COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

Re: Proposed Amendments to FRCP 16 and FRCP 26

October 3, 2023

The DRI Center for Law and Public Policy respectfully asks the Advisory Committee on Civil Rules to consider this submission in support of the amendment to Rules 16 and 26 proposed by the Advisory Committee on the Federal Rules of Civil Procedure. The proposed amendment to Rule 26(f)(3)(D) would require the parties to include in their discovery plan, submitted before the initial case management conference, their views and proposals on how claims of privilege and protection of trial-preparation materials, "including the timing and method for complying with Rule 26(b)(5)(A)," should be addressed during discovery. The proposed amendment to Rule 16 (b)(3)(iv) allows the parties to propose in their discovery plan the timing and method for complying with requirements of Rule 26(b)(5)(A) should claims of privilege or protection of trial-preparation arise. Both of these proposed amendments will aid the parties and the courts in managing the process of asserting and resolving claims of privilege.

WHO WE ARE

The Center for Law and Public Policy ("the Center") is part of DRI, Inc. ("DRI"), the leading organization of civil defense attorneys and in-house counsel. Founded by DRI in 2012, the Center is the national policy arm of DRI. It acts as a think tank and serves as the public face of

DRI. The Center's three primary committees—Amicus, Public Policy, and Legislation and Rules—are comprised of numerous task forces and working groups. These subgroups publish scholarly works on a variety of issues, and they undertake in-depth studies of a range of topics such as class actions, climate change litigation, data privacy, MSP, and changes to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Since its inception, the Center has been the voice of the civil defense bar on substantive issues of national importance.

I. BACKGROUND

The Standing Committee describes these proposed amendments as dealing with what they call the "privilege log" problem. Rule 26(b)(5)(A) and Rule 45(e)(2), as they currently stand, direct litigants and nonparties withholding documents from production based on claims of privilege or work product protection to identify those documents in a manner that "will enable other parties to assess the claim." The default method of doing so employed by most lawyers is for the withholding entity to prepare a privilege log of all withheld records on a "document-by-document basis." However, some categories of documents and communications are, by their authorship, exchange, or content, transparently privileged or protected, while others merit more information. The exponential proliferation of ESI since Rule 26(b)(5)(A) was enacted in 1993 further complicates this process. And despite the 1993 Committee Note to Rule 26(f) regarding flexibility with respect to privilege logging, the proposed Amendments include guidance about optional methods other than continued adherence to the inflexible, "each document must be logged" standards.

These document-by-document privilege logs are very labor-intensive, burdensome, and costly. The costs associated with creating these traditional privilege logs have become possibly the largest category of pretrial spending for litigants in document-intensive litigation. Typically, preparing such logs requires lawyers to identify potentially privileged documents, conduct extensive research into the elements of each potential claim, make and then validate initial privilege calls, and then construct a privilege log describing each withheld document—with the lawyer's client paying the associated costs. These logs are often expensive to produce and inefficient in conveying useful information, and often lead to disputes that require court intervention.

II. PROPOSED AMENDMENTS

Rule 16. Pretrial Conferences; Scheduling; Management

(b) Scheduling and Management

(3) *Contents of the Order.*

(B) *Permitted Contents.*

(iv) include *the timing and method for complying with Rule 26(b)(5)(A)* and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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Conference of the Parties; Planning for Discovery.

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(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

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(D) any issues about claims of privilege or of protection as trial-preparation materials, including *the timing and method for complying with Rule 26(b)(5)(A) and*—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

III. DRI CENTER RECOMMENDATIONS

The 2006 Committee Notes to Rule 26(f) recommended that parties address issues concerning privilege during the Rule 26(f) conference. However, this suggestion is often not followed in actual practice. The Proposed Amendments contemplate that the parties will take the initiative in addressing and reaching agreement with respect to the scope, structure, content, and timing of submission of privilege logs at the appropriate time in each matter.

This contemplated discussion should be initiated at the parties' required Rule 26(f) initial conference and agreement finalized at a reasonable time preceding the commencement of document productions. The precise procedures agreed to are best incorporated in the parties' Rule 26 report and then into a court order. If agreement, in full or part, is not achieved, each party could submit its plan or disputed parts to the court for guidance and, if necessary, resolution. The objective of the parties' conference is to agree on procedures for providing sufficient information to assess privilege claims relating to information that is likely to be probative of claims and defenses and that is not facially subject to protection. This could allow the parties to avoid many of the issues described above.

Some categories of documents and ESI are facially privileged or protected and can be agreed by the parties to be excluded from logging. For example, absent extraordinary circumstances, communications between counsel and client regarding the litigation after the date the complaint is served can be excluded as clearly privileged or protected. The Proposed Amendments contemplate that parties might agree that work product prepared for the litigation need not be logged in detail. Certain forms of communications, for example communications exclusively between in-house counsel and outside counsel to an organization, might be so clearly privileged that a simplified log merely identifying counsel as the exclusive communicants is needed. Express exclusions, as allowed by the Proposed Amendments and encouraged by the Committee Notes, both reduces the burdens of reviews and logging and possible disputes regarding the scope of logging that arise when a party unilaterally excludes documents and ESI otherwise deemed relevant.

Although it is widely understood that tiered discovery can be an efficient way to focus attention on the most important documents and ESI, courts and parties have been slow to apply that concept to privilege logs. But just as not all documents are equally important to a case, so it is that not all documents withheld on the basis of privilege have the same value in the litigation. Whereas sampling and other procedures are employed to determine whether various categories of documents and ESI are sufficiently probative to warrant additional productions, so can iterative, proportional logging determine which privilege claims should be subject to greater scrutiny in the circumstances of the case. For example, certain claimed privileged documents or ESI may pertain to a mixture of privileged and business information that is probative and requires additional information to assess the claim. Providing initial logs with limited information, for example logs based on extracted metadata fields, permits the receiving party to focus on documents and ESI for which further information is needed to assess the privilege claims. Similarly, well-structured categorical logging can include procedures for the receiving party to sample documents or ESI and receive document-by-document log entries for those documents to ascertain the sufficiency of the privilege claims for the category.

The 1993 Committee Notes to Rule 26(b)(5) recognize that detailed, document-by-document privilege logs are appropriate when only a few items are being logged but contemplate identification by category in other circumstances. Thus, even 25 years ago, as the current issues created by the volume of ESI were just beginning to emerge, the Committee recognized the benefit of categorical logs in the face of voluminous productions and claims of privilege. The recent Proposed Amendments allow the parties, and the court, to discuss the timing and method of complying with Rule 26(b)(5)(A). The Committee Note to the Proposed Amendment to Rule 26 reinforces this position, recognizing that "[i]n some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many of the withheld documents."

The DRI Center for Law and Public Policy believes that the Proposed Amendments are, overall, a step in the right direction to help litigants and the courts modernize guidance for handling privilege logs by strengthening the timing and manner of expected compliance with Rule 26(b)(5)(A). These Amendments, as guided by the Committee Notes, would enhance efficiency and expedite litigation by enabling parties to work collaboratively and creatively to avoid needless costs and disputes, saving judicial resources. The Proposed Amendments would also permit the parties to use new and emergent technologies, including technology applications that automatically identify privileged documents and ESI, and extract information for automated logging. Finally, the Proposed Amendments would bring uniformity to the best practices that have developed in many federal courts pursuant to local rules and pilot programs.

Some critics of the Proposed Amendments assert that categorical and iterative logging may provide incentive or ability to cheat the system by hiding important relevant documents and ESI behind invalid claims of privilege or protection. Such criticisms assume that lawyers admitted to practice in federal court would immediately set aside their oaths and violate the rules of ethics in every jurisdiction. This criticism also ignores that the amendments proposed here contemplate meet-and-confers at the appropriate juncture, providing the opportunity for timely judicial involvement if necessary. And, of course, such criticism ignores the obvious—if a lawyer is going to cheat, he or she will do so under either a document-by-document log or a categorical log.

V. CONCLUSION

The general practice under Rules 26(b)(5)(A) and 45(e)(2) has been for the parties to prepare document-by-document privilege logs notwithstanding the 1993 Committee Note suggesting that other procedures might be employed. The status quo puts substantial burdens on the parties, nonparties, and the judiciary because expensive and ineffective logs create collateral disputes concerning the sufficiency of logs without providing the information necessary to resolve them. The Proposed Amendments encourage the parties to devise proportional and workable logging procedures while facilitating timely judicial management where necessary to avoid later disputes. Doing so would reduce both the burdens on the parties and the court while addressing the continual frustration that document-by-document logs seldom, if ever, "enable other parties [and the court] to assess the claim[s]." Thus, the DRI Center for Law and Public Policy urges the Committee to adopt the proposed Amendments.

Respectfully submitted,

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