PUBLIC JUSTICE
IMPACT. CHANGE.

PUBLIC JUSTICE COMMENTS TO THE CIVIL RULES

ADVISORY COMMITTEE ON PRIVILEGE LOG PRACTICE

July 30, 2021

Public Justice, P.C. and the Public Justice Foundation (collectively, "Public Justice") respectfully submit these comments to the Advisory Committee on Civil Rules in response to the Committee's Invitation for comments on privilege log practice.

Public Justice is a nationwide public interest legal advocacy organization that pursue impact litigation and communications campaigns to combat social and economic injustice, protect the sustainability of the Eart and challenge predatory corporate conduct and government abuses. It has 2,700 members, from all fifty states, who represent plaintiffs in a broad range of personal injury, employment discrimination and wage and hour cases, consumer, tort (both mass and individual), antitrust and securities fraud, commercial and civil rights cases.

The current formulation of the rule. Federal Rule of Civil Procedure 26(b)(5)(A) provides that,

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

The rule is written to balance three competing needs: the right to withhold legitimately privileged material, the right to discovery, and the judiciary's duty to provide a forum for truth

publicjustice.net

National Headquarters
1620 L Street NW, Suite 630, Washington DC 20036
(202) 797-8600 phone • (202) 232-7203 fax

West Coast Office
475 14th Street, Suite 610, Oakland, CA 94612
(510) 622-8150 phone

seeking. Since it is black letter law (requiring no citation) that the burden is upon the party claiming the privilege to adduce evidence showing facts that support the claim, the rule requires (a) an express assertion of the claim and (b) a description of the basis for the claim. To assess the claim, the rule requires the assertion to be sufficiently detailed to "enable other parties to assess the claim." Of course, the detail of the description is also the basis that enables *the judicial officer* to assess the claim.

As written and in practice, the rule affords parties and courts the ability to tailor Rule 26(b)(5)(A) compliance with the needs of each case. Cases differ not just by the volume of ostensibly privileged materials. They also differ by the centrality of the role of lawyers in the underlying alleged misconduct, in the nature of the way the documents were kept, in the level of fair play by the asserting party in providing the descriptions, and many other factors. Assertions of privilege are also inherently fact intensive. For the almost 30 years since the rule was added (including many years where much of discovery was electronic and digital), the courts have developed tools and a body of case law fleshing out when privilege logs are appropriate and how they are to operate, and that case law has largely done a good job of protecting the rights of parties.

In short, the current rules require disclosure or the information relevant to evaluate a claim of privilege, but do not place a finger on the scale one way or the other as to the level of detail required and whether a claim should be allowed. The current Rule thus allows the parties and the court to do their jobs. In that process, courts often do require document-by-document descriptions. Given the fact-intensive nature of the inquiry this often makes sense. It also lessens the burden of the courts. Itemized descriptions enable the parties and the court to make rulings based on them (if done correctly), and avoids (or makes less likely) the need for a court to review *in camera* large volumes of documents.

Opposition to categorization. Public Justice strongly opposes the possibility (implicitly suggested by the invitation) of jettisoning the present practices respecting privilege logs from the general practice of document-by-document privilege claims in favor of a new approach of categorical claims of privilege to more than one document. Doing so would not only materially harm the evidence-adducing function of discovery but would also be most likely to increase the burden on federal judges in adjudicating discovery disputes, particularly those related to claims of privilege.

The primary issue posed by privilege logs in the explication of facts is that, unfortunately, a producing party does not always wish to have all the facts produced to a receiving party. That's the nature of the adversarial judicial process. Regrettably, discovery is not self-policing, and the court plays a necessary role in stopping the abuse by parties improperly withholding relevant and non-privileged information. The explication of names, dates, and subjects on privilege logs provides a mechanism for challenging over-broad or improper claims of privilege. The attorney client privilege itself is a screen behind which communications and facts are – for good independent jurisprudential reasons – hidden; reducing logs to topical or subject matter designations erects yet another screen and a well-nigh impenetrable one.

Parties receiving privilege logs are inherently in the dark in their ability to determine the validity of privilege assertions, particularly where there is a complete withholding of a document (as opposed to a redacted production). The listing of names, dates, subjects, and description of the document, together, open the door to permit reasonable challenge and do not, of course, infringe on the privilege. Practice has time and again shown, for instance, that when a list of recipients to a communication contain multiple businesspeople and only a single lawyer, there is a likelihood that the communication was a business communication and not one

seeking or receiving of legal advice. The same is true as to having dates – as chronologies of events are developed in litigation, when dates are provided on a privilege log, the legal/business distinction will often become evident. Time and time again, in actual practice, the ability for receiving parties to examine privilege log detail has permitted intelligent meet and conferrals at which designations were either dropped or a more focused challenge could be presented to a court for review. Obviously, in a world where no client (or lawyer) tried to "hide the ball", this would not be necessary but, in the real world of litigation, some information is needed to permit evaluation of claims of privilege.

The concerns we see with permitting categorical logs are exacerbated by a trend we have seen over the years whereby individuals have, in general, become more savvy in realizing that routing communications through, or including attorneys on, communications can be a mechanism for preventing ultimate disclosure. This is unfortunate but true; and, again, privilege log details permit a window into whether challenges to overly broad privilege claims are necessary and justified.

The reason why permitting categorical designations will only increase the burden on the courts (as well as delayed justice) is that when faced with categorical designations, what can counsel do except ask for the court's intervention on a wholesale basis? The present regime of meet-and-conferrals, which, as noted, can, not infrequently, be effective, will be lost. Opposing counsel will stand on its description of a set of communications and say, "yes, that's a fair description and all the documents are privileged." Unless the federal courts abdicate their responsibility to permitting discovery to be a truth-adducing process, counsel can, to all intents and purposes, *only* request a court to do an *in-camera* review. And if such diligent reviews by the courts do not take place, counsel will have incentives to over-designate, and the use of hiding behind including lawyers on communications will only accelerate. The present practice

of meet and conferrals do, in actuality, reduce the burden on the courts (and the expense on the parties). The proposal would increase it, and would delay "the just, speedy, and inexpensive" adjudication of cases.

Respectfully Submitted,

F. Paul Bland, Jr.
Executive Director, Public Justice
1620 L Street, N.W., Suite 630
Washington, D.C. 20036
pbland@publicjustice.net
(202) 861-5223

Seth Lesser
Amir Alimehri
Klafter Lesser LLP
Two International Drive, Suite 350
Rye Brook, NY 10573
Amir.alimehri@klafterlesser.com
Seth@kllafterlesser.com
(914) 934-9200