

PUTTING THE CART BEFORE THE HORSE:
PROVIDING A PRIVILEGE INDEX UNDER PROPOSED
FEDERAL RULE OF CIVIL PROCEDURE 26 (b) (5)

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I. INTRODUCTION

In 1974, Chief Judge Latchum of the United States District Court for the District of Delaware issued an opinion in the patent infringement case of International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88 (D. Del. 1974), that was to have significant implications for the law of attorney-client privilege. International had served Fibreboard with discovery relating to Fibreboard's application to reissue a patent, asking that Fibreboard produce the documents identified and provide plaintiff with a written list of documents withheld as privileged. Id. at 92. Fibreboard objected to providing the list and moved for a protective order. The Court denied the motion and required Fibreboard to produce an affidavit listing the documents for which attorney-client privilege was claimed, showing:

(a) the identity and corporate position of the person or persons interviewed or supplying the information, (b) the place, approximate date, and manner of recording or otherwise preparing the instrument, (c) the names of the person or persons (other than stenographical or clerical assistants) participating in the interview and preparation of the document, and (d) the name and corporate position, if any, of each person to whom the contents of the document have heretofore been communicated by copy, exhibition, reading or substantial summarization.

Id. at 93-94. The court noted that it was requiring the defendant to produce a privilege index as part of the burden of the asserting party to show that a privilege applies to the particular document withheld from discovery. 63 F.R.D. at 93. The court relied heavily on United States

vs. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950), in which Judge Wyzanski set forth the elements of the attorney-client privilege:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Judge Latchum concluded that the privilege index he described in Fibreboard was a reasonable means of assuring that Judge Wyzanski's formulation had been satisfied and the privilege properly invoked. 63 F.R.D. at 94.

Fifteen years later the Judicial Conference has recommended a new subpart of Rule 26(b) of the Federal Rules of Civil Procedure that would require every party in every case who asserts an attorney-client privilege or work product objection to do exactly as Judge Latchum said, i.e., to produce routinely a description of any materials withheld from production so that the demanding party may contest the basis of the privilege or work product claim. See "Preliminary draft of Proposed Amendments to the Federal Rules," 127 F.R.D. 237, 319-21 (1989).

It is puzzling that the Judicial Conference has chosen to impose on all lawyers this obligation in an area where there is no significant past record of abuse. Unlike the recurrent disputes over the scope and relevance of discovery which have plagued the courts; and in contrast to the profusion of frivolous litigation claims which triggered amendment of Rule 11, this area of privilege and work product has produced neither substantial litigation nor a public outcry for corrective action. To the contrary, the case law reveals strikingly few instances where

a court has been required to intervene because a discovering party's request for substantiating information has been refused by the other side. See, e.g., Fox v. California Sierra Financial Services, 120 F.R.D. 520, 523 (N.D. Cal. 1988); Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 4 (N.D. Ill. 1980).

The only justification for the amendment suggested by the Rules Committee is a cryptic reference that it "is based on successful experience with a local rule." 127 F.R.D. at 321 (Advisory Committee's Note). Neither the local rule nor the successful experience is identified, although some of the public comments to the proposal suggest that the amendment may be fashioned after similar, but not identical local rules in the Southern and Eastern Districts of New York.¹

Despite this unremarkable record, there is no question that the proposed Rule will work a major change in the way lawyers practice in the federal courts. Until now, detailed disclosure of the factual basis for claims of privilege has been deferred until an actual dispute arises as to the availability of the privilege. The amendment would require a privilege index to be generated routinely for every document withheld from production, whether or not there is disagreement about the party's entitlement to protection. Because the amendment is silent on the timing of the index, it can be argued that the log must be supplied at the time of the subject discovery responses, i.e., in the initial stages of the litigation, when the issues are only dimly defined. Finally, all of the lawyer's decisions about the index--what will be listed, how much information will be disclosed--must be made in the shadow of possible charges by the adversary that

¹ See comments of The Honorable Jack B. Weinstein, dated November 14, 1989, and of Michael Hoenig, dated March 15, 1990, available from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Washington, D.C. 20544 [hereafter referred to as "comments (name of commentator and date)"].

omissions have waived the attorney-client privilege or work product protection, not only for a specific document but for all communications dealing with that same subject matter.

The amendment thus promises to bring with it tasks that are burdensome and costly. Where a case involves “shotgun” discovery and an institutional party (such as the government or a corporation), the exercise of indexing thousands of protected documents will be labor-intensive and expensive. This whole difficult process, however, may ultimately be pointless, since in many cases there will be no real disagreement as to the protected status of the materials. In other cases, there may be equally wasteful “satellite” disputes over the adequacy of the index, which are generated for tactical purposes but which nonetheless must be decided by the courts.

It thus appears that the Rules committee has approved a new discovery requirement which will breed additional burdens, disputes, and court involvement--and which may actually diminish the protection afforded by the privilege and the work product doctrine--in the absence of any record that the amendment is really necessary.

II. PROPOSED RULE 26 (B) (5)

On September 12, 1990, the Judicial Conference of the United States approved changes to certain of the Federal Rules of Civil Procedure. Specifically, the Conference recommended an additional subpart, (b)(5), to Rule 26, which provides:

(5) Claims of Privilege or Protection of Trial Preparation Materials. When information is withheld from discovery on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

The Advisory Committee indicates that the purpose of the amendment is “to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified.” Proposed

Fed. R. Civ. P. 26(b)(5) Advisory Committee's Note. Apparently recognizing the burden that this new requirement may impose in large cases with extensive discovery, the Advisory Committee goes on to state that "a party receiving a discovery request that is too broad may be faced with a burdensome task to provide full information regarding all that party's claims to privilege or work product protection" and that "[s]uch a party is entitled to a protective order under subdivision 26(c)." *Id.* The Advisory Committee's Note concludes that the "issue of the sufficiency of a disclosure is appropriate for resolution at a pretrial conference conducted under Rule 16(b), and may require an examination of documents in camera." *Id.*

The final version of proposed Rule 26(b)(5) is different from that originally proposed. The original draft required that, for every document for which protection was claimed, the asserting party would have to provide six specific categories of information, i.e., "as much of the following information as is not encompassed by the privilege: (A) its type; (B) its general subject matter and purpose; (C) its date; (D) the name of the persons making or receiving the communication or a copy thereof or, if the communication was oral, of those present when it was made; (E) their relationship to the author or speaker; and (F) any other information needed to determine the applicability of the privilege or protection." 127 F.R.D. at 319-20.

When this version was published, a vigorous debate developed along familiar philosophical lines. The Association of Trial Lawyers of America, whose leadership is drawn from the plaintiffs' personal injury bar, applauded the proposed amendment as a useful weapon in combating "non-meritorious claims of work product or privilege . . . asserted in an effort to thwart the scope of discovery contemplated by the Rules." ATLA predicted that the Rule would

reduce not only the number of specious privilege claims but also the number of court challenges.²

In the opposite corner, the Product Liability Advisory Council and Lawyers for Civil Justice led the opposition to the amendment, criticizing the logistical problems created by the Rule as well as the illegitimate opportunities it represented for abusive discovery.³ A chorus of commentators, including law firms, corporations, the Department of Justice, local bar associations, and law school professors, pointed out that the amendment reversed the logical order of litigation, requiring massive expenditures of time and energy on the part of both litigants and courts before there had been any showing that the investment was either necessary or helpful.⁴ Of the sixty comments received, fifty-four were critical of some feature of the amendment; six unreservedly supported adoption of the new Rule.

The Committee reacted to these comments not by withdrawing the amendment but by modifying it. The final version of proposed Rule 26(b)(5) eliminates most of the detailed requirements contained in the original proposal. No longer is there a precise formula as to what information must be disclosed; the proposed Rule now requires only that the asserting party provide “information sufficient to enable the demanding party to contest the claim.”

The proposal as approved thus leaves the specifics of what is required to sustain a claim of privilege to be developed on a case-by-case basis. It is probable that what is “sufficient” will be subject to varying interpretations by different courts. Therefore, although the revised

² Comments (Federal Rules, Jurisdiction and Venue Committee, Association of Trial Lawyers of America, February 22, 1990).

³ Comments (Product Liability Advisory Council, March 14, 1990, and Lawyers for Civil Justice, February 28, 1990).

⁴ *E.g.*, Comments (Kirkland & Ellis, March 6, 1990; D. O. Conkle, University of Indiana School of Law, March 7, 1990; Ohio State Bar Association, March 12, 1990).

proposed Rule 26(b)(5) is less burdensome than the original proposal, the language is sufficiently imprecise that litigants may initially be without guidance as to what a particular court may require in terms of a privilege index.

The Judicial Conference approved the modified amendment and submitted its recommendations to the Supreme Court in November 1990. Pursuant to 28 U.S.C. §§ 2073, 2074, the United States Supreme Court has until May 1, 1991, to transmit the proposal to Congress. The Rule will then become effective on December 1, 1991, unless Congress mandates otherwise.

III. THE CASE LAW WHICH PRECEDED THE AMENDMENT

A. The Vaughn Index in Governmental Litigation

Although Judge Latchum's opinion in Fibreboard has acquired the patina of a landmark case, it actually was not the first occasion on which a court required a privilege index. The practice of providing such detailed information originated in cases in which the United States government was a party. The government, with its plethora of offices and files and a daunting array of privileges, see C. Wright and A. Miller, Federal Practice and Procedure, § 2019 at 153-54 (1970), frequently made objections to discovery in the thousands of cases in which it is a party. The privilege index was first developed as a means of policing such claims. Indices have been employed in cases where the government has invoked executive privilege and has claimed various exemptions under the Freedom of Information Act, as well as when the government as a party invokes attorney-client privilege or work product doctrine.

A year before Fibreboard, in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), a law professor doing research on the Civil Service Commission brought an action pursuant to the terms of the Freedom of Information Act (FOIA) to compel disclosure of evaluations of certain agencies' personnel management programs. The Director of

the Bureau of Personnel Management Evaluation refused to release the documents sought on the grounds that such documents reflected the deliberative, predecisional process leading to a governmental agency's decision on a particular issue. Id. at 822-23. The government based its assertion of privilege solely on the affidavit testimony of the agency director, who claimed the privilege in conclusory terms; the affidavit contained no specific information about the documents or their contents. The Court of Appeals determined that there were two problems with permitting the government to claim privilege on such a limited and unspecific affidavit: first, there were no inherent incentives that would spur government agencies to disclose information contained in documents of questionable privilege; and second, the burden of determining the validity of the privilege claim rested entirely on the court without any assistance from the agency in analyzing the documents. Id. at 826. The Court of Appeals remanded the case to the district court and ordered the agency to submit an index containing a detailed analysis of each claim of privilege, along with a specific listing of every document and the relevant subdivision within the document for which a privilege was claimed. Id. at 826-827.

In cases following Vaughn, the District of Columbia Circuit has held that this "Vaughn index" must contain "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant in correlating those claims with the particular part of a withheld document to which they apply." Mead Data Central, Inc. v. United States Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977). See also Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977) (proper procedure to be used in evaluating invocation of a "law enforcement evidentiary privilege" would be to request the government to supply an index correlating indexed items with particular claims of privilege along with an analysis containing descriptions specific enough to identify the basis of the particular claim or claims); Smith v. FTC, 403 F. Supp. 1000,

1016 (D. Del. 1975) (FTC was required to submit an affidavit demonstrating a specific designation and description of the documents claimed to be privileged, precise and certain reasons for preserving the confidentiality of the governmental communications, and the factual basis for any other privileged claims); United States v. Exxon Corp., 87 F.R.D. 624, (D.D.C. 1980) (when government asserts attorney-client privilege, it must provide index). The D.C. Circuit has also emphasized that if the burden of preparing the Vaughn index is too great for the government, the government must disclose the relevant documents. Coastal States Gas Corp. v. DOE, 617 F.2d 854, 858 (D.C. Cir. 1980).

It should be noted, however, that even in cases involving the government, there has been no requirement that an index be provided in the initial stages of the dispute, *i.e.*, the two levels of administrative review under FOIA, which are those levels most comparable to the initial stages of discovery addressed by proposed Rule 26(b)(5). The Vaughn index must be supplied only at the decisional stage and only if there is a live controversy.⁵ This is a critical distinction, as addressed more fully in Section IV(A), *infra*.

B. The Fibreboard Index in Private Litigation

Since Judge Latchum first required a private party to provide an index in Fibreboard, a small number of courts have also required that private parties support their objections to discovery on the basis of the attorney-client privilege by a “privilege index.” *See, e.g., Barr Marine Products Co., Inc. v. Borg Warner Corp.*, 84 F.R.D. 631, 636 (E.D. Pa. 1979) (party asserting privilege has burden of submitting affidavit demonstrating that privilege exists and that each of United Shoe criteria is satisfied); Kelchner v. International Playtex, Inc., 116 F.R.D. 469, 472 (M.D. Pa. 1987) (party asserting privilege was required to submit index describing

⁵ Comments (U.S. Dept. of Justice, January 31, 1990).

documents and containing “precise and certain reasons” for preserving confidentiality or privilege). Prior to the proposed amendment to Rule 26, however, the privilege index requirement had been developed almost exclusively by the courts of the Third Circuit. But see North American Mtg. Inv. v. First Wisconsin Nat’l Bank, 69 F.R.D. 9, 12 (E.D. Wis. 1975) (citing Fibreboard and stating that party resisting discovery on privilege grounds should show by affidavit sufficient facts to bring the disputed matters within the confines of the privilege); Petz v. Ethan Allen, Inc., 113 F.R.D. 494, 497 (D. Conn. 1985) (parties asserting work product objections, as in the case of parties asserting attorney-client privilege objections, must “identify the withheld documents with sufficient particularity that the opposing counsel can intelligently argue that the doctrine ought not to apply.”); Pete Rinaldi’s Fast Foods, Inc. v. Great American Ins. Co., 123 F.R.D. 198 (M.D.N.C. 1988).

Within the Third Circuit, the Fibreboard analysis has been extended beyond the attorney-client privilege to include claims of attorney work product. In Hydramar, Inc. v. General Dynamics Corp., 115 F.R.D. 147, 149 (E.D. Pa. 1986), a case involving a contract for parts to be used in a ship construction project, General Dynamics objected on work product grounds to producing documents which would show how it handled plaintiff’s claim for equitable adjustment of the contract price. The court ruled that General Dynamics must submit the disputed documents for in camera inspection and that it should also provide a memorandum to assist the court in its review. In a passage reminiscent of the Internal Revenue Code, the court described the information to be included in the memorandum:

- A. the names of all persons (e.g. the defendant’s attorneys, consultants, sureties, indemnitors, insurers, agents or other representatives) who participated in the creation and/or preparation:
 - (1) of the documents requested by the plaintiff that were withheld by the defendant on work product grounds;

- (2) of the document or documents that **form the basis:**
 - (a) of a proposed answer to an interrogatory objected to by the defendant on work product grounds, or
 - (b) of a full and complete answer to a deposition question objected to on work product grounds.
- B. the specific role all such persons took in the preparation and creation of the documents described in 2(A) (including 2(A)(1), 2(A)(2)(a) and 2(A)(2)(b).)
- C. the specific date or dates upon which the documents described in 2(A) were prepared and/or created.
- D. the specific place or places where the documents described in 2(A) were prepared and/or created.
- E. if an attorney participated in the preparation and/or creation of documents described in 2(A), a statement of his position, his relationship to the defendant and his relationship to the litigation:
 - (1) at the time the document was created and/or prepared;
 - (2) at the time the present litigation was commenced; and
 - (3) at the present time.

Id. at 152 (emphasis supplied in original). Thus, the work product index required by the court in Hydramar was even more detailed than that required in Fibreboard.

These cases in which a court has ordered a party to provide a privilege index comprise only a tiny fraction of those where privilege and work product objections to discovery have actually been made. In the vast majority of civil cases, such objections have either gone unchallenged or the parties have worked out their differences by agreement.

IV. THE BURDENS IMPOSED BY PROPOSED RULE 26(B)(5)

As the public comments to the proposed amendment demonstrate, large institutions with voluminous files will be the most heavily affected by the proposed amendment. For such parties, there is some small comfort in the fact that the Judicial Conference specifically rejected the proposed version of Rule 26(b)(5) which would have required any party asserting a claim of privilege to provide six categories of highly-detailed information. It can be presumed from the Judicial Conference's rejection of this proposal that the present version of Rule 26(b)(5) contemplates something less than the full-blown, detailed privilege index that was required in

Fibreboard and Hydramar. This interpretation is supported by the Advisory Committee’s Note, which specifically recognizes the burden of providing a description of large numbers of documents withheld on privilege grounds and suggests the efficacy of a motion for protective order in the early stages of the litigation.

Even though the current version is less onerous than the earlier one, the proposed rule still places a substantial burden on a party having numerous documents subject to claims of attorney-client privilege or work product. These burdens and other concerns are discussed in more detail below.

A. The Timing of the Index: Proposed Rule 26(b)(5) May Require a Party to Describe Privileged Documents Before Objections as to the Proper Scope of Discovery Have Been Resolved.

In complex litigation, parties frequently propound broad-based discovery requests that are challenged by the opponent as excessive or irrelevant. This is, perhaps, an inevitable side-effect of the adversarial nature of our litigation process: the parties almost always have legitimate differences about what may be reasonably needed to prosecute or defend the case. In some unfortunate instances, however, a party may use expansive discovery requests as a strategic tool to pressure the opponent into concessions or settlement. For example, many requests ask for “all documents” or “any documents” that “relate to” or “discuss” a particular topic. Such requests are frequently narrowed on a motion to compel.

The proposed Rule requires that whenever a claim of privilege or work product is asserted, “the party asserting the privilege shall” provide the document index without any prior court intervention. Unfortunately, the Rule, at least on its face, appears to apply, regardless of whether the discovery request obviously violates the privilege or whether it is irrelevant, indecipherable, or otherwise objectionable. As pointed out in numerous comments to the

proposal⁶ this raises substantial practical problems. For example, if the party serving discovery in a products liability case asks for all documents relating to the design of the steering system in every vehicle ever produced by an automobile manufacturer, the responding party may arguably be required under the new Rule to provide a description of all privileged documents within that broad universe (covering decades of model years and perhaps hundreds of model lines, many of which employed systems which are outdated and radically different from the recent model at issue), before the court has ruled on the party's objections about the appropriate scope of discovery. The responding party is presented with a Hobson's choice: either the party frantically searches vast categories of documents he or she genuinely believes should be exempted from discovery so that privileged documents can be indexed; or the party risks the sobering possibility that failure to provide a detailed description of all privileged documents within the large universe demanded by the opponent will be challenged as a waiver of the privilege.

The silence of the proposed Rule on this crucial issue of timing may be a product of the pre-amendment case law. In the vast majority of cases where courts have required a privilege index, this issue simply has not been addressed, since non-privileged objections as to scope either did not exist or had been raised and decided prior to the time the court required a log. See, e.g., Fibreboard, 63 F.R.D. at 93 (court specifically pointed out that the only non-privilege objection had been overruled at a prior hearing); Kelchner v. Internat'l Playtex, Inc., 116 F.R.D. at 470 (defendant had already identified and assembled documents and had voluntarily created a privilege index); Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124 (D.C. Cir. 1987)

⁶ E.g., Comments (Lawyers for Civil Justice, February 28, 1990) at 4.

(dispute about two pages of documents); Pete Rinaldi's Fast Foods, Inc. v. Great American Ins. Co., 123 F.R.D. 198, 200 (M.D.N.C. 1988) (dispute over whether two files were protected). The case law endorsing privilege indices thus developed in contexts which did not take into account the practical difficulties of vast numbers of documents in contested categories.

Moreover, in practice, the courts have routinely allowed the objecting party additional time after filing the objections in which to generate an affidavit or index supporting the claims of privilege or work product. E.g., Kelchner, 116 F.R.D. at 472 (court allowed defendant an opportunity to index documents with plaintiff's counsel); Hydramar, 115 F.R.D. at 151 (court allows defendant additional time to submit documents and memorandum establishing basis for work product protection).

This case law suggest that any ambiguity in the language of the amendment should be construed in favor of allowing additional time for providing the index. To do otherwise would not only reward poor drafting of discovery; it could also encourage parties to draft their discovery so broadly that the responding party literally could not provide a detailed list of privileged documents within the thirty days required by Rules 33 and 34, thereby risking the possibility of waiver. In turn, the responding party would be encouraged, or even required, to make his own contribution to judicial burden by routinely filing motions for protective orders.

Unless the courts are willing to become involved in managing discovery, proposed rule 26(b)(5) can become one more weapon in the discovery war. If courts require parties to go through the onerous and expensive process of generating indices at the outset of the litigation and at the unilateral behest of their opponents, the expense and burden will be prohibitive. As the Supreme Court noted in United States v. Zolin, _____ U.S. _____, 109 S. Ct. 2619 (1989), “[t]here is no reason to permit opponents of the privilege to engage in groundless fishing

expeditions, with the district courts as their unwitting (and perhaps unwilling) agents.” 109 S.Ct. at 2630. Given the obvious importance courts have always attached to the attorney-client privilege and work product protection, before any party is required to substantiate a claim of privilege, the discovering party should have to show that the scope of the discovery is reasonable and relevant.

**B. Possible Waiver of the Privilege:
The Stakes Are High If a Litigant
Fails to Provide the Required Information.**

As noted above, the proposed amendment neither specifies the time when the index must be supplied nor the precise information which must be provided. While these omissions may have resulted from the comments which argue that a more specific, detailed protocol might require disclosure of the very information protected by the privilege, the proposal as presently drafted carries with it considerable opportunity for inadvertent waiver.

If in the initial discovery responses a lawyer simply raises a timeliness objection to providing the index (on grounds that other objections should be first resolved or that there has been insufficient time to compile the index), there is the danger an adversary may charge that (i) the rule contemplates no such delay and (ii) the privilege --if any existed--has been waived by the failure to provide the index.

Even if the lawyer takes the extra step of filing a motion for protective order to defer the filing of the index, the question of timeliness is still troublesome. In many courts, such a motion is simply calendared on the regular motions calendar. Accordingly, it may not be decided until after the responses must be filed. Does the lawyer therefore have a duty to obtain expedited action on his motion? If he or she does not, and the court eventually denies the motion, is there a possibility of retroactive waiver because of the failure to supply the index at the earlier time? The proposed amendment answers neither of these inquiries.

Finally, the problems of waiver are not altogether avoided even where an index is supplied at the time responses are provided. Predictably, some parties will claim that whatever information is provided is inadequate, raising the question of what happens where the responding party's definition of "sufficient" differs from the court's. Will there be additional opportunity to provide more information? Or will the waiver be ineradicable as of the time the court finds the index to be insufficient?

Neither the Advisory Committee's Notes nor the cases which preceded the proposed amendment give comfort on these questions. The Advisory Committee recognizes the possibility of waiver as a built-in sanction for failure to comply with the new rule:

A party receiving a discovery request who claims a privilege or protection but fails to disclose the claim is at risk of waiving the privilege or protection and may be subject to sanctions under Rule 37(b)(2). A party claiming a privilege or protection who fails to provide adequate information about the claim to the party seeking the information may be compelled to do so by motion made pursuant to Rule 37(a). Such motions and responses to motions are subject to the sanctions provisions of Rules 7 and 11.

These comments are consistent with the case law. Courts that have required a privilege index or affidavit have noted that where a party fails to make a proper claim of privilege (here, presumably by failing to submit a privilege index), the effect is the same as if there had never been a claim of privilege at all. See Willemijn Houdstermaatschaap BV v. Apollo Computer, 707 F. Supp. 1429 (D. Del. 1989) (failure properly to identify privileged document in index operated as waiver of privilege); Fibreboard, 63 F.R.D. at 94; see also Byrnes v. Jetnet Corp., 111 F.R.D. 68, 71 (M.D.N.C. 1986) (party asserting privilege must support his claim of privilege by affidavit; improperly asserted privilege is the equivalent of no privilege at all).

All of these troublesome questions are much more than academic inquiries. At stake, if the attorney guesses wrong, is nothing less than the attorney-client privilege and the work

product doctrine--historic protections which attorneys are ethically charged to protect.

Moreover, the scope of the waiver is intimidating; it covers not just the specific documentation involved, but arguably all materials related to the same “subject matter.” Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1162 (D.S.C. 1975).

C. The Burden: Compiling Information Sufficient to Identify and Describe Privileged Documents as Required by Proposed Rule 26(b)(5) Will be Expensive, Time-Consuming and Sometimes Impossible for a Large Corporation.

Proposed Rule 26(b)(5) contains no exemptions. Presumably, a lawyer’s own case files may contain memoranda which are technically responsive to a broadly-drafted discovery request, such as “all documents related to the design of the restraint system in the subject vehicle or essentially similar vehicles,” or “all documents reflecting or relating to similar claims.” Such requests may encompass memoranda of witness interviews, correspondence with in-house counsel about the design history of the subject system or component, file memoranda of counsel reflecting counsel’s views on documents to be produced, notes of meetings that staff attorneys have prepared for their own use in handling litigation against the company, documents that have been annotated by attorneys in connection with litigation, and memoranda among various members of a legal staff or an outside law firm. Although most, if not all, of these materials are indisputably protected from discovery, they would nonetheless have to be indexed. The burden would be exponentially greater in the case of national corporations which may have hundreds of staff attorneys and dozens of law firms that represent them.

These are not idle concerns, since attorneys are seeking with increasing frequency to rifle the opposing lawyers’ files. In recent Texas litigation, for example, plaintiffs asked for:

“Complete copies of this Defendant’s guidebooks, handbooks, guidelines and notebooks provided to defense counsel and insurance carriers in asbestos-related injury claims filed against this Defendant, including all documents which comment on, discuss, refer to, relate to or contain information regarding the items made the subject of this request.”⁷

Additionally, Texas plaintiffs have asked for documents reflecting meetings between client and counsel to determine strategy.⁸

Perhaps the most vivid demonstration of the problems the new Rule can create is the situation where a third party’s files are subpoenaed. One commentator to the proposed Rule recounted an experience where his law firm’s entire file on a given matter was subpoenaed. The firm was neither a party to the litigation nor counsel to a party. Hundreds of documents were involved.⁹ Under the new rule, a privilege index would have to be constructed reflecting each of the hundreds of documents contained in the firm’s files. One wonders who will pay for the exorbitant expense involved in such an exercise.

D. Additional Litigation: Proposed Rule 26(b)(5) May Eliminate the Flexibility that Rule 26 Presently Provides and May Create Burdens and Disputes Where None Would Otherwise Exist.

The case law confirms that, in most cases, there is no dispute over privilege or work product claims. Proposed Rule 26(b)(5), however, requires that in every case where privileged documents are withheld, a party must provide a sufficient description of those documents. Often, the discovering party does not want or need such a description.

⁷ Comments (Keene Corporation, March 14, 1990) at p. 3.

⁸ Id.

⁹ Comments (Steinhart & Falconer, February 5, 1999).

Again, the proposed amendment appears to address problems which have not surfaced with regularity in actual practice. In fact, if the discovering party requires more information to determine whether an objection is well-taken, Federal Rules 11, 26(a) and 37, as they presently exist, are sufficiently flexible to enable that party to obtain it. Thus, in most cases, any marginal benefit provided by requiring a responding party to file ab initio a description of the privileged documents or information will be outweighed by the cost and burden that proposed Rule 26(b)(5) imposes in the ordinary case.

The indexing requirement may also contravene the policy of encouraging parties to resolve disputes efficiently and without judicial intervention. In McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72, 75 (Tex. 1989), for example, the Texas Supreme Court rejected a proposal that would require an objecting party to request a hearing on discovery objections in every case, on the grounds that parties should be able to work through discovery disputes without court intervention, thereby making discovery more economical. The court also recognized that parties making overly broad or burdensome requests for information or seeking clearly non-discoverable matters may often abandon or narrow their request(s) when faced with an objection. Id. at 75. As the Texas Supreme Court observed, the benefit of any rule that broadens a discovering party's access to discoverable information at the cost of increasing judicial involvement must be weighed against the burden on the system of litigating objections that might otherwise never be pursued. The same analysis can be applied to proposed Rule 26(b)(5).

E. Erosion of the Privilege: Requiring a Description of the Information Withheld that is Sufficient to Enable the Demanding Party to Contest the Claim May Itself Invade the Attorney-Client Privilege and Work Product Doctrine.

The requirement in proposed rule 26(b)(5) that a claim of privilege or work product must be “made expressly and must be supported by a description of the nature of the documents,

communications or things not produced that is sufficient to enable the demanding party to contest the claim,” contains hidden dangers for the integrity of the privilege. For example, merely identifying the existence of particular communications may in some instances reveal the thought processes of counsel and disclose important information to an intelligent adversary about the manner in which the attorney has gone about preparing his case. Cf. Sporck v. Peil, 759 F.2d 312, 315 (3d Cir.), cert. denied, 474 U.S. 903 (1985) (although individual documents within a grouping of materials shown to an expert were not attorney work product--since they were preexisting documents generated before the litigation--the collection was protected, since it reflected defense counsel’s mental impressions and legal opinions as to how evidence and documents related to the issues and defenses in the litigation). Alternatively, providing a “sufficient” description of the substance of documents withheld on attorney-client privilege or work product grounds may require the attorney to describe facts underlying the privilege claim in such detail that the confidentiality of the communications is effectively lost.

Requiring a description sufficient to identify the persons with whom counsel has communicated may also fly squarely in the face of other procedural protections in the Federal Rules of Civil Procedure. For example, providing a privilege index in response to an interrogatory that asks for information about “individuals with knowledge” about the facts and circumstances surrounding the particular litigation may call for the identity of experts who have been informally consulted, or who have been retained or specially employed, but who are not expected to be called at trial as witnesses by the responding party. Rule 26 specifically forbids discovery concerning experts retained or specially consulted, but who are not expected to be called at trial, except upon a showing of exceptional circumstances. Case law in many jurisdictions has established that this immunity relieves the party from providing even the

identity of the expert, as well as his or her opinions. See, e.g., Ager v. Jane C. Stormont Hospital, 622 F.2d 496 (10th Cir. 1980). Once again, in providing a description of information withheld on privilege grounds, the responding party is faced with the troubling choice of withholding the names of such experts (with the description reflecting only a list of dates and discussions with some anonymous person), thereby running the risk of possible waiver of the protection; or foregoing altogether the protection contemplated by Rule 26(b)(4)(B) by disclosing the identity of the expert(s).

Even if listing a given communication or document on the index is not in and of itself sufficient disclosure to destroy the confidentiality which the privilege and the work product doctrine were designed to protect, the listing can be expected at a minimum to trigger additional challenges and inquiries. The indexing party may be asked to provide more information to sustain his claims of protection; or the opponent may assert that in any event he has “substantial need” for the information, which could not be otherwise obtained without “undue hardship.” See Fed. R. Civ. P. 26(b)(4); Copperweld Steel Co. v. Dernag-Mannesmann-Bohler, 578 F.2d 953, 963, n. 14 (3d Cir. 1978). The work product doctrine is, of course, only a qualified protection which can be abrogated upon a proper showing by the adverse party. Fed. R. Civ. P. 26(b)(4).

V. PRACTICAL WAYS OF DEALING WITH PROPOSED RULE 26 (B)(5)

A. Immediate Negotiation

If the new Rule is adopted, it underlines the necessity of immediate communication with the opposing side upon receipt of extensive discovery. In some cases, it may be possible to work out mutually acceptable accommodations. For example, both sides may be willing to exempt lawyer files from the indexing requirement; or the parties may be able to agree upon an extended timetable for providing the index. If such agreements are reached, the parties should document them, both in correspondence and as part of the discovery responses.

Voluntary agreements may be harder to achieve, however, in automotive products liability cases, where the differing status of the parties has traditionally made discovery a contentious area. The corporate defendant has thousands of files, hundreds of offices, and a legion of employees creating documents by the minute. In contrast, once the individual plaintiff has produced medical records and income tax returns (in those states where they are discoverable), there is little other discovery to be pursued. This inequality has frequently meant that plaintiffs have used discovery as a tool to extract concessions or settlement.

This same imbalance is certain to exist with regard to privileged documents: the individual plaintiff has only those limited documents generated by his counsel once litigation is actively contemplated, while the corporate defendant may have extensive materials generated by an in-house staff expressly charged with giving on-going legal advice on design liability. The proposed amendment to Rule 26 may increase the tendency to use discovery as a tactical measure, and negotiation may not bridge the gap between the parties.

B. Motion for Protective Order

In situations where a litigant is faced with overly-broad discovery requests, the Advisory Committee has recognized that “[s]uch a party is entitled to a protective order under subdivision (c)” of Rule 26. A party faced with requests such as “all documents within your possession, custody or control” relating to a particular product is thus encouraged to move for a protective order in the initial stages of the litigation. Such a motion may force the court to narrow the discovery requests before a party must devote unwarranted resources to compiling a detailed description of the documents withheld on privilege and work product grounds.

Such a motion is not, however, a panacea. Even if the motion is filed, a number of important issues remain:

- Is the filing of the motion sufficient to preserve the privilege, even if the motion is not ruled upon until after the date for responding to discovery? Should the movant seek expedited treatment of the motion or at least an assurance from the court that the pendency of the motion cures any claim of waiver?
- From what should the movant be protected? From filing any index at all until the scope objections have been resolved? From having to identify protected materials only within the disputed categories? From identifying communications with Rule 26(b)(4)(B) experts? From listing materials within the lawyer's own litigation files?
- What happens where a party provides an index, and only later discovers documents that were inadvertently omitted? Has the privilege been waived as to those documents and any related subject matters?

There is no bright-line answer to these questions, which to a great extent will be influenced by local practice and the attorney's relationship with the opposing lawyer.

While motions for protective order will be absolutely necessary wherever there is major discovery, they will certainly slow the litigation. They will also require judicial intervention in a system where judicial resources may be already stretched to their limits. On the other hand, a motion for protective order may encourage the requesting party to narrow his discovery requests to a reasonable scope so that the responding party can provide a sufficient description of the documents withheld on privilege and work product grounds before a court is forced to rule. Most significantly, such motions provide needed protection against waiver of the privileged and the work product protection.

C. Designation of Privileged Documents by Category and Creation of a Database.

In cases where large numbers of privileged or work product documents fall into logical and discernible categories, it may be efficient for responding parties to designate by category the documents or information to be withheld on privilege or work product grounds. This may best be accomplished by creating a privilege database. For instance, a responding party might organize the withheld documents in categories such as (1) documents generated by in-house

counsel providing legal advice to corporate employees, (2) documents received by in-house counsel from outside counsel as a result of a request for legal advice, or (3) internal legal memoranda prepared by law firms and in-house counsel in the course of litigation.

By this process, responding parties would be relieved of the inefficient and expensive process of providing a separate factual basis for each document withheld on attorney-client privilege or work product grounds. The categorization approach would presumably reduce the need for judicial intervention, since the court would only be required to review the categories as to which the parties cannot agree. Various courts have endorsed such a category-by-category approach to designated confidential documents. See, e.g., Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir.), cert. denied, 380 U.S. 964 (1965); Zenith Radio Corp. v. Matsushita Electrical Industrial Co., 529 F. Supp. 866, 892 (E.D. Pa. 1981).

D. Increased Attention to the Treatment of Protected Materials.

The requirement of an index assures that litigants will face increased challenges to the validity of privilege and work product claims. Prudent parties should therefore take additional care in the treatment of protected documents. In generating privileged documents that must ultimately be indexed, it will be increasingly important for in-house and outside counsel to observe all of the “cosmetics” that courts have found so important in assessing claims of privilege and/or work product: stamps and legends, separate filing facilities, appropriate language about “legal advice” and “request of counsel,” and the like. In close cases, some courts have given the benefit of the doubt to a party based not on substance of the communication, but on the simpler basis of whether the document looks like it is privileged. See, e.g., Mobil Oil Corp. v. Department of Energy, 102 F.R.D. 1, 12 (N.D.N.Y. 1983) (“work product” stamp).

VI. CONCLUSION

As noted recently by the Supreme Court in United States v. Zolin, _____ U.S. _____, 109 S.Ct. 2619 (1989), in employing procedures to test claims of privilege, a court must balance the interests and objectives of the discovering party against the interests which underlie the privilege. “Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.” Id. at 2630, citing United States v. Reynolds, 345 U.S. 1, 8 (1952). It is precisely this “compromise” and balance--championed in the Federal Rules--which the courts should take into account in interpreting proposed Rule 26(b)(5).

The Advisory Committee has recognized that during the past decade disturbing trends have emerged in the discovery process. In the Committee’s words, “the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts . . .” 1983 Advisory Comm. Notes to Rule 26. During this period parties have also demonstrated an increasingly suspicious view of the protections afforded by the attorney-client privilege and work-product doctrine. See, e.g., Shelton v. American Motors, Inc., 805 F.2d 1323 (8th Cir. 1986) (seeking deposition of opposing counsel); Mulvey v. Chrysler Corp., 106 F.R.D. 364 (D.R.I. 1985) (seeking depositions of chief executive officers); Huffstutler v. American Motors Corp., No. 90-416 (S. Ct. Ohio, 1990) (former AMC attorney/litigation consultant hired by plaintiffs to assist in prosecuting claims against AMC). Along with these disturbing practices has come an increased usage of “dragnet” discovery requests which call for “any and all” documents relating to broad categories of information.

Unfortunately, the proposed amendment to rule 26(b) threatens to complicate rather than simplify the discovery process. Though the proposal goes to great lengths to insure that claims

of privilege are well-founded, it may fail to protect the party asserting the privilege from improper attempts to discover protected materials and from being embroiled in the kind of abusive discovery warfare which has become all too common in the federal courts.