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## Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework

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### ABSTRACT

The volume of information produced by electronic discovery has made the process of reviewing that information, to ascertain whether any of it is privileged from disclosure, so expensive that the result of the lawsuit may be a function of who can afford it. The volume also threatens the ability to accurately identify and describe relevant and privileged documents so that the system of claims and adjudication teeters on the brink of effective failure.

The authors submit that the majority of cases should reject the traditional document-by-document privilege log in favor of a new approach that is premised on counsel's cooperation supervised by early, careful, and rigorous judicial involvement. That cooperation, having first led to an agreement as to what categories of information will be eliminated from any privilege review because the information is so clearly not privileged or so clearly privileged, will then focus on categorization of the information that must be reviewed. Claims of privilege will then be made and, if challenged, initially assessed by the

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judge on a categorical basis where what is true of a sample from the category is true of the category. This process involves the formal and informal exchange of information to substantiate the categories, with the goal of eliminating many potential disputes. They then propose a requirement of a detailed description for the information withheld as privileged which remains subject to dispute so that the necessity of in camera review is reduced to a minimum. The preparation of this more detailed log for a narrowly targeted population will be more useful and, in effect, much less burdensome because the number of documents which must be logged has been reduced to a minimum.

The authors consistently emphasize the necessity for counsels' cooperation, enforced by strong judicial control and how Federal Rule of Evidence (FRE) 502 can be used to craft a sound agreement—incorporated in a court order—that should provide protection against any loss of privilege through waiver.

Finally, conceding that their approach requires good faith and cooperation, they insist that firm judicial punishment of cheating and gamesmanship will, in the long run, create a new regime of asserting privilege that makes much more sense than the old one, which may soon collapse, in light of the ever-increasing amount of information that the modern technological workplace is producing.

#### TABLE OF CONTENTS

I. INTRODUCTION .....	22
II. BACKGROUND .....	23
A. Rule 26 Prior to 1993, Local Rules and Individual Cases .....	23
B. 1993 Rules .....	27
C. Subsequent Rule Changes .....	28
D. Federal Rule of Evidence 502 .....	29
III. PROBLEMS WITH PRIVILEGE LOGS AND THE IMPACT OF ESI .....	31
IV. EXPONENTIAL PROBLEMS FOR PRIVILEGE CLAIMS CAUSED BY ELECTRONICALLY STORED INFORMATION .....	36
A. Volume .....	36
B. E-mail Strings .....	38
C. Attachments .....	39
V. WAY FORWARD .....	40
A. Rules Based Authority for Framework—1993 and 2006 Amendments Along with FRE 502 .....	40
B. Solutions from Courts .....	41

1.	<i>In re Vioxx Products Liabilities Litigation</i> .....	41
2.	<i>D’Onofrio v. SFX Sports Group</i> .....	43
C.	The Facciola-Redgrave Framework .....	44
1.	<i>Rule 26(f) Meet and Confer on Privilege Issues</i> .....	44
2.	<i>Use of Categories, Indices, and Privilege Logs</i> .....	45
A.	<i>Categories of Exclusion</i> .....	45
B.	<i>Segregating, Categorizing, Indexing, and Logging Privileged Documents</i> .....	45
1.	Segregation of Presumptively Privileged Documents .....	45
2.	Categorization .....	46
3.	Objective Indexing .....	46
4.	Privilege Logs .....	47
C.	<i>Evidentiary Support for Categories</i> .....	47
D.	<i>Meet and Confers Regarding Rolling Categorization, Indexing, and/or Logging</i> .....	47
E.	<i>Rolling Categorization</i> .....	48
F.	<i>Rolling Indexing and Privilege Log Guidelines</i> .....	48
1.	Limited Indexing .....	48
2.	Readily Available Objective Information for Indices.....	48
3.	Additional Information Required for Privilege Logs .....	48
4.	E-Mail Strings (for both Indices and Privilege Logs).....	49
5.	Attachments.....	49
6.	Duplicates and Near Duplicates.....	49
3.	<i>Court Order Regarding Process</i> .....	50
A.	<i>Challenges to and Rulings on Privilege Claims</i> .....	50
B.	<i>Dealing with Uncooperative Counsel and “Cheaters”</i> .....	52
VI.	CONCLUSION .....	53

If, indeed, the common law of privilege is not frozen in antiquity, but rather is flexible and adaptable to changing circumstances, then it must be elastic enough to permit reasonable measures to facilitate production of voluminous electronically stored information during discovery without imposing on the parties unreasonable burdens on their human and fiscal resources. The unavoidable truth is that it is no longer remarkable that electronic document discovery may encompass hundreds of thousands, if not millions, of electronic records. . . . In this environment, to insist in every case upon “old world” record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation, and mark a dramatic retreat from the commendable

efforts . . . to tailor the methods and costs of discovery to fit the case at hand.<sup>2</sup>

## I. INTRODUCTION

In recent years, discovery with regards to electronic information and privilege<sup>3</sup> has grown increasingly burdensome. These burdens often come to light in the disputes over privilege logs, which have grown in number recently, usually vexing courts with a Morton's fork<sup>4</sup> between overruling privileges due to insufficient or inaccurate information or undertaking a laborious document-by-document in camera review to adjudicate privilege claims. Neither choice is appealing nor satisfactory.

In order to maintain proportionality between stakes in a lawsuit and the resources a party must use to litigate those issues, a new framework is needed to alleviate the problems that Electronically Stored Information (ESI) poses to the discovery system and the protection of privileged information. The goals of this new framework are to reduce the number of documents that are subject to logging; to offer early guidance from the court regarding the legitimacy of claims of privilege; to reduce the number of logging disputes that are presented to the court thereby reducing the need for in camera review; to promote cooperation between the parties throughout the discovery process in regards to privilege and ESI; and to provide a method for ensuring that those who act in bad faith in this process are caught and punished. A framework that achieves these goals will save time and money for parties involved in litigation and reduce the resources courts must use to resolve disputes over privilege claims. Achieving these goals will help ensure that cases are resolved on their merits and not based on who has more capability to effectively pay for a lengthy discovery process, and the disputes that

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2. Hopson v. City of Balt., 232 F.R.D. 228, 243-44 (D. Md. 2005).

3. For the purposes of this article, the term "privilege" is construed broadly to include any legal doctrine that allows withholding of a relevant document or relevant information from production in civil litigation, and specifically includes the attorney-client privilege and the work-product doctrine.

4. A "Morton's Fork" is a choice between two equally unpleasant alternatives (i.e., a dilemma). THE OXFORD ENGLISH DICTIONARY 1106 (2d ed. 1989). Named after John Morton—the Archbishop of Canterbury and minister of Henry VII—who supposedly employed a "method of levying forced loans by arguing that those who were obviously rich could afford to pay, and those who lived frugally must have amassed savings"—the term refers to "a practical dilemma, . . . one in which both the choices or alternatives available disadvantage or discredit the chooser." *Id.*

arise from it. Furthermore, a successful framework would help preserve the privileges that rest at the heart of the adversary system by better protecting attorney client confidentiality and work product.

## II. BACKGROUND

Privilege logs have emerged as a staple of discovery in litigation today. They are governed by Federal Rule of Civil Procedure (FRCP) 26(b)(5) and the common law of privilege. The evolution of Rule 26 in general, the addition of Rule 26(b)(5) in 1993, the changes to the Civil Rules in 2006 relating to ESI, and the passage of FRE 502 in 2008 provide the context into which any new framework concerning privilege and discovery must fit.

### A. Rule 26 Prior to 1993, Local Rules and Individual Cases

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. In 1946, subdivision (b) of Rule 26 was amended in order to “make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence.”<sup>5</sup> This change was made because the “purpose of discovery is to allow a broad search for facts” to aid parties in “preparation or presentation” of their case.<sup>6</sup>

In 1970, section (b)(3) of Rule 26 was amended to cover the “most controversial and vexing problems” emerging from the discovery rules, namely requests for the production of documents prepared in anticipation of trial.<sup>7</sup> This amendment required a special showing in seeking discovery of trial preparation materials which eliminated the good cause requirement used by some courts.<sup>8</sup> Also added to Rule 26 in 1970 were the provisions of Rule 30(b) granting broad powers to courts to issue protective and production orders relating to certain documents which brought the sanctions of Rule 37(b) “directly into play”.<sup>9</sup> The 1970 amendments to the discovery

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5. FED. R. CIV. P. 26(b) advisory committee’s note to the 1946 amendment.

6. *Id.*

7. FED. R. CIV. P. 26(b)(3) advisory committee’s note to the 1970 amendment.

8. *Id.*

9. FED. R. CIV. P. 26(c) advisory committee’s note to the 1970 amendment.

rules largely brought about a reorganization that made Rule 26 a general rule for discovery and covered the scope, timing, and regulation of the entire process.<sup>10</sup>

The changes to Rule 26 in 1980 and 1983 were made in response to perceived abuses of the discovery process. Subdivision (f) was added in 1980 in order to provide counsel, faced with uncooperative opponents, assistance from the court to create a reasonable plan for discovery.<sup>11</sup> However, it was not believed that discovery conferences would or should become routine.<sup>12</sup> In 1983, the Advisory Committee noted that “the spirit of the rules [was] violated when advocates attempt[ed] to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues.”<sup>13</sup> Because abusive practices “impose costs on an already overburdened system and impede the fundamental goal of the ‘just, speedy, and inexpensive determination of every action,’” the Committee created new rules to encourage judges to identify needless discovery and to limit it accordingly.<sup>14</sup> Subdivision (g) was added “to curb discovery abuse by explicitly encouraging the imposition of sanctions,” and to encourage the litigants to act responsibly and to avoid abuse by requiring attorneys to sign discovery requests, responses, and objections.<sup>15</sup>

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. Both the Southern District of New York and the Northern District of California had Local Rules governing the use and content of privilege logs.<sup>16</sup> Cases prior to the

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10. FED. R. CIV. P. 26 advisory committee’s note to the 1970 amendment.

11. FED. R. CIV. P. 26(f) advisory committee’s note to the 1980 amendment.

12. *Id.*

13. FED. R. CIV. P. 26 advisory committee’s note to the 1983 amendment.

14. *Id.* (quoting FED. R. CIV. P. 1).

15. FED. R. CIV. P. 26(g) advisory committee’s note to the 1983 amendment.

16. In New York, Local Rule 46(e) governed logs: “Where a claim of privilege is asserted in objecting to any means of discovery or disclosure, including but not limited to a deposition, and an answer is not provided on the basis of such assertion, the attorney asserting the privilege shall identify the nature of the privilege (including work product) which is being claimed and, if the privilege is governed by state law, indicate the state’s privilege rule being invoked; and the following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information: (i) the type of document, e.g., letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) such other information as is sufficient to identify the document for a subpoena *duces tecum*, including, where appropriate, the author of the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the

enactment of 26(b)(5) in these jurisdictions demonstrate some of the inconsistencies and confusion that surrounded what constituted an adequate log and the consequences of failing to live up to that standard.

In *Litton Systems, Inc. v. AT&T*,<sup>17</sup> a dispute over privilege logs arose after four years of discovery governed by a special master and one week short of the conclusion of a five month trial. The plaintiffs refused to acknowledge the existence of notes taken by attorneys in various meetings between the commencement of the action and the beginning of the trial. The plaintiffs did not disclose these documents to the court or the defendants in the discovery process and did not put them on their privilege log. Further, as the existence of the notes came into light, the plaintiffs continued to misrepresent the notes to the court and the defendants.<sup>18</sup> Judge Conner held that the plaintiffs' gross negligence and willful misconduct in failing to properly use privilege logs would likely warrant sanctions. However, he refused to enter them at the time since the trial was seven days from completion.<sup>19</sup> Nonetheless, the failure to use a privilege log by the plaintiffs in *Litton* waived the attorney-client privilege for the unlogged documents.<sup>20</sup> Specifically, the judge found the plaintiffs' arguments "specious" in light of orders from the magistrate and special master to assert privilege in a log and indicated that the "failure to record a claim of privilege in accordance with this procedure effectively waive[d] any privilege or immunity which might otherwise be asserted with respect to the documents. . . ."<sup>21</sup>

In contrast, in *Fox v. California Sierra Financial Services* in the Northern District of California, failure to comply with an order to produce privilege logs in accordance with Local Rule 230-5 resulted in sanctions of \$1,000 but no waiver of privilege.<sup>22</sup> Judge Woelflen ordered that the defendants file a privilege log containing the "subject

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author, addressees, and recipients to each other . . . ." See S.D.N.Y. Civ. R. 26.2 (Rule 46(e)(2) was renumbered as Rule 26.2 as part of the 2007 Amendments to the Local Rules). In California, privilege logs were governed by Local Rule 230-5: "Whenever a claim of privilege is made with respect to a communication or other item, it shall be specifically identified and the grounds for the claim stated. No generalized claims of privilege shall be made." See *Fox v. Cal. Sierra Fin. Serv.*, 120 F.R.D. 520, 524 n.1 (N.D. Cal. 1988).

17. 90 F.R.D. 410 (S.D.N.Y. 1981).

18. *Id.* at 414-19.

19. *Id.* at 421.

20. *Id.* at 414-19.

21. *Id.* at 417.

22. *Fox*, 120 F.R.D. at 532.

of the document or communication, whether the attorney-client privilege or the work-product doctrine applies, and the basis for such claim.”<sup>23</sup> One defendant failed to “indicate[] which privilege is claimed . . . or the basis for any claim of privilege,” while the other argued that “a list of such documents itself is privileged.”<sup>24</sup> While Judge Woelflen found that the defendants’ arguments were justified and that sanctions were not warranted under Rule 37, he applied Rule 26(g) to award monetary sanctions for the failure to comply with the order to produce a complete privilege log.<sup>25</sup>

In two other cases in California, one in the Northern District and one in the Eastern District, the courts analyzed what constituted an acceptable assertion of privilege in contrast with what was so unjustifiable as to require both monetary sanctions and a waiver. In *In re Adobe Systems, Inc. Securities Litigation*,<sup>26</sup> the court found that a description of “legal advice about securities law” was adequate for a privilege log under Local Rule 230-5 requirements. However, in *Eureka Financial Corp. v. Hartford Accident and Indemnity Co.*,<sup>27</sup> the defendant responded to the plaintiff’s requests for interrogatories and production of documents with a blanket assertion of attorney-client privilege. Judge Hollows ruled that blanket assertions of privilege were improper, citing Local Rule 230-5 in the Northern District as well as the proposed new Rule 26(b)(5) as examples of what assertions of privilege required.<sup>28</sup> The judge explained that the proposed rule made:

[C]ommon sense when one considers the reason for the specific objection requirement. The purpose . . . is to provide the party seeking discovery with a basis for determining what documents the party asserting the privilege has withheld. Otherwise, how could this opposing party ever know whether the documents withheld under a blanket privilege objection were withheld correctly, incorrectly, or maliciously? [Defendant] would have the court believe that an opposing party must simply trust the good faith and diligence of the party asserting the privilege.<sup>29</sup>

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23. *Id.* at 523-24.

24. *Id.* at 524.

25. *Id.* at 532.

26. No. C-90-2453 SBA (FSL), 1991 U.S. Dist. LEXIS 15929, at \*12 (N.D. Cal. Oct. 23, 1991).

27. 136 F.R.D. 179, 183-84 (E.D. Cal. 1991).

28. *Id.* at 182 (“This fact should no longer be ‘news’ to a responding party.”).

29. *Id.* at 183 n.9 (“All too often, the blanket privilege is asserted by counsel who have not carefully reviewed the pertinent documents for privilege. In an abundance of



The failure to provide a privilege log or any justifiable argument required the court to rule that monetary sanctions should be applied, any privilege that may have existed should be waived, and the documents should be produced.<sup>30</sup> The only documents to which the waiver applied were those created after the litigation commenced.<sup>31</sup>

*B. 1993 Rules*

In 1993, the Advisory Committee amended Rule 26 to include subdivision (b)(5).<sup>32</sup> Rule 26(b)(5) requires a party to “notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product production.”<sup>33</sup> The Advisory Committee indicated that failure to comply can result in sanctions under Rule 37 or waiver of privilege.<sup>34</sup> The purpose behind this new rule was to provide the opposing party with enough information to enable him to “evaluate the applicability of the claimed privilege” and to assist the court in determining whether the claim applies if challenged.<sup>35</sup> Since the log would provide enough information for the court to make that determination, it “should reduce the need for in camera examination of the documents.”<sup>36</sup>

Importantly, the Advisory Committee declined to identify exactly what information needed to be provided, suggesting that “[d]etails concerning time, persons, general subject matter etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be *described by categories*.”<sup>37</sup> Thus, the Committee offered a path between logging

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caution, counsel withhold documents that are not privileged, thus defeating the full and fair information disclosure that discovery requires.”).

30. *Id.* at 185.

31. *Id.*

32. The same provisions for asserting privilege were imposed on non-party subpoenas in Rule 45(d)(2) in 1991—two years prior to the adoption of Rule 26(b)(5). *See* FED. R. CIV. P. 45(d) advisory committee’s note to the 1991 amendment. As can be seen in the history, the provisions were drafted for simultaneous implementation, but the Supreme Court withdrew 26(b)(5) in 1991, but it was eventually adopted in 1993. *Id.*; FED. R. CIV. P. 26(b)(5) advisory committee’s note to the 1993 amendment.

33. FED. R. CIV. P. 26(b)(5) advisory committee’s note to the 1993 amendment.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* (emphasis added). The availability of a categorical option—as opposed to a document-by-document approach—is critical to understanding the path forward as

individual documents and blanket assertions of privilege.

The Committee also amended subdivision (f) of Rule 26. Subdivision (f) was added in 1980 to require a meeting between the parties to attempt to set a discovery plan and then, if necessary, a conference with the court to implement that plan. Again, these conferences were intended to be rare and not routine. As the court correctly predicted the rarity of discovery conferences, the portions of the rule relating to a conference with the court were removed. This amendment put the ball back in the hands of the litigants to craft a plan for discovery. The Committee noted:

[The parties] are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree.<sup>38</sup>

The Committee sought two outcomes: first, that litigants would be able to plan and conduct discovery in a good faith and cooperative manner; and second, that the change would not “lessen[] . . . the importance of judicial supervision.”<sup>39</sup>

### C. *Subsequent Rule Changes*

Subsequent to the 1993 amendments to Rule 26, the increased reliance on ESI and its relevance to discovery disputes prompted

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indicated in Section V below. However, while previously recognized as a possibility in some cases, the use of categories has been seen as atypical. *S.E.C. v. Nacchio*, No. 05-cv-00480-MSK-CBS, 2007 WL 219966, at \*9 (D. Colo. Jan. 25, 2007) (“While, in the typical case, a Rule 26(b)(5) privilege log will individually list withheld documents and provide pertinent information for each document, this is not an inflexible requirement.”). The court in *Nacchio* further added: “[I]n 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 . . . log would be of no material benefit to the discovering party in assessing whether the privilege claim is well grounded.” *Id.* at 9 (quoting *S.E.C. v. Thrasher*, No. 92 CIV. 6987 (JFK), 1996 WL 125661, at \*1 (S.D.N.Y. March 20, 1996); *see also* *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) (rejecting defendants’ demand for a document-by-document privilege log, and concluding that “defendants [had] not explained how a categorical privilege log impaired their ability to test plaintiff’s claim of work product protection, which [rose] or [fell] as a unit.”); *In re Imperial Corp. of Am. v. Shields*, 174 F.R.D. 475, 478 (S.D. Cal.1997) (acknowledging that a document-by-document privilege log may not always be appropriate or necessary in every case).

38. FED. R. CIV. P. 26(f) advisory committee’s note to the 1993 amendment.

39. *Id.*

additional changes to the rules. By this time, because of the volume of information involved in many disputes and the amount of work necessary to avoid production of privileged documents, prolonged discovery was a fact of life. As a result, the Committee amended 26(b)(5) to provide for a procedure to claim post-production privilege.<sup>40</sup> The Committee emphasized that Rule 26 “does not address whether the privilege or protection that is asserted after production was waived by the production,” allowing the current standards to determine when a waiver results from inadvertent production.<sup>41</sup>

The new rule also was designed to work in tandem with the amendments to Rule 26(f), which directed parties to discuss issues of privilege. One of the primary topics for discussion was the potential agreement to “quick peek” or “clawback” protocols to resolve privilege waiver disputes at the initial discovery conference.<sup>42</sup> These agreements can be included in an order by the court.<sup>43</sup> Another topic that should be discussed by the parties, under the rubric of privilege in Rule 26(f), is the form and content of privilege logs.<sup>44</sup>

By entering into agreements early in the discovery process, parties can avoid later disputes, thereby lowering the costs and delays relative to discovery. These costs can be further lowered by “agreeing to protocols that minimize the risk of waiver.”<sup>45</sup>

#### *D. Federal Rule of Evidence 502*

In September 2008, FRE 502 took effect. The rule was designed to provide a “predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication . . . covered by the attorney-client privilege or work-product protection.”<sup>46</sup> It seeks to achieve these goals by limiting the

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40. FED. R. CIV. P. 26(b)(5)(B) (“If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; . . . and may promptly present the information to the court under seal for a determination of the claim.”).

41. FED. R. CIV. P. 26(b) advisory committee’s note to the 2006 amendment.

42. FED. R. CIV. P. 26(f) advisory committee’s note to the 2006 amendment.

43. *Id.*

44. *Id.*

45. *Id.*

46. FED. R. EVID. 502 advisory committee’s note.

situations where a subject matter waiver will arise from the inadvertent or compelled production or disclosure of privileged information in two ways. First, the rule indicates that inadvertent disclosure will not result in a subject matter waiver if the privilege holder took reasonable steps to prevent disclosure and to rectify the error, including following FRCP 26(b)(5)(B).<sup>47</sup> Second, the rule gives controlling effect to agreements that are made and then put into effect by a court order so that the agreement is binding in any federal or state court action.<sup>48</sup> Notably, this allows parties to agree upon their own threshold standard (or none at all) to govern the return of inadvertently produced privileged documents.

Rule 502(d) also now provides the court with the ability to enter orders that can institute procedures for the review and handling of privileged documents that can never be argued or result in a waiver of any privileges.<sup>49</sup> This allows courts to permit or require disclosures of potentially privileged information with an umbrella protection against loss of privilege. In the extreme, the rule arguably authorizes courts to enter “quick peek” orders with or without the consent of the parties.<sup>50</sup>

Rule 502 was enacted to meet the obvious concern that in a world where a four gigabyte “thumb drive” now costs less than twelve dollars, the costs of review on a file-by-file basis of the contents of a client’s hard drive or server would soon dwarf the actual value of the case. The Advisory Committee stated:

It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work-product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic

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47. *Id.*

48. *Id.* (indicating in 502(d) that agreements that become part of a court order will not result in waiver in any other court proceeding, but 502(e) indicates that agreements that are not incorporated into a court order only bind the parties to the agreement, thus the importance of incorporating any agreement between the parties into an order regarding discovery is high).

49. *See* FED. R. EVID. 502(d).

50. *See id.* Because of the substantial risk that a “quick peek” could reveal important, legitimately privileged material, the authors believe that such procedures should ordinarily only be entered with the full informed consent of the parties, having been fully informed of the risks, dangers and consequences by their counsel who must do so as objectively and candidly as possible.

discovery.<sup>51</sup>

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. Nonetheless, as set forth below, the rule is a critical component of the legal backdrop that will allow for the creative, efficient handling of large volumes of potentially privileged information.

### III. PROBLEMS WITH PRIVILEGE LOGS AND THE IMPACT OF ESI

There have been a number of problems with privilege logs as they have evolved with the rules. The first problem is a lack of agreement as to what is required to make an adequate log.<sup>52</sup> Over time, however, courts across differing jurisdictions have articulated a somewhat common understanding of the requirements for a document-by-document log.<sup>53</sup> Of course, the rote repetition of these

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51. FED. R. EVID. 502 advisory committee's note. *See, e.g., Hopson*, 232 F.R.D. at 244 (explaining that electronic discovery may encompass millions of documents and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

52. *See* DAVID M. GREENWALD, EDWARD F. MALONE & ROBERT R. STAUFFER, TESTIMONIAL PRIVILEGES 220 (2005) ("The case law reflects differing views about the detail to be included on a privilege log.").

53. *Id.* ("In general, to be sufficient, a privilege log must set out: attorney and client, nature of the document, all receiving or sending persons or entities shown on the document, and the date the document was prepared or dated."); *see, e.g., Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164-MLB-DWB, 2007 WL 625809, at \*2-3 (D. Kan. Feb. 23, 2007) ("Courts in this district have determined that Rule 26(b)(5) requires the following with regard to privilege logs: (1) A description of the document explaining whether the document is a memorandum, letter, e-mail, etc.; (2) The date upon which the document was prepared; (3) The date of the document (if different from # 2); (4) The identity of the person(s) who prepared the document; (5) The identity of the person(s) for whom the document was prepared, as well as the identities of those to whom the document and copies of the document were directed, including an evidentiary showing based on competent evidence supporting any assertion that the document was created under the supervision of an attorney; (6) The purpose of preparing the document, including an evidentiary showing, based on competent evidence, supporting any assertion that the document was prepared in the course of adversarial litigation or in anticipation of a threat of adversarial litigation that was real and imminent; a similar evidentiary showing that the subject of communications within the document relates to seeking or giving legal advice; and a showing, again based on competent evidence, that the documents do not contain or incorporate non-privileged underlying facts; (7) The number of pages of the document; (8) The party's basis for withholding discovery of the document (i.e., the specific privilege or protection being asserted); and (9) Any other pertinent information

requirements has often been interpreted as a nearly dogmatic preference for a “document-by-document” log,<sup>54</sup> which in turn, leads to requests for document-by-document in camera reviews in the event of disputes.

The second problem is, that even with guidance, privilege logs are often useless to the court or the opposing party because they still do not contain enough information to make a determination of the accuracy of the privilege.<sup>55</sup> A recent example of typical problems seen

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necessary to establish the elements of each asserted privilege.”) (citations and internal quotations omitted)); N.D. FLA. CIV. R. 26.1; N.D. OKLA. CIV. R. 26.4; D. CONN. CIV. R. 37.

54. See, e.g., *Bozzuto v. Cox, Castle & Nicholson, LLP*, 255 F.R.D. 673, 677 (C.D. Cal. 2009) (“One method of expressly claiming attorney-client privilege or work product protection is a document-by-document privilege log.”) (citations omitted); *Infinite Energy, Inc. v. Thai Heng Chang*, No. 1:07CV23-SPM/AK, 2008 WL 4098329, at \*2 (N.D. Fla. Aug. 29, 2008) (“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 ‘hundreds, if not thousands, of e-mails between Chang and his attorneys, and his attorneys and their staff.’”); *M & C Corp. v. Erwin Behr GmbH & Co.*, No. 91-CV-74110-DT, 2008 WL 3066143, at \*2 (E.D. Mich. Aug. 4, 2008) (“As an initial matter the Court notes that the 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.”); *In re Joy Global, Inc.*, No. 01-039-LPS, 2008 WL 2435552, at \*4 (D. Del. June 16, 2008) (“With its non-privilege objections now overruled, the time has come for Joy to provide specific document-by-document assertions of privilege or work product protection if it is going to continue to refuse to produce documents responsive to the Relevant Request.”).

55. The authors of this article participated in an experiment that tested this thesis in which the judge-author of this article asked the participants at a conference (all of whom were either judges or lawyers) on the attorney-client privilege to determine which of the following typical entries in a privilege log meet the obligation of Rule 26(b)(5):

Date:	Author	Recipient	Topic
12/28/08	Redgrave	Doe	Attorney-client privilege
12/23/08	Redgrave	Doe	Letter providing legal advice
12/20/08	Redgrave	Doe	Letter providing legal advice as to tax consequences of the proposed Smith deal

No lawyer or judge would be surprised that all present agreed the first did not meet the Rule’s requirements. There also should be no surprise that the lawyers thought the second was the most that they would ever put in a privilege log while all of the judges found that the second was insufficient on its face and only the last one was adequate. The consternation arises from the third, which many lawyer-participants felt provided too much

with privilege logs is presented in *S.E.C. v. Collins & Aikman Corp.*<sup>56</sup> Looking at the government's first four privilege log entries, Judge Scheindlin noted:

The SEC has provided Stockman and the Court with no more useful information than the type of document (a memorandum), the addressees (various SEC staff), and the subject matter (Issue 00-25, a policy statement superseded by Issue 01-09, the subject of Request 33). Given this information, the Court is unable to evaluate whether any or all of these four memoranda are privileged, let alone understand why the SEC produced other memoranda on the same subject. The SEC asks the Court simply to take its word that these particular documents were predecisional, deliberative, purely subjective, and neither adopted nor incorporated in the agency's final decision. That cannot be sufficient.<sup>57</sup>

Although the SEC's letter provides additional explanation for the assertion of privilege to broad categories of documents, it should not be necessary for a party to seek court intervention in order to receive sufficient information to assess the strength of an adversary's privilege claim.<sup>58</sup> Even taking into account the SEC's assertions that the documents uniformly address decisions concerning the position the SEC will take on accounting matters or investigations, the agency has not noted the extent to which the memoranda were adopted in the final agency position (and thus provide additional background or analysis analogous to legislative history). While the deliberative process privilege protects important government interests, it still must be construed narrowly, as sustaining any privilege prevents a party from obtaining access to otherwise relevant information. Accordingly, the SEC must submit these documents for in camera review, together with a short memorandum explaining why each document is entitled to protection. A redacted version of the memorandum must be produced to Stockman. These materials must

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information such that there was real risk of privilege waiver; however, the judges were happier with the substantially improved prospects of understanding and ruling upon the privilege claim.

56. 256 F.R.D. 403 (S.D.N.Y. 2009).

57. *Id.* at 416 n.84 (citing *Reino de Espana v. Am. Bureau of Shipping*, No. 03 Civ. 3573, 2005 WL 1813017, at \*13 (S.D.N.Y. Aug. 1, 2005) (requiring "precise and certain reasons for asserting confidentiality" over documents purportedly subject to the deliberative process privilege)).

58. *Id.* at 416 n.85 ("With adequate information, Stockman might have accepted the SEC's privilege assertion concerning some documents and convinced the SEC to withdraw the assertion with regard to others, avoiding unnecessary motion practice.").

be submitted to the Court within twenty days of receipt of this Opinion and Order.<sup>59</sup>

This case is but one of many that can be cited where a party has provided, despite an articulation in case law of basic log requirements, less than sufficient information.<sup>60</sup> Indeed, the jurist-author of this article noted a number of years ago that he had “found privilege logs useless.”<sup>61</sup>

The third problem is that the potential consequences of an inadequate log are largely unclear. In theory, the inadequacy of a privilege log can be remedied in four ways: (1) permit the party another chance to submit a more detailed log; (2) deem the inadequate log a waiver of the privilege; (3) in camera inspection of the withheld documents; or (4) in camera inspection of a select sample of the withheld documents.<sup>62</sup> All four options have drawbacks and, more importantly, they have been inconsistently applied by the courts.

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. 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.”

Regarding the second option, “The law is well-settled that, if a party fails to make the required showing, by not producing a privilege log or by providing an inadequate one, the court may deem the privilege waived.”<sup>63</sup> That said, declaring that an insufficient log leads

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59. *Id.* at 416-17.

60. *See, e.g., Williams v. Taser Intern., Inc.*, No. 1:06-CV-00051-RWS, 2008 WL 192991, at \*3 (N.D. Ga. Jan. 22, 2008) (“The assertions of privilege in Taser’s privilege logs are wholly inadequate to allow Plaintiffs or the Court to evaluate the validity of the assertions. Many of the entries in the logs fail to identify who sent or received the document. The logs disclose little or no information about the actual contents of the documents. Taser uses boilerplate objections which the Court, in the June 4 Order, determined were insufficient. In that Order, the Court directed Taser to provide more information in its privilege logs.”).

61. *Marshall v. D.C. Water & Sewage Auth.*, 214 F.R.D. 23, 25 n.4 (D.D.C. 2003); *Mitchell v. Nat’l R.R. Passenger Corp.*, 208 F.R.D. 455, 461 (D.D.C. 2002); *Avery Dennison Corp. v. Four Pillars*, 190 F.R.D. 1 (D.D.C. 1999).

62. *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 307 (D.D.C. 2009).

63. *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 671 (D.



to a waiver “is the most draconian.”<sup>64</sup> “[S]uch a finding is in the nature of a sanction and, at least in the first instance, should be weighed in terms of the intent of the party producing the defective log and against the harm caused by disclosure of what might otherwise be privileged documents.”<sup>65</sup> There is also a significant element of fairness that must be considered if a client could potentially lose a privilege by virtue of the lawyer’s inability to provide an adequate privilege log.

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.”<sup>66</sup> 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.

Lastly, there exists a hybrid solution that is sometimes employed when there are too many documents, too little time, or both, to do a traditional document-by-document in camera analysis. Reducing the number of documents to be reviewed not only lessens the burdens on the court, but it also lessens the risk that the finder-of-fact will see privileged documents. This is important because “despite the fact that judges, for example, routinely disregard inadmissible evidence, it may

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Kan. 2005) (citing FED. R. CIV. P. 26(b)(5)); *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 476 (E.D. Pa. 2005); *Potter v. United States*, No. 02-CV-0632-H (POR), 2002 WL 31409613, at \*7-8 (S.D. Cal. July 26, 2002).

64. *NLRB*, 257 F.R.D. at 307.

65. *Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 126 n.2 (2007) (citing FED. R. CIV. P. 26(b)(5) advisory committee’s note to 1993 amendment; *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005) (rejecting a per se rule under which a privilege is deemed waived if a proper privilege log is not initially produced)); *see also* *Muro v. Target Corp.*, 250 F.R.D. 350, 360 (N.D. Ill. 2007) (“[B]lanket waiver is not a favored remedy for technical inadequacies in a privilege log.”) (citing *Am. Nat’l Bank & Trust Co. of Chi. v. Equitable Life Assurance Soc’y of U.S.*, 406 F.3d 867, 879 (7th Cir. 2005) (holding that Magistrate Judge abused his discretion by finding that defects in privilege log merited a sanction of blanket waiver, absent a finding of bad faith.)).

66. *NLRB*, 257 F.R.D. at 307.

be difficult to “unring the bell”. Caution and the need to eliminate even the potential for prejudice to the holder of the privilege, require that in camera inspection never be any greater than absolutely necessary.”<sup>67</sup> Of course, a potential problem with this hybrid approach is determining which documents will be subject to the sampling, and what conclusions can be drawn from the sampling to apply to other documents without further review. Without a process framework and agreements at the outset of the case, the court is left with the frustrating problem of untangling the ball of yarn in the midst of the case and usually near the end of the discovery period.

#### IV. EXPONENTIAL PROBLEMS FOR PRIVILEGE CLAIMS CAUSED BY ELECTRONICALLY STORED INFORMATION

ESI enormously exacerbates the problems with traditional privilege logs. First and foremost, the problems caused by ESI are those of volume. Second, e-mail chains, attachments, and collaborative work environments created through the use of e-mail, chat systems, and other electronic forms of interaction all raise serious questions about privilege claims that must be addressed during a privilege review. These problems are not necessarily new. Nearly twenty-five years ago, in a Utah district court, Judge Greene saw this as a coming problem, noting that “most court battles now involve discovery of some type of computer-stored information.”<sup>68</sup> However, despite three rule amendments and the introduction of FRE 502, many courts appear no closer to a coherent solution to these problems with respect to privilege logs than they were twenty-five years ago.

##### A. Volume

The primary issue caused by ESI is one of sheer volume. As Judge Grimm noted in *Hopson*, “it is no longer remarkable that electronic document discovery may encompass hundreds of thousands, if not millions, of electronic records . . . .”<sup>69</sup> For example,

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67. *Id.*

68. *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 462 (D. Utah 1985). See David Isom, *Electronic Discovery: New Power, New Risks*, 16 UTAH B.J. 8, 9, & 14 n.7 (2003) (noting that while Greene’s opinion was the “most cited electronic discovery case of the 1980s,” his assertion that most litigation involved electronic discovery in 1985 was “not supported by the reported cases or commentaries. Until the late 1990s, electronic discovery issues in reported cases were scarce.”).

69. *Hopson*, 232 F.R.D at 244.

in *In re Vioxx Products Liability Litigation*, Merck produced over 2.3 million documents consisting of 18,000,000 pages and claimed privilege on 30,000 additional documents.<sup>70</sup> Also, in *In re Intel Corp. Microprocessor Antitrust Litigation*, Intel produced a reported 150,000,000 pages of documents.<sup>71</sup> This is expected to be one of the largest document productions ever and seems to be an indication of things to come rather than a rare occurrence in which millions of pages of documents must be produced.<sup>72</sup> In *In re Fannie Mae Securities Litigation*, the Office of Federal Housing Enterprise Oversight (OFHEO), which was not a party to the litigation, was subpoenaed to produce documents related to their regulation of Fannie Mae.<sup>73</sup> OFHEO and the defendants stipulated to a timeline to produce the ESI. After OFHEO failed to produce all responsive e-mails, OFHEO spent \$6,000,000 and hired fifty attorneys to produce and review the documents by the agreed upon deadline.<sup>74</sup> This effort failed, and the district court held OFHEO in contempt despite its efforts.<sup>75</sup> The appellate court affirmed and ordered production of all the documents that had not been produced or logged by the deadline.<sup>76</sup> Finally, in *In re Zurn Pex Plumbing Products Liability Litigation*, Judge Montgomery granted a plaintiffs' motion to compel production of ESI in the class certification stage of the litigation.<sup>77</sup> The motion forced the defendants to search nearly fifty gigabytes of ESI stored on their hard drives and to back up DVDs using fourteen search terms despite the previous production of substantial amounts of hard copy documents.<sup>78</sup>

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70. *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007); *In re Vioxx Prods. Liab. Litig. Steering Comm.*, No. 06-30378, 2006 U.S. App. LEXIS 27587 (5th Cir. 2006).

71. See Ann Steffora Mutschler, *Intel, AMD Antitrust Trial Pushed Back*, June 6, 2008, <http://www.edn.com/article/CA6568070.html>.

72. There is a real question as to the utility of requesting or producing 150,000,000 pages of documents; but, the reality with ESI is that it is not rare to have to produce or log what seems to be an absurdly excessive number of pages and documents.

73. *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 816 (D.C. Cir. 2009).

74. *Id.* at 817.

75. *Id.* at 823-24.

76. *Id.* at 816.

77. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-1958 ADM/RLE, 2009 U.S. Dist. LEXIS 47636, at \*7 (D. Minn. June 5, 2009).

78. *Id.* at \*5-7. This will require searching through nearly four million pages of documents, and while the terms will limit what actually needs to be reviewed, the amount of searching required at the class certification stage provides yet another example of the voluminous amounts of ESI that must be dealt with in litigation.

B. *E-mail Strings*

Beyond issues of volume, the unique nature of ESI also poses serious problems during the discovery and logging of documents. E-mail strings<sup>79</sup> create unique scenarios even when they are correspondence between only two people. Some courts have concluded that each individual e-mail in a string needs to be logged and reviewed for privilege individually. The fact that the string begins with or contains confidential communication between an attorney and a client is not enough to invoke the privilege for the entire string. Further, even if the originating e-mail and its response are privileged and logged properly, there is no guarantee that any subsequent replies or e-mails would be privileged; therefore, they must be reviewed and logged individually.

This causes problems in the organization of the logs, in addition to the problems that e-mail strings create due to their volume. Should the entire string be grouped together? Should each individual e-mail be logged in order of date thereby breaking up the string? Should e-mails be logged based on recipients and senders only? Courts have come to different conclusions.

First, in *Rhoads Industries, Inc. v. Building Materials Corp. of America*, Judge Baylson ruled on Rhoads's privilege logs after a search of nearly 80,000 e-mails.<sup>80</sup> In logging the e-mails, Rhoads sometimes failed to include all responses and forwards of a string of e-mails.<sup>81</sup> There were two categories of strings at issue. First, there were strings where "all or some of the earlier e-mail messages were listed on a previous privilege log, but in which the most recent e-mail (often a 'reply' or 'forward' message, on top of the e-mail string) was not on a previous log."<sup>82</sup> The second category consisted of strings where "the most recent e-mail . . . was privilege logged . . . and in which all or some of the earlier e-mail messages in the string were not otherwise included on a previous privilege log."<sup>83</sup> Judge Baylson

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79. *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 238, 239 (defining "e-mail strings" as "a series of e-mail messages by and between various individuals").

80. *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am. (Rhoads I)*, 254 F.R.D. 216, 222 (E.D. Pa. 2008); *see also Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am. (Rhoads II)*, 254 F.R.D. 238 (E.D. Pa. 2008)(clarifying the scope of Judge Baylson's earlier order regarding which e-mails were privileged).

81. *Rhoads II*, 254 F.R.D. at 239.

82. *Id.*

83. *Id.*

concluded that the failure to log each individual e-mail in a string meant that those messages, which were not on a previous log, were no longer privileged.<sup>84</sup> Thus, the failure by Rhoads to log each e-mail individually resulted in waiver of privilege for many communications.<sup>85</sup> The same conclusion was reached by Judges Brown and Pallmeyer in *Muro v. Target Corp.*<sup>86</sup> However, Magistrate Brown's order requiring production of the documents on the log was vacated. It was not clear whether the documents were found not privileged, or if the order was a sanction for failing to produce an adequate log because strings of e-mails were not logged separately.<sup>87</sup>

### C. Attachments

E-mail attachments also present unique problems for logging and privilege review. While an e-mail may be labeled "privileged," it does not necessarily follow that attached documents are likewise privileged, and vice versa. Thus, attorneys must review each attachment in addition to reviewing each e-mail, creating significant problems due to the volume of documents that must be reviewed and logged for privilege. In *C.T. v. Liberal School District*,<sup>88</sup> the plaintiff submitted an inadequate privilege log. After denying the defendant's motion to compel, the court required the plaintiff to submit a new privilege log.<sup>89</sup> This second log failed to list attachments to e-mails separately, but noted their existence in the logging of the e-mails themselves.<sup>90</sup> Judge Sebelius concluded that "to the extent that the plaintiff has not produced these attachments the court finds any claim of privilege plaintiff might wish to raise as to those documents has been waived, and the attached documents . . . shall be produced."<sup>91</sup> Judge Sebelius

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84. *Id.* at 241-42.

85. *Id.* This was also one of the first cases to apply FRE 502 to inadvertent production. The court ruled that the steps taken by Rhoads were reasonable and that the production of privileged material did not waive the privilege under FRE 502 or Rule 26(b)(5)(B) because they hired a consultant who performed testing and used sophisticated search technologies to review the nearly 80,000 e-mails. Thus, there was no subject matter waiver, and there was no waiver of documents as a result of their production. However, the failure to log each e-mail in a chain resulted in waiver in relation to the e-mails which were not logged.

86. (*Muro I*) 243 F.R.D. 301, 310 (N.D. Ill. 2007), *overruled by* *Muro v. Target Corp.* (*Muro II*), 250 F.R.D. 350, 365 (N.D. Ill. 2007).

87. *Muro II*, 250 F.R.D. at 365.

88. No. 06-2093-JWL, 2008 U.S. Dist. LEXIS 5863, at \*3 (D. Kan. Jan. 25, 2008).

89. *Id.*

90. *Id.* at \*30.

91. *Id.* at \*30-31.

noted that the “Plaintiff has had ample opportunity to list these attachments on either of the privilege logs, . . . and the court will not afford plaintiff a third bite at the apple.”<sup>92</sup>

## V. WAY FORWARD

In order to overcome some of these issues, the proposed Facciola-Redgrave Framework (FRF) is designed to reduce the number of documents subject to logging, thereby reducing the number of disputes regarding logs and the number of claims that require in camera review by the courts. Further, the framework seeks to offer early guidance from courts regarding legitimate claims of privilege and to force early cooperation between the parties on the legitimacy of privilege claims and the boundaries for discovery of ESI. By starting this process early in the litigation and encouraging cooperation between the parties with guidance from the judge, time and resource consuming disputes can be avoided.

### A. *Rules Based Authority for Framework—1993 and 2006 Amendments Along with FRE 502*

The 1993 amendments, which included a framework for privilege logs, indicate that there are multiple ways to satisfy the requirements of FRCP 26, including logging documents by categories.<sup>93</sup> 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.<sup>94</sup> With the changes to Rule 26(f) and the addition of FRE 502, parties now have rule-based authority for coming to agreements in the planning stages of discovery that would govern ESI strategies, necessary requirements for privilege review and post-production claims of privilege.<sup>95</sup> The rules indicate support for various arrangements, including clawback agreements, post-production agreements, and quick peek agreements pre-production.<sup>96</sup> There is no limitation in the rules as to what type of agreement parties could come to. Any agreement regarding privilege review or waiver that is approved by the court and incorporated into a scheduling order would be binding on the parties in the instant

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92. *Id.* at \*31.

93. FED. R. CIV. P. 26 advisory committee’s note to the 1993 amendment.

94. *Id.*

95. *Id.*; FED. R. EVID. 502.

96. FED. R. CIV. P. 26 advisory committee’s note to the 1993 amendment.

litigation as well as other parties pursuant to FRE 502.<sup>97</sup>

Rule 502 does not specify when, if ever, a waiver of the attorney-client or work product privilege has occurred because existing law controls that question.<sup>98</sup> By coming to an agreement prior to a waiver dispute, parties can influence what reasonable pre- and post-production steps can be taken in order to preserve privilege. The use of grouping, the meet and confer, and scheduling orders, allows parties significant flexibility in handling privilege review and can thus reduce the resources and time necessary to meet discovery demands.

### *B. Solutions from Courts*

#### *1. In re Vioxx Products Liabilities Litigation*<sup>99</sup>

One idea that has been utilized to solve particularly problematic and large issues regarding ESI and privilege logs is sampling with the help of a special master. In *Vioxx*, defendant Merck produced over 2.3 million documents amounting to approximately 18,000,000 pages.<sup>100</sup> Merck subsequently claimed privilege to approximately 30,000 additional documents and submitted a privilege log.<sup>101</sup> The district court did not address Merck's inadequacy claim and undertook an in camera review of each document to which Merck asserted privilege.<sup>102</sup> After review, the district court ordered that only 491 documents were privileged,<sup>103</sup> and Merck sought a writ of mandamus from the Court of Appeals.<sup>104</sup> Despite what the appellate court termed the "commendable effort" of the district judge, the

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97. *Id.*

98. FED. R. EVID. 502.

99. No. 06-30378, 2006 U.S. App. LEXIS 27587 (5th Cir. May 25, 2006).

100. *Id.* at \*2.

101. *Id.*

102. Merck's privilege log was not inadequate for lack of trying or due to bad faith representations on the log. The log included the names of the authors, addressees and recipients, the date of the document, the subject matter of the document, a listing of attachments to the document and an explanation of the privilege being asserted. *Id.* at \*4, n.2. Further, Merck urged the court that it could categorize the documents and the court could then review samples from each category and make privilege determinations that could then be applied to the rest of the documents within that category. *Id.* at \*2-3. The categories that were proposed by the parties were by subject matter, such as marketing documents, regulatory documents, etc. *Id.*

103. *Id.* at \*5.

104. *Id.*

result and method he used was deemed unacceptable.<sup>105</sup> Merck had offered assistance in reviewing the documents, although the judge refused. The judge also found the categories unhelpful and the documents (in 81 boxes) to be disorganized.<sup>106</sup> Further, the judge ruled inconsistently on many of the documents, finding one document privileged and later finding an exact duplicate of that document not privileged.<sup>107</sup> Thus, while the court of appeals refused to decide the merits of issuing the writ, it ordered the district court or a special master to conduct a detailed review of at least 2,000 documents selected by Merck to be a representative sample.<sup>108</sup> Both parties asserted that a “document by document review is both impractical and inefficient,” and the plaintiffs suggested in-camera review of samples of documents from each of several categories.<sup>109</sup>

The district court appointed a special master to review a sample of the documents and to make privilege determinations for those which could be applied to the rest of the documents on the privilege log.<sup>110</sup> The sample contained 2,600 documents: 2,000 selected by Merck and the rest offered by the plaintiffs from the privilege log.<sup>111</sup> These documents were reviewed multiple times by the special master who then issued a report. The report offered nine substantial guidelines, mostly related to senders and recipients of communications, but sometimes related to the subject matter of the documents themselves and made privilege determinations on these categories.<sup>112</sup> Merck objected to portions of the special master’s report, but both sides were appreciative of the “effort and time” put in and found the process “thorough, fair, and complete.”<sup>113</sup> Merck was then required to apply the guidelines and conclusions of the special master to the remaining documents on the privilege log. The court indicated that once this process was complete, it would likely request that the special master review the documents ultimately withheld to

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105. *Id.* at \*6.

106. After U.S. Court of Appeals for the Fifth Circuit refused defendant’s petition for mandamus, the court appointed a special master to review. *In re Vioxx Prods. Liabil. Litig.*, 501 F. Supp. 2d 789, 791 (E.D. La. 2007).

107. In reviewing the ruling by the U.S. District Court for the Eastern District of Louisiana, the court examined the process and not the merit of the privilege claim. *In re Vioxx*, 2006 U.S. App. LEXIS 27587, at \*6.

108. *Id.* at \*10.

109. *Id.* at \*2-3.

110. *In re Vioxx*, 501 F. Supp. 2d 789.

111. *Id.*

112. *In re Vioxx*, 501 F. Supp. 2d at 809-13 (reproducing report of Special Master).

113. *Id.* at 813.



determine if Merck applied the guidelines in good faith, warning that if Merck failed this check, the court would have the special master review every document individually and would shift the cost of the special master's review to Merck.<sup>114</sup>

While this process was not perfect, the parties approved of the sampling of documents, and it greatly reduced the time and cost required to review the privilege log. Although it took three months and cost \$400,000 for the special master to review 2,600 documents and prepare a report, this is far cheaper and faster than a review of all 30,000 would have been.<sup>115</sup> At the same time, the process was much more thorough than just declaring the log inadequate and ruling that Merck had waived any possible privilege related to the 30,000 documents which Merck had logged.<sup>116</sup> Thus, *Vioxx* is an example of a possible way forward; indicating that when parties cooperate on standards for sampling, it can be very effective, and it offers guidance as to what sort of categorization is most helpful. It also provides a process for checking for compliance and enforcing consequences, which do not necessarily eliminate privilege, but instead impose monetary consequences as the initial step in deterring would-be cheaters. *Vioxx* shows that a framework based upon categorization and sampling of documents can withstand even the largest of discovery disputes in complex cases if the parties work together, and the judge effectively shepherds the process forward.

## 2. *D'Onofrio v. SFX Sports Group*<sup>117</sup>

In SFX, two solutions were offered in order to attempt to resolve a prolonged and contentious discovery dispute. The defendants in the case produced a privilege log which listed 9,413 items and offered two compromises to the plaintiff in order to test the log.<sup>118</sup> First, the defendants offered to give the plaintiff's attorney their attorney's notes, taken while creating the privilege log in order to offer context

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114. *Id.* at 815-16 n.35-36 (explaining that it cost more than \$400,000 for the review of the sample alone).

115. *Id.* at 235.

116. While the 30,000 seems like a lot, it is merely one percent of the documents that were produced in the litigation which is not an unreasonable amount. *See In re Vioxx*, 2006 U.S. App. LEXIS 27587, at \*2.

117. In light of the pendency of this matter before the jurist-author of this article, he did not contribute to this summary of the case or the conclusions drawn. *See D'Onofrio v. SFX Sports Group, Inc.*, 256 F.R.D. 277, 278 (D.D.C. 2009).

118. *Id.* at 278.

to the information in the log. Second, defendants were willing to allow the plaintiff's expert to use sampling to view some of the documents where privilege was asserted in order to confirm the veracity of the privilege claim. Both of these offers were conditioned on two limitations: first, that the documents turned over not be viewed by anyone other than the attorneys and experts for the plaintiff without written consent; and second, that the documents created after March 17, 2006 were not to be included in the sample.<sup>119</sup> These techniques were adopted in order to bring an end to a protracted discovery dispute; had they been worked out by the parties at the beginning of the dispute, these techniques would have saved time and money for both sides.

### C. *The Facciola-Redgrave Framework*

With this background, we offer the following framework to guide the assertion of privilege claims in modern litigation. In light of the factors cited above, we suggest that this framework replace, in many, if not the majority of cases, the traditional document-by-document privilege log process.

#### 1. Rule 26(f) Meet and Confer on Privilege Issues

The parties must, as a part of the Rule 26(f) process, discuss the anticipated volume of privilege claims, the type of privilege claims that may be asserted, and the process by which privilege claims will be identified and adjudicated. The resulting agreement or dispute should be presented to the court at the Rule 16 conference.

As part of the meet and confer process, the parties should discuss and agree upon language addressing the non-waiver or privilege for the disclosure of information during the privilege assertion/logging process, as well as a process to address the inadvertent production of privileged documents and ESI.<sup>120</sup> These agreements should then be

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119. *Id.* at 279-81 (allowing these two conditions while noting that the time table was reasonable because it only prevented discovery of privileged materials which were created six months after the firing of the employee that begat the lawsuit, and noting the "attorneys eyes' only" condition was reasonable because there was no reason that the attorney needed help from the plaintiff in making privilege determinations).

120. Throughout this protocol, the word "document" should be construed broadly to include all manner of ESI as well as traditional paper documents. *See generally* FED. R. CIV. P. 26 (a)(1)(A) (stating initial disclosure must include electronically stored information).

incorporated into a court order.<sup>121</sup>

## 2. Use of Categories, Indices, and Privilege Logs

### A. Categories of Exclusion

The parties should meet and confer in good faith to identify documents and ESI which may be excluded from collection or production by virtue of the high likelihood that they are not discoverable due to a privilege or protection. An example may be the correspondence between the client and litigation regarding about the instant lawsuit. The documents and ESI in these categories need not be logged, indexed, or produced. The materials should, however, be preserved in the event of a later dispute.

### B. Segregating, Categorizing, Indexing, and Logging Privileged Documents.

The following tools may be used independently or together to achieve the objective of Rule 1<sup>122</sup> in achieving the efficiency and reducing the cost of asserting and resolving claims of privilege:

#### 1. Segregation of Presumptively Privileged Documents

The parties should meet and confer in good faith to identify documents and ESI that may be segregated and excluded from production through agreed-upon exclusionary search terms, concepts, or some other methodology as potentially privileged documents. The parties should also meet and confer about the information that will be supplied regarding the withheld documents (e.g., the total volume withheld and an index of withheld documents containing readily available objective information, such as document number, author, and recipient).<sup>123</sup> The object should be to efficiently segregate those documents which are likely to be privileged from the rest, allowing for a more nuanced set of alternatives to alleviate the burden of a document-by-document review of all potentially privileged documents. Indeed, in some cases it is likely the parties may only seek

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121. See *infra* Part V(C)(3).

122. FED. R. CIV. P. 1 (“These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

123. See *infra* Part V(C)(2)(B)(3).

additional information for a very limited subset of the segregated, presumptively privileged documents in light of the information exchanged through the meet and confer process.

## 2. Categorization

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.

## 3. Objective Indexing

The parties should meet and confer in good faith to identify those categories or types of information where an objective index of readily available information can be prepared to aid the parties in understanding the universe of documents at issue. For example, if the electronically stored information is in a database such that a report can be generated which provides objective information about the documents (such as presumptive authors, recipients, dates, assigned bates, or production number and file size), then the parties may agree to produce such an index for some or all of the categories.

Importantly, this indexing is not a privilege log nor is it intended to be a substitute. Rather, it is a catalogue of information that is available without undue burden and can be shared regarding withheld documents. In conjunction with the provision of additional information,—affidavits<sup>124</sup> and the confidential meet and confers<sup>125</sup>—this information will likely be sufficient to justify many privilege claims.

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124. See *infra* V(C)(2)(C).

125. See *infra* V(C)(2)(D).

#### 4. Privilege Logs

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. They should make every effort to specify what is a sufficient claim of privilege (by category or document) by using an agreed upon formula such as: “This category includes all documents created during the period of July 1, 2008 to July 1, 2009 in which a party communicated to counsel about the legality or advisability of entering into the contract at issue.” We anticipate the court may consent to provide informal advance guidance as to the sufficiency of the formulas the parties intend to use.

#### C. Evidentiary Support for Categories

For each established category, the requesting party may request an affidavit attesting to the facts that support the privileged or protected status of documents and ESI within that category. The affidavit does not need to identify or address documents on an individual basis, as it serves to provide the evidentiary context and support for the category as a whole. 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.<sup>126</sup> 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, avoiding problems seen in cases such as *Rivastigmine*.

#### D. Meet and Confers Regarding Rolling Categorization, Indexing, and/or Logging

Once production begins, the parties will meet and confer on any issues which arise with respect to the categorization or indexing of documents. Under the protection of a Rule 502(d) Order,<sup>127</sup> the

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126. See *In re Rivastigmine Patent Litigation*, 237 F.R.D. 69, 88 (S.D.N.Y. 2006) (“Categorical log entry 3 suffers from a problem common to many of the plaintiffs’ categorical log entries. Like entries 1, 2, 40, and 41, all discussed above, entry 3 leaves the alleged basis for the assertion of privilege uncertain.”).

127. See *infra* Part V(C)(3).

parties will be encouraged to share information (orally or otherwise) that may be subject to a privilege or protection and will assist in informally resolving the privilege issues. The information exchanged in these meet and confers cannot be used or cited outside of the conference, nor will the exchange of information be a waiver of any privilege or protection.

#### E. Rolling Categorization

Once production begins, the producing party will, in good faith, use readily available information about the documents to segregate them into the agreed upon or ordered categories on a rolling basis. This process may be done by any reasonable, defensible methodology, including search terms, extracted metadata, or manual review. The producing party will, upon request, describe to the requesting party the process used to categorize documents.

#### F. Rolling Indexing and Privilege Log Guidelines

##### 1. Limited Indexing

Only those categories for which indexing has been agreed upon or ordered need to have the corresponding documents and ESI indexed.

##### 2. Readily Available Objective Information for Indices

For the documents and ESI which need to be included in a category index, the producing party is only required to provide readily available non-privileged information. This can be information that has been recorded by the party or information derived from the electronically stored information (such as metadata). It may be created through an automated process, a human process, or a hybrid. For example, an index that categorizes all documents exchanged by counsel for the plaintiffs, whether from the same or different firms, between certain dates as “work product” would suffice.

##### 3. Additional Information Required for Privilege Logs

A traditional privilege log, when required, will involve additional research and analysis to ensure that the following information is provided (as applicable) in the log for each document:

- (1) Document identification number;
- (2) Document type;
- (3) Document length/file size;
- (4) Attachments;
- (5) Date;
- (6) Author;
- (7) Recipients;
- (8) Copyees;
- (9) Categories;
- (10) Privilege(s) or protection(s) claimed;
- (11) The basis for the claimed privileges or protections, including information sufficient to establish the elements of each asserted privilege meeting the agreed upon criteria as suggested above; and
- (12) Any additional information that may be required by the agreement of the parties and/or order of the court.

#### 4. E-Mail Strings (for both Indices and Privilege Logs)

The parties should index or log the “last-in-time” e-mail in each string provided that (a) each separate communication in the chain is at some point the “last in time” e-mail in a string, and (b) the index or privilege log notes that the e-mail communication is part of a string.<sup>128</sup> If an embedded e-mail communication is not otherwise available, then it must separately be identified and indexed, logged, as well as categorized.<sup>129</sup>

#### 5. Attachments

Attachments to e-mails should be identified as attachments and separately indexed, logged, or categorized.

#### 6. Duplicates and Near Duplicates

Exact duplicates do not need to be separately indexed, logged, or categorized. Where required, near duplicates<sup>130</sup> should be, indexed, logged or categorized as well as identified as a near duplicate to assist

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128. The authors believe that such an identification can be made without undue burden.

129. In other words, the goal is to ensure that the burden of indexing is reduced but that there is no opportunity for inadvertent or deliberate “gaps” in identifying withheld communications.

130. Near-duplicates are documents which differ by a few words or paragraphs.

in the consistent treatment of the document.

### 3. Court Order Regarding Process

Importantly, to avoid disputes and to get the protections available under FRE 502, all of the agreements and protocols set forth above must be incorporated, as tailored to the circumstances of the case, into a court order. That court order should reflect that neither the processes in the framework, nor the actions taken by the parties in accord with the framework, operate as a waiver as to any and all privileges and protections that may be asserted in any state or federal proceeding. Specifically, it should state, under the authority of Rule 502(d), that (a) the sharing of information in any meet and confer process regarding privilege documents is to be held confidential and will not, in any circumstance, be deemed a waiver of any privileges; and (b) the intentional or inadvertent inclusion of privileged information in an index or privilege log will not, in any circumstances, be deemed a waiver of any privileges. In addition, it is highly advisable that the court order include a specific “clawback” protocol to govern the inadvertent production of privileged documents and ESI.

#### A. Challenges to and Rulings on Privilege Claims

If a good faith basis exists, the requesting party may request for the court to (a) address the legitimacy of the premise that documents within a category of exclusion or inclusion are privileged in the first instance or (b) conduct an in camera review of a sample subset of the documents within a category to assess the validity of the privilege claims for those documents. The sampling process need not be scientific and can either be random (e.g., every 200th document) or targeted (e.g., the requesting party identified 100 documents from the index for review). That said, the parties need to agree to the sampling process or the court needs to provide a sufficient rationale to the process in any order.

The court has the discretion to rule upon the categorized documents as it best sees fit to efficiently and fairly resolve the dispute. Basically, the court can:

- (a) Uphold claims by category or individually;
- (b) Overrule claims and order individual documents produced;
- (c) Overrule claims and order groups of documents within categories produced;



(d) Determine that insufficient evidence was presented to sustain claim for entire category and thus overrule claims by category (or subset);

(e) Provide guidance to the parties regarding the future categorization of documents in the case as it proceeds; and/or

(f) Order documents (individually or by category/sub-category) produced for abuse of process if sampling or other procedures indicate that a party did not engage in the framework in good faith.

Although there are a number of possible judicial resolutions, the comparative advantage of the Facciola-Redgrave Framework (and difference from the status quo) comes from the fact, if followed in good faith, (a) fewer documents will be subject to the indexing/logging process, reducing the universe of potential challenges; (b) fewer challenges to this population will be brought; (c) fewer marginal claims of privilege will be asserted for fear of waiver or otherwise; and (d) the challenges brought (to either categories, bases for claims, and/or documents) will arise much earlier in the process, and the resolution can provide guidance which will influence the remaining privilege assertions to reduce disputes.

With respect to the panoply of potential judicial rulings, courts clearly have the discretion to find entire categories simply not privileged under substantive law, (e.g., all communications to a third person not within the scope of the privilege are no longer privileged) or that an exception to a privilege (such as the crime-fraud doctrine or a substantive waiver) defeats the claim as to category or a subset. A closer question is presented when the court finds that a number of sampled documents do not support the claimed privilege (even though the purported privilege is valid). In particular, there are significant concerns that a sampling process which results in the loss of privilege for an entire category due to perceived abuse is too arbitrary and would be an abuse of discretion.<sup>131</sup>

Thus, courts should take care to avoid wholesale overruling of privileges on a categorical basis for the very same reasons that finding a waiver for an inadequate log is disfavored. At the same time, we note that the lawyers' notion that only document-by-document review will suffice is flatly wrong. Studies have established that manual

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131. See *Equitable Life Assurance Soc'y of U.S.*, 406 F.3d at 878-89 (finding that the magistrate judge abused his discretion in using a sample of 20 documents, selected by the requesting party, to review and then apply a standard by which the entire category was rejected if he found that more than three documents (i.e., 20% of the sample) were not privileged).

document-by-document review alone may be one of the poorest ways to find what one is looking for in a large data set.<sup>132</sup> Accordingly, when we propose a different method, we have no concern that we are displacing a system that already works well.

#### B. Dealing with Uncooperative Counsel and “Cheaters”

This framework is a process that is predicated on cooperation and good faith. If either of these pillars falter, then using the framework process set forth above may not be helpful. Indeed, observers may argue that these problems will completely undercut the utility of the proposed framework entirely. We disagree.

We submit that there are four reasons why the risk of uncooperative behavior will not be the downfall of the proposed framework. First, the costs of electronic discovery have been so great that judges are increasingly losing patience with lawyers who refuse to cooperate and are frequently citing the recently issued Sedona Conference Cooperation Proclamation as setting a legitimate standard by which counsels’ behavior will be judged. Second, discovery disputes where there is bad faith or a refusal to cooperate cause problems regardless of the framework in which the discovery process operates. Thus, the objection is not unique to this framework. Third, if a judge stresses the importance of the process and moves the parties forward in their meet and confer sessions, it will be far easier to determine the causes of disputes and rectify them early in the process. Rules 26(g) and 37 offer broad discretion for judges to issue sanctions against parties who refuse to act appropriately in the discovery process. Fourth, in situations where one party refuses to agree on a framework, categories, non-waiver process, or privilege review agreements, a judge has wide discretion to make those determinations and issue an order that would be binding on the parties. As more and more parties use a similar framework to resolve discovery issues and reduce the time and resources required to conduct discovery, it will become easier for judges to issue orders forcing parties into a similar process.

At the same time, there are two important issues which have to be confronted when dealing with bad faith “cheating” in the discovery process. First, one must acknowledge that, absent a document-by-

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132. See George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 1, 24-25 (2007), available at <http://law.richmond.edu/jolt/v13i3/article10.pdf>.

document review in camera by a judge, there is no surefire way to catch every instance of bad faith in discovery with respect to the withholding of relevant documents and ESI on the basis of privilege. The question, then, is whether a new framework would reduce instances of disproportionate discovery and increase situations where cases are decided on the merits (theoretically leading to the most just outcome) often enough to allow for a trade off of the chance of increased instances of cheating and bad faith. If the answer to the question is yes, then objections to the framework based on bad faith cheating are less weighty because the overall scale will tilt toward a more consistent administration of justice.

The second issue is that deterring misbehavior requires either catching more people who act in bad faith, or making punishment for acting in bad faith harsher. The best method for deterring misbehavior is to impose harsh sanctions, both monetary and in terms of waiver, for parties who conduct discovery in bad faith. In addition to harsh penalties for cheating, the process should evolve over time to increase instances where those who attempt to circumvent the system are caught through sampling, better search and keyword technologies, and more familiarity by the judiciary and attorneys involved in these disputes.

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 and abuse of discovery strategies in order to offset instances where bad faith cheaters can escape detection.

## VI. CONCLUSION

The key to smooth and successful privilege review in the world of ESI is to ensure that the parties cooperate and have support and guidance from the court in formulating a plan for the logging of relevant but privileged documents and ESI. This plan should be agreed to by both parties, and then placed into an order by the judge so that the accidental production of privileged information does not necessarily result in any waiver of privileges or protections. By limiting the documents that must be indexed or logged, by using

categories to organize the information, and by using detailed logs only when necessary, the cost of claiming and adjudicating privilege claims can be greatly reduced. Additionally, the parties can agree to “clawback” agreements (or something similar) in order to ensure that documents and ESI that are accidentally produced but are privileged do not result in any waivers. Finally, the efficiency and utility of the privilege process can increase substantially if attorneys can spend more time explaining the rationale for privilege for conceptual categories and less time being forced to review exceptionally large numbers of documents for privilege to complete a document-by-document log. Using the Facciola-Redgrave Framework along with FRE 502 orders can greatly reduce the cost of privilege review and logging, and, therefore, return the focus of litigation to the merits of a claim rather than the discovery and privilege logging process.