. Defendants' privilege logs consist largely of general descriptions and lists of bates numbers associated with the privilege. With respect to the categorical privilege logs, defendants do not provide dates, specific author names, or recipient names. The privilege logs are organized by asserted privilege rather than describing the documents by category."); Fleisher v. Phoenix Life Ins. Co., 11 CV 8405, 2013 WL 42374, at *3 (S.D.N.Y. Jan. 3, 2013); Chevron Corp. v. Salazar, No. 11 CIV. 3718 LAK JCF, 2011 WL 4388326, at *1 (S.D.N.Y. Sept. 20, 2011) ("For example, Category no. 260 in Chevron's 'Non–Communications Privilege Log' refers to the authors of the documents (the 'Category 260 Documents') as 'outside counsel or in-house counsel or Chevron other in-house or common interest counsel or representatives or investigators.' . . . In fact, there is a much more straightforward description for the documents in this category: they are all press releases and news stories related to the Lago Agrio litigation. . . . The defendants could not have guessed this, however, based on Chevron's categorical description of the documents."); Smith v. Texas San Marcos Treatment Ctr., LP, No. 3:09-CV-00141-TMB, 2010 WL 11508319, at *4 (D. Alaska Oct. 4, 2010) (finding a categorical log failing to identify the individuals involved in the withheld materials "plainly insufficient"); Maint. Enterprises, Inc. v. Dyno Nobel, Inc., No. 08-CV-170-B, 2009 WL 10670683, at *7 (D. Wyo. Nov. 13, 2009) ("After careful review of defendant's privilege log and the record, the Court finds the log to be inadequate. Defendant's privilege log utilizes categories listing persons and then identifies various persons within those categories as 'Esq.,' but the log fails to mention the individual's title, position, and/or specific job-related duties. Moreover, the log completely fails to clarify the relationship of the author(s) to any of the recipients."); Lee v. State Farm Mut. Auto. Ins. Co., 249 F.R.D. 662, 684 (D. Colo. 2008) ("While these categories purport to comply with the requirements of the privilege log rule, the Special Master concludes that in numerous instances, State Farm has failed to provide information sufficient to satisfy these requirements. Examples of this failure are State Farm's blanket assertion of privilege in the billing records and numerous facsimile cover sheets."); United States v. Health Care Mgmt. Partners, Ltd., No. 04-CV-02340-REB-BNB, 2006 WL 6654875, at *5 (D. Colo. Aug. 17, 2006) (finding insufficient three categories stated as "(1) Reports of Interviews; (2) Reports of Investigative Activities; and (3) Notes and Reports of Communications"); Jones v. Boeing Co.,

were rarely appeals: in only one case did an appellate panel weigh in.[219] One district court called the categorical descriptions before it "vague and repetitive" and confessed that it could "discern no rhyme or reason behind its chosen groupings."[220] Another, constrained by the S.D.N.Y. local rules' presumption of categorical logs' propriety, clarified nonetheless that not all factual postures would be amenable to the expediency.[221] Indeed, some disapproving courts have

163 F.R.D. 15, 17 (D. Kan. 1995) ("The information provided does not begin to establish any of the elements of either privilege. For example, the presence of so many people, including non-parties, raises a legitimate issue as to whether the communications, and the notes of those communications, are confidential. How do these notes represent a 'communication' between the plaintiff and her attorney? What is the basis for showing that they were prepared in 'anticipation of litigation?' In addition, there is a serious question whether plaintiff had even retained counsel when the meetings took place.").

[219] Rowe v. Liberty Mut. Grp., Inc., 639 F. App'x 654, 657 (1st Cir. 2016) ("While the list likely sufficed as a privilege log to accompany a document production, see FED. R. CIV. P. 26(b)(5), neither the list nor the motion provided the district court with any feasible means of understanding why each document is privileged. . . . While categorical treatment of voluminous documents can sometimes suffice, (e.g., 'emails from general counsel to senior manager limited to subject of X and retained in confidence as confirmed in affidavit of Y'), here the district court did not abuse its discretion in finding a failure to prove that the documents were privileged.").

[220] *In re* Aenergy, S.A., 451 F. Supp. 3d 319, 326 (S.D.N.Y. 2020) ("Although GE's 'Category Descriptions' purport to state the subject matter to which the documents relate, the vast majority state only, generically, that the documents are confidential internal documents between GE employees and in-house counsel 'seeking or conveying legal advice' about the "on-sale contracts,' the 'Credit Facility Agreement,' or 'the AE-GE contracts.' According to GE's cited guidance on categorical privilege logs—as well as common sense—a shared attribute true of all documents in a category should bind the category together, but the Court can discern no method or reason behind GE's decision to carve out the categories it did. As a result, GE's log does little to communicate the potential basis for its privilege assessments.").

[221] *See* Auto. Club of New York, Inc. v. Port Auth. of New York & New Jersey, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) ("Finally, an assessment of a categorical privilege log should also include a determination of whether a categorical log is appropriate in the particular case before the court. Even though Local Civil Rule 26.2 arguably permits categorical logs in all cases, the rule should be read in light of its purpose, which is to reduce the burden of individually identifying a large volume of documents."); *see also In re* Actos Antitrust Litig., 340 F.R.D. 549, 553 (S.D.N.Y. 2022) ("Accordingly, categorical privilege logs are appropriately used in this Court. . . . Plaintiffs' proposal of permitting categorical logging of emails only where all emails 'involved the same participants and subject matter' is inconsistent with the foregoing principles, since there is no requirement that all participants be identical for categorical logging to be appropriate. Takeda's proposal of only logging the

straightforwardly applied the *Thrasher* test but found it unsatisfied,[222] which does not evince hostility to categorical logs *per se* so much as to sloppy proponents of privilege.[223]

As for those sloppy categorical logs, forbearing courts might well order only rectification in the form of a sharpening of the categorical descriptors rather than submission of a document-by-document log (or waiver).[224] A court might also conclude it cannot

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threaded emails also is inconsistent with the foregoing principles, since it is unlikely that the log would contain sufficient information for Plaintiffs to assess the claim of privilege for each email in the thread. However, now that the Court now is requiring the production of all responsive ESI, the parties are directed to meet and confer with respect to the privilege log protocol.") (citations omitted).

[222] *E.g.,* Norton v. Town of Islip, No. CV043079, 2017 WL 943927, at *8 (E.D.N.Y. Mar. 9, 2017) ("Defendants reliance on S.E.C. v. Thrasher is unpersuasive."); *Companion Prop.*, 2016 WL 6539344, at *2-3 (quoting *Thrasher* test but finding that "Plaintiff's log does not allow Defendant or the court to test the applicability of the attorney-client privilege and/or work product protection as to each document" and therefore "conclud[ing] that Plaintiff's Categorical Privilege Log is inadequate"); First Horizon Nat'l Corp. v. Hous. Cas. Co., No. 2:15-cv-2235-SHL-dkv, 2016 WL 5867268, at *6 (W.D. Tenn. Oct. 5, 2016) ("Further, the Defendants have shown that a document-by-document log would be of material benefit to them in assessing whether the privilege claim is well grounded. The documents listed in the nine categories may not involve lawyers or may involve lawyers but contain non-privileged communications of fact. Or, the documents listed in the nine categories may fall within an exception to the asserted privilege. . . . Without a document-by-document log, the Defendants cannot analyze which documents in First Tennessee's privilege log might fall within this or other exceptions.") (citations omitted).

[223] *See In re* Aenergy, S.A., 451 F. Supp. 3d 319, 325 (S.D.N.Y. 2020) ("There is little doubt that '[b]oth the Federal and Local Rules permit categorical privilege logs.'") (quoting Norton v. Town of Islip, No. 04-CV-3079, 2017 WL 943927, at *8 (E.D.N.Y. Mar. 9, 2017)); Nationwide Mut. Fire Ins. Co. v. Kelt, Inc., No. 6:14-CV-749-ORL-41, 2015 WL 1470971, at *8 (M.D. Fla. Mar. 31, 2015) ("While document-by-document privilege logging is the norm, many courts, including this one, have endorsed the use of 'categorical privilege logging' in appropriate circumstances."). In fairness, the *First Horizon* court was rather hostile, implying that he took umbrage with categorical logs as a methodology rather than merely found fault in the specimen before him: "Even if the court were to allow a categorical logging of these documents, the information provided by First Tennessee would still be too minimal and vague and would prevent the court from evaluating the privilege claimed." *First Horizon Nat'l Corp.*, 2016 WL 5867268, at *6.

[224] *E.g.,* U.S. *ex rel.* Keeler v. Eisai, Inc., No. 09-22302-CV, 2012 WL 12842995, at *3 (S.D. Fla. Sept. 27, 2012); Sprint Commc'ns Co. v. Big River Tel. Co., No. 08-2046-JWL, 2009 WL 2878446, at *2-3 (D. Kan. Sept. 2, 2009) ("Sprint argues that its broad categorical description of the withheld documents is sufficient, given the burden that would accompany the individual entry of documents. This case is distinguishable from *In re Motor Fuel*, however. In *In re Motor Fuel*, defendants

derive sufficient information from the categorical entries and take up the task of in camera review of each document.[225] More often, however, when faced with a "woefully inadequate" categorical log, courts will revert to the default of demanding a document-by-document listing.[226] Even waiver can ensue before disgruntled judges,[227] especially where previously allowances for rectification or

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asserted a privilege over 'tens of thousands of documents' exchanged between counsel. Defense counsel submitted detailed declarations about the burdens that would accompany reviewing and logging such documents. In contrast, Sprint is withholding only about one thousand documents related to the Vonage litigation. . . . The court therefore orders Sprint to further supplement its privilege log with respect to the documents related to the Vonage litigation by September 18, 2009. While the court will not require an individual entry for every single document, Sprint must make more detailed and specific categorical entries that will permit Big River to assess Sprint's claims of privilege.") (citations omitted).

[225] *E.g.,* Begley v. Windsor Surry Co., No. 17-CV-317-LM, 2019 WL 10094424, at *3 (D.N.H. Dec. 23, 2019) ("Windsor argues that each of the log's entries was prepared for the purpose of providing legal services and that a categorical approach was necessary to avoid voluminous entries. . . . However, an analysis of the allegedly defective privilege log would be fruitless without access to the documents themselves. The court cannot make a finding on waiver without reviewing the communications.") (citations omitted).

[226] Jones v. Boeing Co., 163 F.R.D. 15, 17 (D. Kan. 1995) ("woefully adequate"); *id.* at 18 ("Plaintiff complains that the rule does not require a log for each document, noting the burden of such a requirement. However, the clear language of the rule does require a showing of privilege as to each document. In past cases, when voluminous documents are in issue, the court has permitted the documents to be described by categories; i.e., a party could indicate a number of letters from counsel to the client and the beginning and ending dates of those letters without listing each individual letter, and then could indicate why they are privileged. However, the bottom line is that the party claiming the privilege must establish the existence of that privilege."); *see, e.g.*, Norton v. Town of Islip, No. CV043079, 2017 WL 943927, at *9 (E.D.N.Y. Mar. 9, 2017); Chevron Corp. v. Salazar, No. 11 CIV. 3718 LAK JCF, 2011 WL 4388326, at *2 (S.D.N.Y. Sept. 20, 2011) ("The manner in which Chevron has implemented its categorical privilege logs has thus impeded the defendants' ability to challenge Chevron's assertion of privilege and discovery immunity. Chevron must therefore produce an itemized privilege log for those documents it seeks to withhold.").

[227] *E.g.,* McNamee v. Clemens, No. 09 CV 1647 SJ, 2013 WL 6572899, at *3 (E.D.N.Y. Sept. 18, 2013) ("Accordingly, the Court finds that Clemens has waived his claims of privilege and work product protection by virtue of his failure to timely submit an adequate privilege log."), *clarified on denial of reconsideration*, No. 09 CV 1647 (SJ), 2014 WL 12775660 (E.D.N.Y. Jan. 30, 2014); *In re* Rivastigmine Patent Litigation, 237 F.R.D. 69, 87 (S.D.N.Y. 2006) (quoted *supra* note 217).

itemization have failed.[228] Waiver may be tempered, however, by allowing claims for "presumptively privileged" documents to stand despite forfeiture of purportedly privileged documents in more questionable categories.[229]

One of the most thoughtful opinions considered at length how "egregiously uninformative" the objectionable log was and whether "obvious gamesmanship" or boilerplate attempts at "'conclusory or *ipse dixit* assertions'" were at play before deciding whether an order of rectification, itemization, or waiver was the appropriate response.[230] In opting for itemization, that court stressed that the typical response to a faulty privilege log must be calculated to act as a reparative remedy, not as a punitive sanction on the errant party.[231] This truism is a vital reminder that all of the hoopla about privilege logs is just a means to an end rather than some trial by combat assaying lawyers' intestinal fortitude for no-holds-barred discovery.

V. THE CATEGORICAL IMPERATIVE

> Men really do need sea-monsters in their personal oceans.[232]

After even a brief survey of the judiciary's reception of categorical privilege logs over the last three decades, it should be clear that there

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[228] *E.g.*, Meade v. Gen. Motors, LLC, 250 F. Supp. 3d 1387, 1396 (N.D. Ga. 2017) ("Defendant's conduct in this case in asserting an overly broad claim of attorney-client privilege and failing to produce a proper privilege log after twice being ordered by the Court to do so was improper, obstructive, and undertaken in bad faith in order to avoid its discovery obligations. Accordingly, the Court finds that Defendant has waived its attorney-client privilege as to all documents other than those specifically identified."); Williams v. Taser Int'l, Inc., 274 F.R.D. 694, 696-98 (N.D. Ga. 2008).

[229] *E.g.*, Neelon v. Krueger, No. 12-CV-11198-IT, 2015 WL 1037992, at *4 (D. Mass. Mar. 10, 2015) ("Plaintiff provided inadequate detail regarding the putatively privileged documents and . . . waived his privileges and protections as to such documents (except as to presumptively privileged documents). . . . The magistrate judge found that 'communications between Plaintiff and his counsel in the instant litigation' were 'presumptively privileged' and need not be disclosed.").

[230] *In re* Aenergy, S.A., 451 F. Supp. 3d 319, 327-28 (S.D.N.Y. 2020) (quoting Golden Trade. S.r.L. v. Lee Apparel Co., 90-CV-6291, 1992 WL 367070, at *5 (S.D.N.Y. Nov. 20, 1992)).

[231] *Id.* at 326 ("This distinction is not academic. The standard governing when to waive a party's claims to privilege as a sanction differs from the standard determining when a party has failed to meet its burden to show privilege.").

[232] STEINBECK, *supra* note 162, at 31 (chapter 4).

is a strong appetite for innovation, even if there is also a powerful countercurrent of wary skepticism. Litigants in virtually every case agitate for concessions as to the burdens they must assume to defend their precious privilege, even when they cannot articulate why their ordinary duties in discovery are unwarranted.[233] Quarrels inevitably arise as the party seeking discovery grows suspicious that its counterpart is withholding documents not because they are privileged but because they would damage its case.[234] As many courts have noted, these privilege disputes often come to overshadow if not overwhelm the actual merits themselves in time, cost, and fervor:[235]

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[233] *See, e.g.*, cases cited *supra* note 200 and accompanying text.

[234] *See* Cui, *supra* note 18, at 634 ("At the core of the disputes surrounding privileged documents is a simple trust problem: the privilege-claiming party holds secret documents that it is unwilling to show to the requesting party, who suspects the veracity of the privilege-claim."); Austin Zuege, *Comments on Privilege Log Practice*, July 16, 2021, at 1, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0013 (quoted *supra* note 134); *compare* Huawei Techs. Co. Ltd. v. T-Mobile US, Inc., No. 216CV00052JRGRSP, 2017 WL 7052463, at *2 (E.D. Tex. Sept. 20, 2017) ("Having said that, the Court is concerned that a party might refer to a privilege log primarily to put before the jury the fact that some documents have been withheld from discovery. . . . A privilege log carries with it the potential for the jury to conclude that a document has been withheld because it includes damaging information, and that is the inference the Court must prevent."), *with* U.S. *ex rel.* Parikh v. Premera Blue Cross, No. C01-0476MJP, 2006 WL 6654604, at *1 (W.D. Wash. Oct. 31, 2006) ("A party may not selectively disclose privileged communications that it considers helpful while claiming privilege on damaging communications relating to the same subject."), *and* Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("[A] party may not insist on the protection of the attorney-client privilege for damaging communications while disclosing other selected communications because they are self-serving. Voluntary disclosure of part of a privileged communication is a waiver as to the remainder of the privileged communications about the same subject.").

[235] *In re* Currency Conversion Antitrust Litig., No. 05 CIV. 7116 WHP THK, 2010 WL 4365548, at *6 n.1 (S.D.N.Y. Nov. 3, 2010) ("Although not relevant to the analysis, for those redactions where the Court views the distinction between legal and business advice to be a close call, the material redacted is fairly innocuous and, in the Court's view, is not material to the claims and defenses of the parties. As is often the case, the vehemence of the dispute about privilege far overshadows the importance of the material in issue."); *see* Coleman v. Newsom, 424 F. Supp. 3d 925, 932–33 (E.D. Cal. 2019) ("The court's general impression from its review of these documents is that defendants have overreached in a number of their privilege claims, although some claims of privilege would be sustained if not waived by reason of defense positions taken previously in these proceedings. Nonetheless, the court has determined that to venture further into the thicket of these privilege claims would waste valuable court time and resources and distract from the important,

"Even in a very large case is the tail of privilege controlling the dog of the case itself?"[236] It would seem that the yen for modernization is well-founded, and new solutions are sorely needed. The widely felt imperative for categorical logs may not be the long-awaited panacea to all woes, but the decadal striving for their efficiencies has its basis in desperation rather than hope.

A. The Wages of Antagonism and Acrimony

At base, much of the rancor derives from an alarmingly antagonistic view amongst parties in privilege matters of "rules for thee, not for me."[237] Litigants defend their own prerogative for privilege even as they assail their opponents' recourse to the same principles they would wish for themselves, as one judge called out in *Chevron Corp. v. Salazar*:

> Distressingly, Chevron has taken a view of its own discovery responsibilities sharply different from the obligations it seeks to impose on the defendants and on non-parties. In a motion to compel production of documents in the possession of defendants' counsel, Chevron was highly critical of privilege log descriptions that turn out to have been far more detailed than Chevron's own. Furthermore, Chevron withheld the public relations documents included in its privilege logs notwithstanding the fact that I had just issued an order indicating that similar documents could not be withheld by defendants' attorneys. And, although I

indeed imperative, tasks that remain to achieve delivery of constitutionally adequate mental health care to the plaintiff class. The court therefore has not prolonged these proceedings by issuing further orders defendants are likely to appeal.").

[236] EPSTEIN, *supra* note 14, at 1523 ("The parties spent nine months providing five separate versions of privilege logs and objections thereto and trying to come to agreement. . . . The parties then quarreled over whether the purported inadequacy of the privilege logs constituted a forfeiture. The special master ruled that it did not since there was no indication of bad faith in the process on the part of the privilege proponent, while the privilege opponent unduly complicated matters and its objections were not confirmed by *in camera* review.").

[237] *Cf.* Perez v. Roto Rooter Servs., Co., No. SACV2201508CJCADSX, 2022 WL 17420034, at *4 (C.D. Cal. Nov. 15, 2022) ("But contract interpretation does not operate under interpretive rules for thee but not for me.").

> have focused here on the Category 260 Documents, some documents in other categories appear not to have been properly withheld because they are neither privileged nor subject to the work product doctrine.[238]

Despairing of the parties' goodwill, the judge ended up ordering extensive duties of disclosure, whilst lamenting that both were suffering greater burdens because of their unwillingness to compromise or reciprocate.[239] This result is far from unusual,[240] as judges are called upon to mediate the endless clashes over the format of logs.[241] The adversarial system employed in American courts may expect the parties to zealously challenge their opponents, but it is predicated upon a measure of civility and good faith that privilege disputes all too often seem to leave in the rearview mirror.[242] When

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[238] Chevron Corp. v. Salazar, No. 11 CIV. 3718 LAK JCF, 2011 WL 4388326, at *1 (S.D.N.Y. Sept. 20, 2011) (citations omitted).

[239] *Id.* at *2 n.1 ("I note that, had counsel been more cooperative and less contentious with one another, they might have reached an accommodation less onerous for all concerned.").

[240] *E.g.*, *In re* Pabst Licensing GmbH Pat. Litig., No. CIV. A. 99-MD-1298, 2001 WL 797315, at *22 (E.D. La. July 12, 2001) ("While the court is free to relieve the parties of what can be a burdensome and time-consuming task required by Rule 26(b)(5), it has provided the parties with ample opportunity to reach agreement on a stipulation that would lighten this load. Like almost everything else related to discovery in this case, however, the parties have failed to do so. The court is unable to concoct a means of lessening this burden on the parties when their own counsel, more knowledgeable than the court of the burdens and practicalities involved, have been unable to do so.").

[241] EPSTEIN, *supra* note 14, at 1524 ("It is not in the least unusual to see corrected privilege logs filed . . . , requests for substantial *in camera* review, redesignation and supplementation judicially ordered following such review. It appears that increasingly the litigation is not about the substance of the privilege but the adequacy of the forms by which it is raised.").

[242] *See* Rozell v. Ross-Holst, No. 05 CIV. 2936(JGK)JCF, 2006 WL 163143, at *4 (S.D.N.Y. Jan. 20, 2006) ("Discovery in our adversarial system is based on a good faith response to demands for production by an attorney constrained by the Federal Rules and by ethical obligations."); Compass Int'l Ass'n Ltd. v. Agility Logistics Sdn Bhd, No. 09 CIV. 6403 (NRB), 2009 WL 3097209, at *3 (S.D.N.Y. Sept. 25, 2009) ("The Court does not take such misrepresentations lightly. The integrity of our adversarial system of justice relies upon the diligence, honesty, and good faith of the parties' attorneys."); *see also In re* Jarvis Adventure Bldg., LLC, No. 12-31005, 2012 WL 1883920, at *7 (Bankr. S.D. Tex. May 22, 2012) ("This is not a nuanced ethical issue. A lawyer's obligation to comply with court orders is a precept that it is necessary for the adversarial system to function properly. Lawyers, acting

lawyers stray from the consensual Marquess of Queensberry rules of fair play—which are withal not the same as the Federal Rules—the results are seldom satisfying to anyone involved.[243]

Principled lawyers who would never dream of suborning perjury or spoliating evidence may see little harm in a measure of embroidery, obfuscation, or even subterfuge buried in the minutiae of sprawling but seemingly nugatory discovery disputes over privilege and logs.[244] In one outrageous case, the offending party had

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in good faith on behalf of adverse clients, come before an independent judiciary for a decision. The decisions must be followed.").

[243] *See* Griffith v. Brannick, No. 117CV00194TWPMJD, 2019 WL 1006618, at *3 n.2 (S.D. Ind. Jan. 17, 2019) ("While the Court acknowledges the creative and entertaining nature of the Defendants' hypothetical recounting Muhammad Ali and George Foreman's classic boxing match, the Rumble in the Jungle, it is not persuaded that the Marquess of Queensberry Rules, which continue to govern the sport, sportsmanship, and fair play, are comparable to the Federal Rules of Civil Procedure. Discovery in a lawsuit is not properly analogized to strategic decisions in a boxing match."); Pa. Higher Educ. Assistance Agency v. Mississippi Higher Educ. Assistance Corp., No. 1:11-CV-1320, 2011 WL 13217192, at *10 n.3 (M.D. Pa. Dec. 6, 2011) ("At the risk of being gratuitous, Defendants' experience in the case at bar may constitute for them a teachable moment. Having raised a claim in excess of one million dollars, we do not believe that they should have been surprised by Plaintiff's hawkish response, expressed in the form of the 'first strike' complaint filed in this Court. Unfortunately for Defendants, there are no Marquess of Queensberry rules governing civil litigation in federal court.").

[244] *E.g.*, Kristensen v. Credit Payment Servs., Inc., No. 2:12-CV-00528-APG, 2015 WL 327702, at *2 (D. Nev. Jan. 23, 2015) ("The general objections were followed by additional objections to the specific requests. The court found that CPS's general and additional objections were boilerplate objections which were designed to 'evade, obfuscate, and obstruct discovery.' CPS had objected on attorney-client privilege grounds, but had not produced a privileged document log. CPS's boilerplate objections also made it impossible to determine whether CPS had conducted a diligent search for all responsive documents and produced them, notwithstanding its objections, or whether it had withheld responsive documents, and if so, on what grounds."); McNamee v. Clemens, No. 09 CV 1647 (SJ), 2014 WL 12775660, at *6 (E.D.N.Y. Jan. 30, 2014) ("Having carefully reviewed defendant's submission in light of all the prior papers submitted in connection with this dispute, the Court finds that defendant has failed to demonstrate that the Court misapplied or overlooked controlling case law when it found that Clemens had failed to provide an adequate privilege log. Defendant's arguments are not only unpersuasive but obfuscate and confuse the issues actually raised by defendant's conduct here.") (citation omitted); Riccitelli v. Water Pik Techs., Inc., 203 F.R.D. 62, 65 n.3 (D.N.H. 2001) ("Since the defendants removed this case to this court, they have engaged in delaying tactics. Defendants and their counsel have fought straightforward discovery and, despite knowledge, have released discovery responses piecemeal. In addition, they have

interposed no log or claim of privilege but simply did not produce the supposedly privileged documents; upon inquiry about the missing Bates numbers, it initially contended categorically (and falsely) that they were mere duplicates of produced material; and it outright failed to respond to motion practice or provide any explanation for its dissembling.[245] Waiver ensued.[246] An article in 2019 warned of the growing abuse of categorical privilege logs.[247] Because of their more summary nature, "categorical privilege logs that contain improper category designations, descriptions, and dates allow the proponent to obscure the nature of the documents being withheld."[248] The CLEF letter to the Advisory Committee in 2021 feared the same, pointing to existing abuses in categorical logs as evidence that "they increase

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filed overwhelming *in camera* materials and have sought to obfuscate their conduct. They required three attempts to produce meaningful privilege logs and complete answers to interrogatories."); *In re* Asousa P'ship, No. 01-12295DWS, 2005 WL 3299823, at *4 (Bankr. E.D. Pa. Nov. 17, 2005) ("I cannot determine that these exchanges were for the purpose of Smithfield obtaining legal advice from its outside counsel, Hunton & Williams LLP ('H & W'). The privilege log's ambiguous reference to future litigation is insufficient to meet the reasonable anticipation standard required for work product protection, nor is there any reference to litigation in the e-mails themselves. Moreover, the subject matter of the e-mails is obtaining insurance from Marsh based upon an appraisal. The only appraisal during this time period appears to be that which was performed by Valuation Research. As discussed below, Smithfield engaged in a blatant subterfuge, *i.e.*, using H & W as a mere conduit, in order to make its relationship with Valuation Research appear privileged. As such, I am dubious of the privilege log's assertion, unsupported by anything else, that Marsh was an agent of H & W.").

[245] Ritacca v. Abbott Lab'ys, 203 F.R.D. 332, 335-36 (N.D. Ill. 2001) ("In this case, Abbott's inexcusable and unjustified delay in asserting the attorney-client privilege warrants waiver. A few glaring facts highlight the propriety of this sanction.").

[246] *Id.* at 336.

[247] Peggy J. Wedgworth & John D. Hughes, *Challenging 'Attorneys' Eyes Only' and Improper Categorical Privilege Logs*, TRIAL, Dec. 2019, at 37, 39 ("Another area often abused is categorical privilege logs, which allow the producing party to identify certain categories of privileged documents withheld in groups. Supposedly in the name of efficiency, these logs provide summary information that the documents being withheld contain the solicitation or provision of legal advice protected under attorney-client privilege or were prepared in anticipation of litigation under the work product doctrine.").

[248] *Id.* (initial majuscule reduced to minuscule) ("For example, failing to identify the authors and recipients of any correspondence separately may make it impossible to make a privilege determination, particularly when a category of documents is described as 'attorney communications to obtain legal advice,' in which case at least one attorney should be identified as the author or recipient.").

rather than lessen disputes and increase reliance, and thus burden, on the courts for resolution . . . because the logs make it impossible to challenge, at a document level, whether the privilege claim is valid."[249]

It may be that the perceived pettiness and picayune stakes conduce the oversized acrimony of privilege disputes. Scoring points in such skirmishes may serve as outlet for lawyers inculcated in the adversarial mindset, providing proxy victories unavailable or far-off in the mainstream of the litigation at hand. Indeed, lawyers may feel obliged to prophylactically challenge privilege logs by rote lest their opponent put one over on them undetected.[250] By these lights, to wage war over the log *is* the point rather than the underlying substance of the privilege: "What was once intended to facilitate adjudication has taken on a life of its own."[251] The conjuration of a villain to vanquish becomes its own motive, as Steinbeck's *Log from the Sea of Cortez* ruminated meditatively: "men really do need sea-monsters in their personal oceans."[252]

B. An Ominous Patina on the Golden Rule

Broadly, any meaningful advances in the practice of privilege must be predicated on the mutuality of a two-way street, and in that regard it is wise to recall the categorical imperative not of Facciola and

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[249] Dana Smith, Letter, Aug. 2, 2021, at 15-16, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0104.

[250] *See* Brent Marshall & Robert Draba, *Saving Your Eyes and Sparing Your Memory: Developments in Privilege Log Review and Implications for Log Preparation*, FED. LAW., Aug. 2015, at 74 ("Of course, at the outset, one might question what difference it makes—whether reviewing privilege logs is worth doing in the first place. Several factors indicate that the answer is yes. First, documents on the privilege log are presumptively relevant and potentially significant to their subject matter. By placing a document on the log, a party implicitly represents that it is responsive to the request, and such communications are typically among persons with significant roles for the companies involved. Second, experience indicates that many privilege claims are not justified.").

[251] EPSTEIN, *supra* note 14, at 1523-24 ("Indeed at times it seems that litigation over the adequacy of privilege logs and the consequences of inadequate ones have become the staple of adjudication. It appears as if the parties are quarreling more over the form of the privilege log than they are over the substance of the privilege.").

[252] STEINBECK, *supra* note 162, at 31.

Redgrave but of Immanuel Kant.[253] Kant's foundational axiom is often paraphrased by the precept of the Evangelist Matthew, "therefore all things whatsoever ye would that men should do to you, do ye even so to them,"[254] known yet more succinctly as the Golden Rule, "do unto others as you would have them do unto you."[255] The Discovery Subcommittee's recommendation of directing the parties to achieve agreement as to what is expected of both coequally in privilege assertions would do much to ensure the ground rules for all are equitable and understood.[256] As another author observed, an adequate log is only the concomitant of an adequate privilege review; they are "two sides of the same coin."[257] If the basis for privilege cannot be easily enunciated to a counterparty, then it may well not exist.[258]

Nevertheless, another of the Discovery Subcommittee's observations confounds these better angels of human nature: stark

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[253] IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF ETHICS 37-42 (Thomas Kingsmill Abbott trans., Longman's, Green & Co., Dublin 1925); *see* David Gray, *The Fourth Amendment Categorical Imperative*, 116 MLR ONLINE 14, 31-32 (2017-2018) ("The categorical imperative asks whether we can allow everyone discretion to act on a particular maxim without giving rise to a contradiction. If we want to know whether people should be free to steal then we ask what would happen if everyone acted on the maxim 'I take that which is not mine.' Of course, if everyone acted on this maxim, then the whole concept of mine and thine upon which the maxim of theft is predicated would cease to exist. It follows that we cannot allow everyone unfettered discretion to take that which is not theirs. Whether and when one may take the property of another must instead be regulated by the moral law and, consequently, juridical law.").

[254] *Matthew* 7:12 (King James).

[255] Foster v. Delo, 11 F.3d 1451, 1458 (8th Cir. 1993) ("The Christians have the Golden Rule. 'Do unto others what you would have them do unto you.'"), *on reh'g en banc*, 39 F.3d 873 (8th Cir. 1994).

[256] *See* October 2022 Rules Committee Agenda, *supra* note 157, at 141-46.

[257] Marshall & Draba, *supra* note 250, at 80 ("Moreover, these issues do not affect the receiving party alone. The analysis on both sides is impeded. Specifically, if the information produced in a privilege log is not adequate for the receiving party to analyze, then it seems doubtful that the producing party can analyze it either. Because withholding for privilege is an exception to the general rule of production, to withhold an entire document or a portion thereof through a redaction, a producing party must determine that a privilege exists and has not been waived. Yet the producing party's determination depends on the same information that the receiving party needs to examine the asserted privilege claims: These respective efforts are two sides of the same coin. If the information is insufficient for analysis, then to what extent does the producing party have good-faith grounds for asserting a claim of privilege?").

[258] *Id.*

discrepancies in the interests and views of plaintiffs' and defendants' counsel as to privilege logs.[259] "When both sides have comparable interests in maintaining the claim of privilege," comments Epstein, "the burden of creating such indexes may not seem too onerous to either side"—but "when only one side is making a claim of privilege as to many documents," the burden on the disproportionately affected party may be viewed (by that party) as more "considerable."[260] Laden with the burden of proof, it is usually plaintiffs who are keenest on discovery, and thus defendants who bear the predominant onus of production.[261] This disparity explains the Committee's empirical observations, and disincentivizes rational parties from agreement as to the proper scope and detail required in their mutual privilege logs when the advantages and disadvantages of any common protocol accrue so unequally. Good faith makes for a mismatched rival to rational self-interest.

When the parties cannot agree on a framework, their quarrel is thrown to a judge to decide,[262] but few want that extra duty thrust upon them, and some will demur to intercede.[263] Left to their own devices,

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[259] *See supra* text accompanying note 134.

[260] EPSTEIN, *supra* note 14, at 1544.

[261] *See* Tourgeman v. Nelson & Kennard, 900 F.3d 1105, 1112–13 (9th Cir. 2018) ("But the [Supreme] Court has also cautioned that . . . '[v]ery often one must plead and prove matters as to which his adversary has superior access to the proof.' Access to evidence, while perhaps a consideration, is far from determinative. We also note that it is not uniquely difficult for consumer plaintiffs to acquire the debt collector's financial information. Here, Tourgeman had every opportunity to acquire evidence of Nelson & Kennard's net worth. . . . Tourgeman also argues that placing the burden on the plaintiff would increase litigation costs, make discovery battles inevitable, and generally discourage class actions under the FDCPA. . . . We think the statute is clear, and our inquiry ends there.") (citations omitted) (quoting Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 60 (2005)); Cool Runnings Int'l, Inc. v. Gonzalez, No. 1:21-CV-974-DAD-HBK, 2021 WL 3418725, at *2 (E.D. Cal. Aug. 5, 2021) ("Accordingly, the lack of discovery in this action is more prejudicial to Plaintiff than Defendant since Plaintiff bears the burden of proof on its motion for a preliminary injunction. Further, the fact that a preliminary injunction is filed does not *ipso facto* give rise to expedited discovery.").

[262] *See, e.g.*, Rozell v. Ross-Holst, No. 05 CIV. 2936(JGK)JCF, 2006 WL 163143, at *4 (S.D.N.Y. Jan. 20, 2006) ("Where the parties disagree as to the contours of relevance in connection with particular discovery demands, they present their dispute to the court, as the parties have done here.").

[263] *E.g.*, Patriot Rail Corp. v. Sierra R.R. Co., No. 2:09-CV-0009 TLN AC, 2016 WL 1213015, at *2 (E.D. Cal. Mar. 29, 2016) ("Thus, if the production of a document-by-document privilege log would be 'unduly burdensome,' Pacific can comply with the requirements of Rule 25(b)(5)(A) by crafting a privilege log in some other

parties may often then follow a path of least resistance and supply categorical privilege logs or sparse assertions in some other economizing fashion, even at the risk of such logs' being found deficient absent a court order authorizing the plan.[264] Overbroad assertions may be thought prudent to cover the waterfront in a categorical log, catalyzing the suspicions of the court or receiving party.[265] This Article has already sampled the lengthy litany of judges confronted with such inadequacies, and the accompanying waste of time, talent, and treasure.[266] Facciola and Redgrave suggested that the

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format. The undersigned will not set forth for Pacific exactly what its privilege log must look like. That is something for Pacific to work out, so long as the privilege log—whatever its format—permits this court, and interested parties, to assess its claim of privilege."); *In re* Pabst Licensing GmbH Pat. Litig., No. CIV. A. 99-MD-1298, 2001 WL 797315, at *22 (E.D. La. July 12, 2001) (quoted *supra* note 240); *see* Facciola & Redgrave, *supra* note 18, at 34 ("With respect to the potential of a more detailed log, the court is required to either demand a revised log without setting forth particular guidance (risking the submission of yet another inadequate log) or invest a significant amount of time reviewing deficiencies and suggesting specific remedies to be made by the logging party.").

[264] *See* Twitter, Inc. v. Musk, No. 2022-0613-KSJM, 2022 WL 4459574, at *1 (Del. Ch. Sept. 26, 2022) (McCormick, Ch.) ("It bears noting that, as a general matter, where the parties have not agreed in advance to prepare category logs as an alternative to tradit[i]onal logs, a party relying on a category log risks waiver of privilege. But where the court has ordered it, that risk is eliminated.") (citations omitted).

[265] *See, e.g.*, *In re* Aenergy, S.A., 451 F. Supp. 3d 319, 326 (S.D.N.Y. 2020) ("The Court is thus concerned that overbroad or otherwise unwarranted privilege determinations are hiding behind GE's groupings. The Court is confident that GE could have included more granular and informative categories, assuming that there was a legitimate basis to withhold the documents."); Amy E. Keller, Letter re: Invitation for Comment Upon Contemplated Changes to Rule 26 of the Federal Rules of Civil Procedure and Discovery Disputes Arising Therefrom, Aug. 1, 2021, at 5, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0087 ("We agreed to negotiate such a protocol with the defendants in that case despite the fact that categorical privilege logs can be prone to gamesmanship and overdesignation, a fact recognized by leading voices in the bar regarding privilege logs. Unfortunately, defendants' response was consistent with that experienced by other firms with whom we have worked extensively, in that they refused to: (1) agree what categories would be used; (2) include an attestation by an attorney to provide reasonable context as to the role of the person making the privilege assertion, the applicability of the privilege, and how the review was conducted; (3) include specific data points for categorical logs; and (4) provide distinct data points for document-by-document logs. Instead, defendants continued to propose category descriptions that were facially overbroad . . . .") (citations omitted).

[266] *See* cases cited *supra* note 218.

parties seek stipulated orders of the court to install the machinery of a better framework for privilege in discovery but presupposed that the parties can or wish to agree on such machinery out of mutual benefit.[267] The escalating difficulties confronting courts about privilege arise not from accommodating parties adhering to a putative "evolving trend of cooperation in discovery,"[268] but rather from those who do not. Indeed, all too many cases narrate luridly that "devolving" may better describe the trajectory of cooperation in contemporary discovery.[269]

C. Taking Disputants Out of the Dispute

In 2019, Yuqing Cui wrote in the *Harvard Journal of Law &*

[267] Facciola & Redgrave, *supra* note 18, at 40; *see also* Oot, *supra* note 8, at 249-50.
[268] Oot, *supra* note 8, at 249 ("In all of the cases stated where a litigant was subject to waiver, had the parties agreed upon a court ordered FRE 502 non-waiver order, the outcome would likely have been different. I have included a brief discussion of the cases where courts have either effectively suggested or entered Rule 502 protective orders to protect against waiver or privilege. These cases also provide evidence of an evolving trend of cooperation in discovery.").
[269] So many courts have lyrically limned their tragicomic toils at managing discovery that one can select only a handful as illustration. *See, e.g.*, Paylor v. Hartford Fire Ins. Co., 748 F.3d 1117, 1127 (11th Cir. 2014) ("Rather than availing itself of the protective tools in the Federal Rules of Civil Procedure, Hartford responded to Paylor's shotgun pleading with a shotgun answer: one-line affirmative defenses, none of which refers to a particular count, and none of which indicates that Hartford was even aware of when the retaliation and interference allegedly occurred. At oral argument, Hartford's counsel acknowledged that the complaint was totally lacking in specifics, but maintained—in essence—that all's well that ends well: after all, the parties were able to sort things out through discovery. Even if that were true—and it isn't, as evidenced by the parties' ongoing bickering over even the most picayune facts in the case—why should parties wait until discovery to identify, with precision, the subject of the litigation? That is exactly backward. Civil pleadings are supposed to mark the boundaries for discovery; discovery is not supposed to substitute for definite pleading. In any case, the parties delivered this mess to the District Court. Instead of demanding a repleader, the District Court tossed the case overboard to a Magistrate Judge for discovery. At that point it was too late: the discovery goat rodeo had begun.") (citations omitted); Athena Cosms., Inc. v. AMN Distrib. Inc., No. 220CV05526SVWSHK, 2021 WL 6882299, at *1 (C.D. Cal. Dec. 21, 2021) ("[T]he parties had been involved in a litany of discovery disputes that had taken up much of this Court's time and Magistrate Judge Kewahamani's time in prior hearings. In some instances, the parties seemed unable to agree about even basic facts regarding what discovery had taken place. Thus, the Court sought to keep the trial from devolving into yet another arguing match over discovery, which would only serve to confuse the jury and distract them from the relevant issues.").

Technology:

> In addition to the sheer amount of work involved, judges are also tasked with striking the delicate balance between imposing high financial costs on the privilege-claiming party by demanding detailed descriptions of the claimed documents in the privilege logs, and risking allowing non-privileged documents to be unfairly withheld. As a result, privilege disputes have become a vexing legal problem. They await better solutions.[270]

Four years later, after all the machinations and intrigues of the Judicial Conference, those vexing privilege disputes are still waiting, and waxing. Although some commentators have predicted optimistically that advances in electronic storage technology may reduce the scope and burden of privilege disputes of their own accord,[271] it seems more plausible that "not only are they large now, privilege logs are likely to stay large"[272]—if not grow larger still. Regardless, it would be foolhardy to simply hope and pray for an unheralded *deus ex machina* to emerge and resolve the whole sorry mess. Given that the root cause of disputes appears to be the incurable disputatiousness of litigants,

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[270] Cui, *supra* note 18, at 634 (citations omitted).

[271] *See* David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1055 (2020) ("Short of substantial changes to current discovery rules, the near- to medium-term is likely to see a reduction in overall discovery costs. As a corollary, the proportionality concerns that have animated much recent litigation reform activity are likely to fade in importance, particularly in cases whose major costs are driven by large-corpus electronic document discovery.").

[272] Marshall & Draba, *supra* note 250, at 75 (initial majuscule reduced to minuscule) ("Underneath is an electronic world in which documents are being created at increasing rates as computers, smartphones, and ubiquitous email turn most everything we do into electronic records. Not that much gets deleted. It is easier for documents to accumulate in this electronic world. Hard disks in the server room are out of sight and out of mind, and adding hard-disk space or other electronic storage is relatively simple and easy compared to finding space for more file cabinets, file rooms, or even file warehouses. Thus, we begin with a larger and still growing base of documents. Add broad document requests characteristic of modern investigations and litigation and long list of hits from broad term searches, and the universe of potentially responsive documents grows larger and larger. The significant risks of disclosing privileged documents and the limited downside to making dubious privilege claims also contributes to longer logs.").

the most promising proposals involve marginalizing the disputants themselves.

Not content to "await" any longer, Cui herself proposed an ingenious answer to the Gordian knot: "Zero-knowledge proof is a cryptographic tool that makes it possible for a prover (here, the party attempting to prove privilege) to convince a verifier of the prover's knowledge of an assertion without revealing any information other than the validity of the prover's assertion."[273] Cui's illustrations of such proofs to, for example, confirm that a sudoku puzzle has been solved without revealing the solution are, as she says, "fascinating,"[274] but the marvel falters when she turns to privilege logs specifically.[275] For a zero-knowledge proof to fully function there, a machine-learning algorithm would have to be developed that could reliably decide if documents were or were not privileged.[276] Absent that as-yet unrealized feat, Cui suggests that opposing counsel might verify the algorithm's efficacy, but that concedes the very promise of the proposal.[277] Likewise, "a judge could conduct *in camera* review to participate in the construction of the seed set, or review or provide feedback to documents from sampling, but this would defeat the initial purpose of using zero-knowledge proof in resolution of privilege log disputes—to establish trust without an intermediary."[278]

Indeed, the traditional manner of sidelining parties at loggerheads was exactly that: for the judge to take over and subject the documents at issue to in camera inspection.[279] That approach,

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[273] Cui, *supra* note 18, at 639.
[274] *Id.* at 639-43.
[275] *Id.* at 643-50.
[276] *Id.* at 651-53.
[277] *Id.* at 650 ("In cases where the privileged documents are so sensitive such that they cannot even be seen by attorneys of the opposing party, zero-knowledge proof protocol cannot be implemented through case-specific machine learning algorithms.").
[278] *Id.* n.97.
[279] *See In re* Com. Fin. Servs., Inc., 247 B.R. 828, 840 (Bankr. N.D. Okla. 2000) (ordering that "objections to CFS's claimed privileges will be handled in the ordinary course according to ordinary procedures, including an *in camera* review of documents, if warranted"); United States v. Neill, 952 F. Supp. 834, 841 (D.D.C. 1997) (expressing dubiety of government reliance on its own internal "taint team" review rather than "the more traditional alternatives of submitting disputed documents under seal for *in camera* review by a neutral and detached magistrate or by court-appointed special masters"); Founding Church of Scientology of Washington, D.C., Inc. v. Dir., F.B.I., 104 F.R.D. 459, 463 (D.D.C. 1985) ("The

however, is superlatively taxing on judicial resources and increasingly unfeasible as the volume of privileged assertions multiplies.[280] Even delegation of this unsavory duty to special masters still incurs prohibitive costs and delays.[281] Notwithstanding the "herculean" efforts of a few uncommonly heroic souls,[282] in camera review has not been favored by judges, who deem such labors appropriate only for a more circumscribed pool of exceptionally problematic documents, not as a norm for micromanaging the assertion of privilege at large.[283] For

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Magistrate is of the view that where privilege is asserted, the least intrusive means reasonably necessary to determine the validity of the claim should be followed. Counsel's participation should only occur after less intrusive methods have proved unworkable. Further, this Magistrate has had substantial involvement in this litigation in resolving numerous prior discovery disputes and thus fully appreciates the factual and legal issues involved in this case. Thus, this Magistrate is of the view that he can capably evaluate the applicability of the privileges by the traditional approach to an *in camera* examination.") (citation omitted).

[280] Facciola & Redgrave, *supra* note 18, at 35 (The third option, an *in camera* inspection of all of the withheld documents, is the most forgiving in terms of the potential loss of privilege; however, it is also the most consumptive of judicial resources. Indeed, the determination by the trial judge that a document is or is not privileged may have to be reviewed by an appellate court, using additional judicial resources. In complex cases, a special master may be appointed, which inserts yet another layer of review if there are appeals: 'That expenditure of resources can be particularly wasteful when, as often happens, the documents will never be offered into evidence.' As noted in the section below, this problem is exacerbated when the volume of documents to be reviewed increases significantly, as has been seen with electronically stored information.") (quoting Evergreen Trading, LLC v. United States, 80 Fed. CI. 122, 126 n.2 (2007)).

[281] Cui, *supra* note 18, at 638 ("When disputes arise in this context, courts use *in camera* review or special masters to review privileged materials, both of which are costly and time-consuming.").

[282] Vioxx Prods. Liab. Litig. Steering Comm. v. Merck & Co., No. 06-30378, 06-30379, 2006 WL 1726675, at *2 (5th Cir. May 26, 2006) (describing "the herculean task of personally reviewing 30,000 documents over a two-week period" undertaken by one judge); *see, e.g.*, Mitchell v. Nat'l R.R. Passenger Corp., 208 F.R.D. 455, 461 (D.D.C. 2002) (Facciola, M.J.) ("I have held that such logs are nearly always useless. Instead, defendants will now be required to submit all documents as to which a privilege is claimed, to chambers for an *in camera* review."); *see also* Cui, *supra* note 18, at 638-39 (discussing *Vioxx*).

[283] *See* Lurensky v. Wellinghoff, 271 F.R.D. 345, 355–56 (D.D.C. 2010) (Facciola, M.J.) ("Thus, if I am faced with a dispute over the sufficiency of descriptions in a privilege log, and if the number of documents is not great, I often will order the documents produced for *in camera* review. Nevertheless, *in camera* review, because of the burden it places on the Court, should be the exception, and not the norm.") (citing Covad Comm'ns Co. v. Revonet, Inc., 267 F.R.D. 14, 27 (D.D.C. 2010),

a sense of acceptable scale, one judge begrudgingly acquiesced to consider in camera review only after winnowing the population for his attention down to "three (3) documents"—and even then only after the proponent was given a chance to elucidate its assertions.[284] Jealous of their colleagues' time, courts of appeals have reaffirmed that in camera scrutiny is ordinarily warranted only upon identification of some specific factual basis to believe that the prima facie showing of privilege is defective.[285]

A further proven method of minimizing at least the *agency* of the disputants is to reduce the document-by-document index to a machine-generated table of the electronically-stored metadata harvestable from each.[286] As this tabulation can be created virtually

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NLRB v. Jackson Hosp. Corp., 257 F.R.D. 302, 308 (D.D.C. 2009) and Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 265-66 (D. Md. 2008)); *accord* Covad Comm'ns Co. v. Revonet, Inc., 267 F.R.D. 14, 27 (D.D.C. 2010) (Facciola, M.J.).

[284] ClubCom, LLC v. Captive Media, Inc., No. 02:07-CV-1462, 2009 WL 1885712, at *3 (W.D. Pa. June 30, 2009) ("Based on the limited number of documents at issue (*i.e.*, three (3)), the Court will grant ClubCom the opportunity to revise its privilege log as to these three (3) documents *only* and further define the basis for privilege of these documents, if so desired.") (emphasis original).

[285] NLRB v. Interbake Foods, LLC, 637 F.3d 492, 502 (4th Cir. 2011); *In re* Grand Jury Investigation, 974 F.2d 1068, 1074 (9th Cir. 1992); *see* United States v. Bell, No. C 94-20342 RMW, 1994 WL 665295 (N.D. Cal. Nov. 9, 1994) (observing that the Ninth Circuit required a "minimum threshold" for justifying in camera review); *see also* G.D. v. Monarch Plastic Surgery, P.A., 239 F.R.D. 641, 650 (D. Kan. 2007) (requiring "cogent basis" to justify in camera review); *ClubCom*, 2009 WL 1885712, at *3 (demurring where the opponent had "not established any factual basis to support an in camera review").

[286] Marshall & Draba, *supra* note 250, at 74 ("In addition to scanning for responsiveness, computers are also scanning for indications of privilege, even extracting information from metadata and putting it into privilege logs."); Stephanie A. Walters, Letter re: F.R.C.P. 26(b)(5)(A) – Privilege Logs, July 27, 2021, at 2, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0039 ("Parties can easily use document management software to automate and export most privilege-log content. This content includes insightful metadata such as authors, dates, email senders and recipients, file names and email subject lines."); Altom M. Maglio, Letter re: Invitation to Comment on Privilege Logs Practice, July 29, 2021, at 2, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0042 ("Most document review and production platforms today make generating and producing privilege logs incredibly quick and efficient - done at the touch of a button. With the use of metadata for document sets coupled with essential document review, most of the necessary information for the privilege log is already there, and the system simply uses it to generate the logs."); Lea Malani Bays, Letter, July 29, 2021, at 3, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0045 ("These mostly

automatically in any modern document-review database, the incremental burden for the producing party ought to be essentially nil.[287] And if such tables lack any additional subjective input like a description of the privilege, the producing party has no avenue for embroidery or subterfuge.[288] Indeed, refusing to produce readily

automated logs do not require any special functionality beyond what would typically be available in a document review database (e.g., Relativity) used for any substantial document review."); Berger Montague PC, Letter re: Comment on Privilege Log Practice, Aug. 1, 2021, at 3, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0093 ("The need for categorical privilege logs containing less information rather than traditional document-by-document logs is also lessened by modern litigation technology, which allows for much of the content of a privilege log to be extracted from metadata."); Dana Smith, Letter, Aug. 2, 2021, at 3, 14-15, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0104 ("Modern privilege logs are ordinarily assembled from document-by-document exportable metadata that identifies senders, recipients, dates, etc., for each document. . . . Following review, most document-by-document privilege logs are initially constructed by exporting from the review platform an Excel spreadsheet or .csv file containing 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. That provides the foundation for a document-level log. Most traditional logs are assembled using electronic tools that perform these functions. 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.").

[287] *See* The Sedona Conference, *supra* note 21, at 163 ("This procedure has been used successfully in complex litigation, resulting in substantial cost savings to the parties."); Stephanie A. Walters, Letter re: F.R.C.P. 26(b)(5)(A) – Privilege Logs, July 27, 2021, at 2, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0039 ("Combining automation with a strict approach to the application of privilege would greatly reduce a party's time spent fulfilling their privilege logging responsibility."); Dana Smith, Letter, Aug. 2, 2021, at 22, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0104 ("These metadata logs substantially alleviate any burdens associated with constructing privilege logs.").

[288] *See* Dana Smith, Letter, Aug. 2, 2021, at 22, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0104 ("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."); *see also* Lea Malani Bays, Letter, July 29, 2021, at 3, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0045 ("In my experience over the last ten years, it is common

accessible metadata will seem at least suspect if not outright obstructionist.[289] The Sedona Conference recommended the use of such metadata-based "objective privilege logs," permitting the receiving party (and if need be, a court) to discern any entries that factually raise particular concerns for further more subjective elucidation.[290]

Courts may well turn to the reassuring objectivity of a metadata log when disputes (for example, over categorical logging)

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practice for the parties to come to an agreement on fields to be included in the privilege log that can be auto-populated with corresponding metadata extracted from the document. The only fields that typically require 'manual' input would be (1) Privilege Asserted, which is actually just a choice field (e.g., Work Product or Attorney-Client Privilege) in a document review database that a reviewer would click on and then would be auto-populated into the privilege log, and (2) Privilege Description, which would typically be a one-sentence description of the nature and purpose of the document and general subject matter of the document.").

[289] *See* Favors v. Cuomo, 285 F.R.D. 187, 223 (E.D.N.Y. 2012) ("[G]iven today's litigation technology, there is no good reason why privilege logs should not include . . . other readily accessible metadata for electronic documents, including, but not limited to: addressee(s), copyee(s), blind copyee(s), date, time, subject line, file name, file format, and a description of any attachments."); Wedgwood & Hughes, *supra* note 247, at 39 ("Defendants also use categorical privilege logs to withhold metadata, including the senders, recipients, and authors of withheld documents. This practice obscures whether communications are truly between an attorney and client or whether documents are attorney work product drafted by an attorney in anticipation of litigation. Courts favor the production of metadata when possible because it provides characteristics of withheld documents and often is readily accessible and automated.") (citing *Favors*); Dana Smith, Letter, Aug. 2, 2021, at 3, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0104 ("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.").

[290] The Sedona Conference, *supra* note 21, at 163 ("For any ESI that is identified by the screening process, the producing party provides in the first instance a list of documents that are claimed to be privileged in the form of the objective metadata (author, recipient, date created, document title, etc.) that is generated from the litigation support system. The receiving party can then designate documents or categories of documents on the objective privilege log that it would like the producing party to review in greater detail and provide a traditional Rule 26(b)(5)(A)(ii) log for those entries/categories."); *see also* Sharon Markowitz, Email re: Response to Invitation for Comment on Privilege Log Practice, June 16, 2021, at 1, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0104 ("I think the solution to this problem is to allow parties to produce privilege logs with metadata only AND allow opposing counsel to ask follow-up questions about specific documents as needed.").

have proven intractable.[291] Indeed, categorization may be most useful in a hybrid approach whereby a document-by-document metadata index is provided but the arguments for privilege are asserted on a categorical basis, grouping like documents from the objective index.[292] Critics of categorical privilege logs standing alone have observed that categorization is better suited to more subjective characterizations like the "general nature of a set of documents and justifications related to the subject matter," as a supplement to rather than replacement for an underlying index of objective facts such as the author and recipients of each communication.[293] Objectors may rejoin that metadata is not necessarily so simple to disclose automatically, for some metadata might in and of itself intrude upon

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[291] *E.g.*, Companion Prop. and Cas. Ins. Co. v. U.S. Bank Nat'l Assoc., C.A. No. 3:15-cv-01300-JMC, 2016 WL 6539344, at *3 (D.S.C. Nov. 3, 2016) (ordering production of metadata log).

[292] *E.g.*, Williams v. Duke Energy Corp., No. 1:08-CV-00046, 2014 WL 3895227, at *12 (S.D. Ohio Aug. 8, 2014) ("Ariane S. Johnson, Associate General Counsel, Duke Energy Business Services, Inc., reviewed the documents withheld as privileged or entitled to work product protection and grouped them into 13 categories. This decision will discuss the withheld documents by reference to the categories in Ms. Johnson's December 17, 2013 declaration."); *see, e.g.*, EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., No. 3:12-CV-00463, 2018 WL 3628890, at *2 (M.D. Tenn. Mar. 29, 2018) ("The metadata log is substantively deficient. Read in conjunction, the log and category descriptions contain the ingredients for either a document-by-document log or a categorical log. The fatal flaw is TNI's failure to associate the twenty-five categories of withheld documents with the fields of information listed in the voluminous metadata log. Absent some connection between the document categories and the metadata, EPAC and the Court cannot reasonably assess Thomas Nelson's asserted reasons for withholding the documents as privileged or protected. It is not the Court's job, nor is it EPAC's, to ferret out the alleged justification for each withheld document."), *aff'd sub nom.* EPAC Techs., Inc. v. Thomas Nelson, Inc., No. 3:12-CV-00463, 2018 WL 3322305 (M.D. Tenn. May 14, 2018).

[293] Marshall & Draba, *supra* note 250, at 77 ("As an aside, the critical role of the persons should give pause as to the proposed use of categorical claims in privilege logs and the use of sampling to test claims. Categories are suited more toward describing the general nature of a set of documents and justifications related to the subject matter of those documents. However, a particular document is not privileged merely because it is of the same general nature and subject as privileged documents: The particular communication of which a particular document is a part must involve an attorney whose legal advice is being sought and must not involve third parties whose involvement would waive any privilege—that is black-letter law. Thus, for one party to substantiate a privilege claim and for the other party to test the claim, a listing of that particular document's authors and recipients seems essential.").

the privilege—but most courts have been dubious of the proposition.[294]

VI. CONCLUSION

In the final analysis, categorical privilege logs seek to prove too much. If they provide sufficient information to truly evaluate each claim of privilege, it is difficult to see how they are actually conservative of proponents' time and effort;[295] if, by contrast, their economies are accomplished by pretermitting the predicates to a prima

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[294] *E.g.*, S2 Automation LLC v. Micron Tech., Inc., No. CIV 11-0884 JB/WDS, 2012 WL 3656454, at *11 (D.N.M. Aug. 9, 2012) ("S2 Automation argued that it should not have to produce metadata, because there may be sensitive information about who viewed certain electronic mail transmissions. The Court questioned S2 Automation how any of that information would be privileged, and S2 Automation asserted that some of the electronic email transmissions may have been drafted in preparation for litigation.") (citation omitted); Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 653–54 (D. Kan. 2005) ("For any other metadata Defendant claims is protected by the attorney-client privilege or as attorney work product, the Court finds that Defendant should have raised this issue prior to its unilateral decision to produce the spreadsheets with the metadata removed. . . . In this case, Defendant has failed to object and has not provided a privilege log identifying the electronic documents that it claims contain privileged metadata. Defendant has not provided the Court with even a general description of the purportedly privileged metadata that was scrubbed from the spreadsheets. As Defendant has failed to provide any privilege log for the electronic documents it claims contain metadata that will reveal privileged communications or attorney work product, the Court holds that Defendant has waived."). *But see* Percy v. Charter Twp. of Canton, No. CV 19-11727, 2020 WL 13564078, at *3 n.2 (E.D. Mich. May 6, 2020) ("However, to the extent any e-mail or other document is privileged, the underlying metadata would also be privileged, and would not need to be produced.").

[295] *See* Dana Smith, Letter, Aug. 2, 2021, at 15, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0104 ("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.").

facie case for privilege, they fail to meet any interpretation of Rule 26 or notion of fair play.[296] Some cynics suspected that a desire for such pretermission motivated the institutional advocates for change before the Judiciary Conference.[297]

The debate over categorical logs has, however, laid bare the more fundamental problem with privilege logs, one that categorization cannot itself heal—the unbridgeable contentiousness of the parties, riven by sharply diverging interests.[298] In urging reform, Judge Facciola was surely not amongst those in whom some commenters espied questionable motives; rather he was striving to redress his heartfelt and oft-repeated complaint that privilege logs as they had been traditionally practiced were wholly useless to him as an experienced magistrate.[299] As of 2023, it seems clear that the oppressive quarter-century reign of the "traditional" privilege log—actually more *nouveau riche* in its origins[300]—is nearing an end, and reform is inevitable, even if the conqueror is not categorical privilege logs as such. Some combination of objective metadata logs,

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[296] *See* Lea Malani Bays, Letter re: Invitation for Comment on Privilege Log Practice From the Committee on Rules of Practice and Procedure, July 29, 2021, at 6-7, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0045 (quoted *supra* note 145).

[297] *E.g.*, Altom M. Maglio, Letter re: Invitation to Comment on Privilege Logs Practice, July 29, 2021, at 2, *in* Privilege Log Public Comments, *supra* note 133, at PRIV-0042 ("In light of the increasing ease with which privilege logs are maintained, generated, and produced, it is perplexing as to why this has even been raised to the Discovery Subcommittee as an issue. Could it be that this is less about the production costs posed by privilege logs, and more about further limiting the specificity and utility of privilege logs and thus their value? Unfortunately, this attack on discovery using the rule-making process seems to be an increasing trend by certain well-funded, agenda-driven organizations.").

[298] *See supra* Part V-B.

[299] Lurensky v. Wellinghoff, 271 F.R.D. 345, 355 (D.D.C. 2010) (Facciola, M.J.) ("Privilege logs are the most common vehicle by which parties attempt to comply with these rules in claiming privilege. I do, however, find privilege logs to be on the whole useless."); Covad Comm'ns Co. v. Revonet, Inc., 267 F.R.D. 14, 27 (D.D.C. 2010) (Facciola, M.J.) ("I have long found privilege logs to be on the whole useless."); Roy Banks v. Office of Senate Sergeant-At-Arms Doorkeeper, 222 F.R.D. 7, 21 (D.D.C. 2004) (Facciola, M.J.) ("I have reviewed the privilege log and find, as I invariably do, it is useless."); Marshall v. D.C. Water & Sewage Auth., 214 F.R.D. 23, 25 n.4 (D.D.C. 2003) (Facciola, M.J.) ("As I noted in my previous opinions, I have found privilege logs useless."); Mitchell v. Nat'l R.R. Passenger Corp., 208 F.R.D. 455, 461 (D.D.C. 2002) (Facciola, M.J.) ("I have held that such logs are nearly always useless.").

[300] *See supra* notes 14-18 and accompanying text.

categorical descriptions, and in camera review tailored to each case appears the best candidate for asserting privilege in the here and now.

Cui was not wrong, nevertheless, that the courts and bar "await better solutions."[301] With generative artificial intelligence models proliferating in society and industry,[302] the dream of an expert machine system that can assess privilege in lieu of human lawyers cannot be unthinkably far in the future: "'Where the technology is going to be in three to five years is the really interesting question,' said Ben Allgrove, a partner at Baker McKenzie, a firm with 4,600 lawyers. 'And the honest answer is we don't know.'"[303] Five years after that remark, the honest answer is the same. A *deus ex machina* may be waiting in the wings after all.

The partisans of categorical logging thus have "proved an essential verity of underdogs: they can triumph even when, technically, they lose—as the Spartans did at Thermopylae and the Finns to the Soviets in the 'winter war.'"[304] To be clear, as Part IV demonstrates, categorical privilege logs have not definitively *lost*, as no small number of courts have approved their use in various circumstances,[305] and no doubt many more will as circumstances permit. But neither have they shown themselves to be an all-purpose successor to the traditional privilege log's throne. In its annual retrospective yuletide issue, *The Economist* dubbed 2022 as The Year

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[301] Cui, *supra* note 18, at 634 (citations omitted) (quoted *supra* text accompanying note 270).

[302] *See* Cade Metz, *Making Proteins With DALL-E's Techniques*, N.Y. TIMES, Jan. 9, 2023, at D4; Erin Griffith & Cade Metz, *Tech Slump Doesn't Slow New Boom In A.I. Field*, N.Y. TIMES, Jan. 7, 2023, at B1; Craig S. Smith, *Is A.I. the Future of Test Prep?*, N.Y. TIMES, Dec. 27, 2022 at B3; Cade Metz, *Chat Bots Can Amaze, But Also Lie*, N.Y. TIMES, Dec. 12, 2022, at B1; Cade Metz, *Meet GPT-3. It Has Learned To Code (and Blog and Argue)*, N.Y. TIMES, Nov. 4, 2020, at D6.

[303] *See* Steve Lohr, *I, Robot, Esq.? Not Just Yet*, N.Y. TIMES, Mar. 20, 2017, at B1 ("An artificial intelligence technique called natural language processing has proved useful in scanning and predicting what documents will be relevant to a case, for example. Yet other lawyers' tasks, like advising clients, writing legal briefs, negotiating and appearing in court, seem beyond the reach of computerization, for a while. . . . The pace of technology improvement is notoriously unpredictable. For years, labor economists said routine work like a factory job could be reduced to a set of rules that could be computerized. They assumed that professionals, like lawyers, were safe because their work was wrapped in language. But advances in artificial intelligence overturned that assumption. Technology unlocked the routine task of sifting through documents, looking for relevant passages.").

[304] *The Year of the Underdogs*, *supra* note 2.

[305] *See supra* Part IV.

of the Underdogs, rhapsodizing, "Underdog heroes and heroines do not merely surmount obstacles or defeat adversaries. The best and most moving beat a whole rotten system. They hold out hope that might—or reputation, power and influence—will not always prevail; that even if . . . rules are rigged, the game can still be won."[306] Out with the old, in with the new.

[306] *The Year of the Underdogs*, *supra* note 2.