COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

October 4, 2023

THE DIRECT APPROACH: WHY FIXING THE RULE 26(b)(5)(A) PROBLEM REQUIRES AN AMENDMENT TO RULE 26(b)(5)(A)

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules (the "Committee") in response to the Judicial Conference Committee on Rules of Practice and Procedure's Request for Comments on the proposed amendments to rules 16(b) and 26(f) of the Federal Rules of Civil Procedure ("FRCP").[2]

INTRODUCTION

The proposed amendments recognize the significant problems and inefficiencies in today's complex federal court litigation involving the appropriate withholding of records on the basis of privilege – particularly the widely divergent standards and expectations across the nation. The fact that these problems exist despite the clear statement in the Committee Notes to the 1993 amendment to Rule 26(b)(5)(A) that document-by-document logs are not required in every case[3] suggests that the solution is not to issue guidance in Rules 16(b) and 26(f)(3)(D) and in the Committee Notes to those rules (the "Committee's Proposal"), particularly when the proposed comments will be inserted in notes unrelated to the rule that sets out the expectations when parties withhold documents from production on the basis of privilege, Rule 26(b)(5)(A). The fact that there are thirteen references to Rule 26(b)(5)(A) in the Committee's Proposal demonstrate that the Committee's intent is to address a Rule 26(b)(5)(A) problem. Because the

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure* (Aug. 2023), https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.

[3] It should be noted that the multiple amendments to Rule 26 since 1937 have caused the committee notes to become voluminous, making it difficult for courts and parties to find the relevant notes.

indirect approach will not serve the need, the Committee should modify its proposal to include an appropriate amendment to Rule 26(b)(5)(A).

The 1993 Committee Note correctly observes that detailed privilege logs "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."[4] However, Rule 26(b)(5)(A) fails to help distinguish between appropriate and unduly burdensome logging, likely because the 1993 Committee Note has gotten lost in the voluminous notes to the 13 amendments to Rule 26 since 1937.[5] Many courts and parties continue to misconstrue Rule 26(b)(5)(A) to require document-by-document privilege logs in all cases—including in cases involving massive amounts of data, and even for categories of documents that are highly unlikely to contain discoverable information, such as communications with counsel after the filing of a complaint.[6] This misinterpretation of Rule 26(b)(5)(A) is causing significant inefficiency and injustice by imposing unsupportable and unjustifiable burdens and by hindering courts and parties from making use of more efficient alternative methods to comply with the rule. It is also suborning the unfortunate tactic of imposing asymmetric litigation burdens on litigants to force the compromise of claims and defenses in response to economic pressure rather than the merits.

To address the Rule 26(b)(5)(A) problem, the Committee is proposing to amend two other rules, Rule 26(f) and Rule 16(b), to require parties to discuss, and prompt judges to order, the timing and method for compliance with Rule 26(b)(5)(A). Although this proposal is well-intended, and might help in some cases correct the misinterpretation that leads many courts to find a presumptive requirement for document-by-document privilege logs, its utility will be limited. As Judge Facciola and Jonathan Redgrave accurately observed to the Committee:

> [T]he omission of any proposed amendments to Fed. R. Civ. P. 26(b)(5)(A)(ii) itself in the rules package unfortunately fails to address directly the progeny of cases that misapply this rule and axiomatically insist that the rule requires that a party must log each privileged document individually, including courts holding that the rule rigidly requires a separate log entry for each email in a chain of emails, regardless of circumstances.[7]

Meetings and conferences will not fix Rule 26(b)(5)(A), nor will they adequately address the problem of ever-increasing burdens of the privilege process as the volume of records and costs of discovery continue to increase. Only an amendment to Rule 26(b)(5)(A) can sufficiently clarify that the rule does not require document-by-document privilege logs but rather allows producing

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[4] FED. R. CIV. P. 26(b)(5) advisory committee's note to 1993 amendment ("The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details 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.")

[5] To find committee notes to a specific section of the rule, practitioners and courts need to know the year that section was amended. Importantly, the Committee's Proposal does not include a cross-reference in Rule 26(b)(5)(A) referring to the amendments and committee notes to Rules 16(b) and 26(f)(3)(D).

[6] *In re Imperial Corp. of America*, 174 F.R.D. 475, 478 (S.D. Cal 1997).

[7] Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Jan. 31, 2023), https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf.

parties to create categorical privilege logs or to agree on other alternatives. At very least, an amendment to Rule 26(b)(5)(A) should provide a reference to the proposed Rule 16(b) and Rule 26(f) amendments and should be accompanied by a note explaining what compliance with the rule means.

This Comment sets forth the Rule 26(b)(5)(A) problem, explains why a modification to the Committee's Proposal to add a direct amendment to Rule 26(b)(5)(A) is necessary, urges a change from "rolling" logs to "tiered" logs in the proposed Committee Notes to the proposed Rule 16(b) and 26(f) amendments, and suggests that the Committee should follow through with this rulemaking by next taking up a Rule 45 amendment to address the needs of non-parties. Modifying the Committee's Proposal as suggested here will achieve the Committee's purpose of informing and enabling parties to customize appropriate logging procedures that are effective, efficient, and proportional to the needs of each case.

I. PRIVILEGE LOGS ARE TOO EXPENSIVE, OFTEN MORE BURDENSOME THAN HELPFUL, AND FREQUENTLY INDUCE HARMFUL GAMESMANSHIP

A. Costs and Burdens

Indiscriminate document-by-document privilege logs are one of the most labor-intensive, burdensome, costly, and wasteful parts of pretrial discovery in civil litigation.[8] The Sedona Conference recognizes that "[i]n complex litigation, preparation of [privilege] logs can consume hundreds of thousands of dollars or more."[9] The costs and complexity of privilege logs are increasing exponentially as the volume of data and communications increase at incredibly high rates. It is estimated that human beings produce 2.5 quintillion bytes of data every day. Ninety percent of the world's total data was produced in the past two years. Document and communication demands are consequently straining the current rules, which were designed for a world of paper.

The burdens of overlogging are not limited to producing parties. Because document-by-document logs treat each item as if it had equal importance, such logs force receiving parties and courts to focus often misplaced attention on items that may have no material relationship with the claims and defenses. Receiving parties often review thousands of entries, assess those entries, and fashion responses, irrespective of importance. Courts often must resolve disputes over the sufficiency of such log entries that frequently require *in camera* reviews and proceedings.

As the volume of material potentially subject to discovery has escalated, so too has the number of documents withheld for privilege. As the Committee explained to the Standing Committee, the burdens of producing document-by-document privilege logs have escalated as digital

[8] *See* New York State Bar Association, *Report of the Special Committee On Discovery And Case Management In Federal Litigation*, at 73 (June 23, 2012) ("Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive case, especially one with many e-mails and e-mail strings.").

[9] The Sedona Conference, *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 103 (2016).

communications have supplanted other means of communication.[10] As a result, the burdens and expenses of asserting privilege claims has grown dramatically. A court in the Southern District of New York has noted that "the advent of electronic discovery and the proliferation of e-mails and e-mail chains" has made "traditional document-by-document privilege logs . . . extremely expensive to prepare, and not really informative to opposing counsel and the Court."[11] While artificial intelligence and other technological advancements have increased the capability and efficiency of finding *potentially* privileged documents, litigants cannot use these tools alone to assert their privilege claims under the current rules. Instead, creating privilege logs remains a manual, burdensome, and exceptionally expensive process in litigation.

B. Limited Value

Document-by-document privilege logs are frequently of little value to the requesting party and the court in analyzing or evaluating the privilege claims, despite the time, effort and money spent preparing them.[12] The Sedona Conference explains: "Privilege logs rarely 'enable other parties to assess the claim' as contemplated by Rule 26(b)(5) [n]or do the logs 'reduce the need for *in camera* examination of the documents.'"[13] A major reason for the problem is that document-by-document logging is based on the flawed premise that each document (or redacted portion) should be treated with equal detail, rather than focusing more attention on the documents that are more important to the case and less attention to unimportant items. Preparing a privilege log requires careful and time-consuming analysis of descriptions sufficient to convey the basis for withholding the document without unintentionally conveying the substance of the communication and thus waiving privilege—an effort that should be tailored rather than applied as a blanket default to the universe of documents.

C. Gamesmanship

Although disagreements regarding the sufficiency of privilege logs can cause extensive skirmishes between the parties, rarely do such fights impact the ultimate outcome of the case. Too often, challenges to privilege logs are used as a tool by overly aggressive requesting parties to impose added expenses on producing parties, to obtain desired concessions with respect to other discovery disputes, or to delay litigation. Such actions place additional barriers to the

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[10] Memo from Hon. Robin L. Rosenberg, Chair, Advisory Committee on Civil Rules, to John D. Bates, Chair, Committee on Rules of Practice and Procedure (Dec. 9, 2022), Agenda Book, Committee on Rules of Practice and Procedure (Jan. 4, 2023), at 205, https://www.uscourts.gov/sites/default/files/2023-01_standing_committee_meeting_agenda_book_final_0.pdf.

[11] *Auto Club of N.Y., Inc. v. Port Auth. of N.Y. and N.J.*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013).

[12] *See* The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 81 (2018) ("[o]ften, the privilege log is of marginal utility."); *see also id* at 159, Comment 10.h ("[T]he precise type and amount of information required to meet the general standards set forth in Rule 26(b)(5)(A)(ii) varies among courts, and frequently fails to provide sufficient information to the requesting party to assess the claimed privilege.").

[13] The Sedona Conference, *Commentary on Protection of Privileged ESI, supra* at 104 n.7. *See also id* at 155 ("[T]he deluge of information and rapid response time required by pressing dockets have forced attorneys into using mass-production techniques, resulting in logs with vague narrative descriptions. In some instances, the text of privilege logs 'raise[] the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive to produce as it is useless.'").

efficiency of our civil justice system and inevitably force parties to compromise rights that otherwise could be vindicated on the merits. Rarely do privilege log disputes result in the production of documents or data that are dispositive of a case or claim.

D. Lack of Uniformity

There is a troublesome lack of uniformity across federal courts in the caselaw interpreting Rule 26(b)(5)(A). Many district courts across the country have attempted to address the Rule 26(b)(5)(A) problem by promulgating local rules and standing orders that provide for limits on logging requirements and endorse alternative methods of privilege logging—a clear indication that the absence of a national standard is causing problems.[14] Local rules developed in response to the burden of document-by-document privilege logs have also been varied and inconsistent. For example, the District of Colorado urges counsel to engage in good faith to identify types of documents that do not need to be logged document-by-document,[15] while district courts in New York have local rules that presumptively find categorical groupings of documents for privilege logs to be proper.[16] Still other courts hold that Rule 26(b)(5)(A) rigidly requires a separate log for each email in a chain of emails, regardless of the circumstances.[17] There is also a lack of uniformity with respect to which kinds of documents may be categorically excluded from privilege logs, such as duplicative emails in lengthy email chains or communications between counsel and clients after the commencement of litigation.[18]

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[14] Even in jurisdictions where courts have not undertaken larger-scale efforts to address the problem of logging privileged documents in the digital age, a growing number of courts have recognized the appropriateness of categorical privilege logs based on the burden imposed by individual logs and lack of benefit they provide. *See, e.g., Asghari-Kamrani v. U.S. Auto. Ass'n,* No. 2:15-cv-478, 2016 WL 8243171, at *1– 4 (E.D. Va. Oct. 21, 2016) (finding party's categorical privilege log complied with 26(b)(5) and holding that requiring plaintiffs to separately list each of the 439 documents categorically logged would be "unduly burdensome for no meritorious purpose*")*; *Manufacturers Collection Co., LLC v. Precision Airmotive, LLC*, No. 3:12-CV-853-L, 2014 WL 2558888, at *4-5 (N.D. Tex. June 6, 2014) (permitting categorical privilege log when a "document-by-document listing…. would be unduly burdensome" and provide "no material benefit to Precision in assessing whether a privilege …. claim is well grounded."); *First Horizon National Corp*. v. Certain Underwriters at Lloyd's, 2013 WL 11090763, at*7 (W.D. Tenn. Feb. 27, 2013) (permitting categorical privilege log and noting that "several courts have employed such a categorical approach to balance competing concerns of, on the one hand, the burden on the withholding party to perform a detailed indexing of a large amount of documents and, on the other hand, the need for the requesting party, and even more importantly, the court, to be able to adequately assess the applicability of the privilege being asserted.")

[15] Guidelines Addressing the Discovery of Electronically Stored Information cmt. 5.1 (D. Colo. 2014)

[16] S.D.N.Y. Civ. R. 26.2(c); W.D.N.Y. Civ. R. 26(d)(4).

[17] *See, e.g.*, *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.").

[18] *Compare Brown v. West Corp*., 287 F.R.D. 494, 499 (D. Neb. 2012) ("This Court has joined other district courts in assuming privilege for attorney-client communications that transpire after the initiation of litigation in situations where the plaintiff is requesting extensive discovery."), *with Shufeldt v. Baker, Donelson, Bearman, Caldwell and Berkowitz, P.C.*, No. 3:17-cv-01078, 2020 WL 1532323, at *6 (M.D. Tenn. 2020) ("[T]here is no apparent reason to limit the scope of the log to materials generated before the filing of the [action]").

While a categorical privilege log can be a reasonable alternative to a document-by-document privilege log in many cases, it is certainly not the only alternative. The spirit of Rule 26(b)(5)(A) calls for effective and proportional alternatives, as contemplated in the 1993 Committee Note, and for parties to select the privilege log form that best suits the case. Establishing clear guidance on the elements of a sufficient privilege log will ensure consistency across courts and relieve parties of the default document-by-document privilege log burden.

II. THE COMMITTEE'S PROPOSAL SHOULD BE MODIFIED TO INCLUDE AN AMENDMENT TO RULE 26(b)(5)(A) WITH A COMMITTEE NOTE DESCRIBING A SUFFICIENT LOG

The Committee's Proposal will best achieve its purpose if an amendment to Rule 26(b)(5)(A)(ii) provides a reference to the new amendments. As suggested by Facciola and Redgrave,[19] adding this single sentence would put the focus where it belongs—the rule that is the source of the misunderstanding:

> The manner of compliance with subdivisions (A)(i) and (ii) shall be determined in each case by the parties and the court in accord with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D).

Adding this provision will help ensure that courts and parties turning to Rule 26(b)(5)(A) for guidance will learn that the FRCP require parties to take the initiative in addressing and reaching agreement on the scope, structure, content, and timing of privilege logs at the appropriate time in each case. A Committee Note accompanying this amendment should clarify that Rule 26(b)(5)(A) does not specify the method of compliance and should describe the elements of a sufficient privilege log. The Committee Note should also clarify that, absent unusual circumstances, there is a presumption that parties are not required to provide logs of trial-preparation documents created after the commencement of litigation, communications between counsel and client regarding the litigation after service of the complaint, or communications exclusively between a party's in-house counsel and outside counsel during litigation. These three categories are clearly within the privilege and almost never will be admissible in the substantive case. Providing clarity on this topic is much-needed (as noted in LCJ's original submission[20]) and would reduce satellite litigation over whether documents in these categories must be logged. The Committee Note should also suggest that prioritizing logging by tier can help parties focus on the documents that are most likely to matter to the litigation. An effective Committee Note could look like this:

> Rule 23(b)(5)(A) is amended together with Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) to direct the parties to select a privilege log form and process that is effective and proportional to the needs of the case. The form should allow the parties to assess

[19] Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Jan. 31, 2023) , https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf.

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

privilege claims and make the proper assertion as to whether privilege applies. The process should be efficient; the parties' selection should reflect the volume of documents, the burdens and expenses of producing the log, and the value of the log to the litigation. The privilege log form and process should not require judicial attention or intervention in the ordinary course.

The privilege log form will vary with the needs of the case. Elements of a sufficient privilege log form may: (1) include sampling to determine whether privilege claims are legally and factually sound; (2) utilize broad categories or summaries for secondary, nonmaterial documents; (3) provide more detailed information for subsets of important or primary, material documents; or (4) establish logging protocols for particular types of linked/serial communications such as emails or text messaging.

The process of compiling a privilege log should also reflect the needs of the case. Prioritizing the logging of documents that are more likely to be significant to the claims and defenses could help focus attention on the key issues, just as with a tiered approach to document production.

Certain categories of documents are presumed not to need logging absent unusual circumstances, including trial-preparation documents created after the commencement of litigation and communications between counsel, client regarding the litigation after service of the complaint, and communications exclusively between a party's in-house counsel and outside counsel during litigation.

Parties may select a privilege log form and process that incorporates technology and the creativity of parties and counsel, so long as the privilege log form and process are clear, efficient, and proportional to the needs of the case.

III. THE PROPOSED COMMITTEE NOTES TO THE RULE 16(b) AND 26(f) AMENDMENTS SHOULD SUGGEST TIERED LOGGING RATHER THAN ROLLING PRODUCTION

The Committee's Proposal includes a proposed note to the Rule 26(f)(3)(D) amendment stating: "Often it will be valuable to provide for 'rolling' production of materials and an appropriate description of the nature of the withheld material." Similarly, the proposed Note to the Rule 16(b) amendment says: "It may be desirable for the Rule 16(b) order to provide for 'rolling' production that may identify possible disputes about whether certain withheld materials are indeed protected." This language should be changed to substitute the word "tiered" for "rolling" because tiering is an effective management technique but rolling is frequently a counterproductive concept that often exacerbates the problems of ineffective and inefficient logging practices.

A "tiered" process allows coordination between privilege logging and the production of documents.[21] It prioritizes the production and logging of documents that are most likely to

[21] Comment by Robert D. Keeling to the Advisory Committee on Civil Rules (Sept. 8, 2023) at 9, https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0003.

contain information that is material to the issues in the case. Organizing the process in this manner means that any potential disputes related to the most important documents are resolved as early as possible in the discovery process. By focusing on sources that are more likely to be material, tiering can provide more detailed logs for important withheld documents while relieving the burdens of focusing undue attention on the less significant tiers.

In contrast, rolling logs often cause substantial delay in the completion of document productions because providing privilege logs at or near the same time as corresponding document productions adds significantly to the burden while decreasing the quality and accuracy of the privilege log.[22] Devoting resources and attention to composing privilege log entries takes away resources from the document production. "More often than not, rolling logs create needless 'fire drills' where not enough time (or resources) exists to provide quality productions simultaneously with quality log entries."[23] Because document productions are typically of more immediate interest to the requesting party, when a choice must be made, the privilege log is often the second priority, which leads to disputes and motion practice. Moreover, logs that are produced on a rolling basis often must be corrected and reproduced later in the process based on information from subsequent document review. "For example, the question of whether an individual copied on a communication is a third-party recipient who breaks privilege may not be clear from review of a single document, but subsequent review of additional documents may assist lawyers in making the correct privilege determination in the first instance."[24] Correcting and redoing previously produced logs, and making supplemental productions of documents in the previous log population, is inefficient. It is better for parties and the courts if privilege logs are compiled after the majority of documents in a particular tier have been reviewed.

IV. A RULE 45 AMENDMENT IS NEEDED BECAUSE THE COMMITTEE'S PROPOSAL DOES NOT ADDRESS THE PROBLEMS OF NON-PARTY PRIVILEGE LOGS

Non-parties facing the prospect of producing a privilege log pursuant to Rule 45 have an equal, or perhaps even greater, need for guidance about requirements than parties. Although Rule 45 makes clear that non-parties should be entitled to greater protection against undue burdens, it fails to provide it expressly with respect to privilege logging. Because non-parties do not typically participate in Rule 26(f) or Rule 16 conferences, the Committee's Proposal does not address their needs and problems. If the Committee does not want to address Rule 45 in the current rulemaking, it should nevertheless take up the topic for a future proposal because an amendment to Rule 45 is the most effective way to provide non-parties the appropriate guidance and protection.

CONCLUSION

The Committee's 1993 insight has been misunderstood or ignored, and now Rule 26(b)(5)(A) and its case law progeny have institutionalized a *de facto* default to "document-by-document" overlogging. This Rule 26(b)(5)(A) problem imposes significant burdens on parties, non-parties, and courts that are not worth the price, and it also induces gamesmanship. Although the

[22] *Id*. at 7-9.
[23] *Id*. at 8.
[24] *Id*.

Committee's Proposal could help, the indirect approach of amending Rules 26(f) and 16(b) will not be as effective without direct guidance in Rule 26(b)(5)(A) to focus on finding an efficient process that best meets the needs of the case. An amendment to Rule 26(b)(5)(A) referring to the new Rule 26(f) and 16(b) provisions, together with a Committee Note as described above, will inform and enable courts, parties, and non-parties to customize logging forms and procedures to ensure effective and efficient logging.