6. Proposed Amendments to Rules 16(b)(3) and 26(f)(3) (privilege logs)

The Discovery Subcommittee (David Godbey, Chair, Jennifer Boal, Ariana Tadler, Helen Witt, Joseph Sellers, David Burman, and Carmelita Shinn) recommends forwarding the proposed amendments to Rules 26(f) and 16(b) presented below to the Standing Committee for publication for public comment in August 2023.

These amendment proposals deal with what is called the "privilege log" problem. Before 1993, Rule 26(b)(1) exempted privileged materials from discovery, and Rule 26(b)(3) did the same for work product materials, but no rule required producing parties to declare that they had withheld responsive materials, much less provide any details about those materials or the ground for declining to produce them.

Rule 26(b)(5)(A) addressed that problem and directed that a producing party must expressly state that responsive materials had been withheld on grounds of privilege and describe the materials in a manner that would "enable other parties to assess the claim." The Committee Note to the amendment said that the method of providing such particulars could vary depending on the circumstances of the given case.

Despite that comment in the Committee Note, some courts adopted the "privilege log" idea that had originally developed in litigation under the Freedom of Information Act for practice under Rule 26(b)(5)(A). In many cases, that approach worked reasonably well, but in some it imposed considerable burdens.

These burdens escalated as digital communications supplanted other means of communication. The volume of material potentially subject to discovery escalated, and the cost of preparing a privilege log for all of them also escalated. Nevertheless, there were also regular objections that these very expensive and voluminous lists did not really provide the needed information.

In 2020, proposals were submitted to the Advisory Committee supporting re-examination of Rule 26(b)(5)(A). One idea was that the rule should provide that it was sufficient for the producing party simply to identify "categories" of materials withheld on grounds of privilege. The burdens of current privilege log practice were emphasized.

After these issues were introduced at the October 2020 meeting of the Advisory Committee, a new Discovery Subcommittee (members identified above) was formed and it began intense work on this project. In June 2021, it issued an informal invitation for comment on the pertinent issues and received more than 100 comments. Summaries of these comments were included at pp. 213-46 of the agenda book for the Committee's October 2021 meeting.

In addition, the Subcommittee received presentations from members of the National Employment Lawyers' Association, the American Association for Justice, and Lawyers for Civil Justice about experience under current Rule 26(b)(5)(A). Retired Magistrate Judge John Facciola (D.D.C.) and Jonathan Redgrave also organized a two-day Symposium on the Modern Privilege Log that was attended (virtually) by members of the Subcommittee.

This extensive input made a number of things clear. One was that there seemed to be a rather pervasive divide between what might be called the "requesting" and "producing" parties. The former frequently argued that detailed logs were critical to permit effective monitoring of withholding on grounds of privilege and leveled charges of frequent over-withholding. Attorneys who routinely made production demands urged that without the detail provided by document-by-document logs they could not evaluate privilege claims, and also reported that producing parties often abandoned claims of privilege when those were challenged, and that judges often rejected the claims even when they were not abandoned.

Attorneys who are usually on the producing side emphasized the great cost and difficulty of creating logs, even when the other side thereafter pronounced them inadequate. From their perspective, too often requesting attorneys used the privilege log expectation as a club, either to obtain a desired concession in regard to other discovery or to impose added costs on the producing parties. They also emphasized that it was often possible to devise categories of materials that could be exempted from any listing requirement in light of the issues involved in a given case, thereby reducing the burden of logging.

Another point that became clear was the great variety in the cases governed by Rule 26(b)(5)(A). The original proposals for amendment came from those principally involved in commercial litigation and often focused mainly on the attorney-client privilege and work product protection. But the comments submitted in response to the invitation for public comment showed that the rule was important in very different sorts of cases. One example raised in several comments was an excessive force suit against the police. Such cases might involve very different privileges from those that matter in commercial litigation, meaning that the information pertinent to privilege claims would perforce be different. Another category brought to the Subcommittee's attention due to the public comment already received was medical malpractice -- again involving a very different set of privilege criteria.

Yet another point that emerged from this study was the recurrent reality that delivery of a privilege log shortly before the close of discovery could be a recipe for chaos. Resolving any privilege disputes that emerged only at that point could disrupt trial preparation or require that discovery be redone. It would be far better to unearth these issues early on, permitting the parties to work them out or, at least, get them resolved by the court in a timely manner.

Perhaps the most pertinent point was that one size would not fit all cases. Some cases involved only a limited number of withheld documents; for those cases a "traditional" document-by-document privilege log might work fine. Depending on the nature of the privileges likely to be asserted, the specifics necessary in one case might have little to do with the specifics important in another case. Often the type of materials involved and the manner of storage of those materials could bear on the information needed to evaluate a privilege claim.

Taking account of these aspects of the information it obtained through its outreach, the Subcommittee concluded that trying to amend Rule 26(b)(5)(A) and prescribe an all-purpose solution to the variegated problems of claiming privileges with regard to variegated materials would not work.

Instead, what emerged was a consensus that the most beneficial rule amendment would be one that would make the parties focus carefully at the outset of litigation on the best method for compliance for their case and also that they apprise the court of their proposed method for complying with the rule, and also focus on the timing of that activity. None of this interaction will solve all problems that claims of privilege present, but the Subcommittee is convinced that these small additions to Rules 26(f) and 16(b) promise to significantly reduce difficulties that have occurred due to the requirements of Rule 26(b)(5)(A).

By the time the whole Committee met in March, this Subcommittee had come close to agreement on rule language, but because the MDL Subcommittee was then considering possible amendments to the same rules it seemed wiser to defer presentation of the privilege log package. Since then, as explored elsewhere in this agenda book, the MDL Subcommittee has shifted its focus to a possible new Rule 16.1.

Accordingly, by consensus the Subcommittee now proposes that the Advisory Committee recommend publication for public comment of the preliminary draft of the rule amendments set out below.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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(f) 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 <u>the timing for and method to be used to comply with Rule 26(b)(5)(A) and</u> – 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.

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COMMITTEE NOTE

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A) that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document "privilege log." Those logs sometimes may not provide the information needed to enable other parties or the court to assess the justification for withholding the materials, or be more detailed and voluminous than necessary to allow the receiving party to

evaluate the justification. And on occasion, despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and withhold materials not entitled to protection from discovery.

This amendment provides that the parties must address in their discovery plan the question how they will comply with Rule 26(b)(5)(A), and report to the court about this topic. A companion amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about complying with Rule 26(b)(5)(A) in scheduling or case management orders.

Requiring this discussion at the outset of litigation is important to avoid problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period.

This amendment also seeks to grant the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials, and to prompt creativity in designing methods that will work in a particular case. One matter that may often be valuable is candid discussion of what information the receiving party needs to evaluate the claim. Depending on the nature of the litigation, the nature of the materials sought through discovery, and the nature of the privilege or protection involved, what is needed in one case may not be necessary in another. No one-size-fits-all approach would actually be suitable in all cases.

From the beginning, Rule 26(b)(5)(A) was intended to recognize the need for flexibility. The 1993 Committee Note explained:

> 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.

Despite this explanation, the rule has not been consistently applied in a flexible manner, sometimes imposing undue burdens. And the growing importance and volume of digital material sought through discovery have compounded these difficulties.

But the Committee is also persuaded that the most effective way to solve these problems is for the parties to develop and report to the court on a practical method for complying with Rule 26(b)(5)(A). Cases vary from one another, in the volume of material involved, the sorts of materials sought, and the range of pertinent privileges.

In some cases, it may be suitable to have the producing party deliver a document-by-document listing with explanations of the grounds for withholding the listed materials.

As suggested in the 1993 Committee Note, in some cases some sort of categorical approach might be effective to relieve the producing party of the need to list many withheld documents. Suggestions have been made about various such approaches. For example, it may be that

communications between a party and outside litigation counsel could be excluded from the listing, and in some cases a date range might be a suitable method of excluding some materials from the listing requirement. Depending on the particulars of a given action, these or other methods may enable counsel to reduce the burden and increase the effectiveness of complying with Rule 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the specifics of the action.

In some cases, technology may facilitate both privilege review and preparation of the listing needed to comply with Rule 26(b)(5)(A). One technique that the parties might discuss in this regard is whether some sort of listing of the identities and job descriptions of people who sent or received materials withheld should be supplied, to enable the recipient to appreciate how that bears on a claim of privilege. Current or evolving technology may offer other solutions.

Requiring that this topic be taken up at the outset of litigation and that the court be advised of the parties' plans in this regard is a key purpose of this amendment. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an accompanying listing of withheld items. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution. That resolution, then, can guide the parties in further discovery in the action. In addition, that early listing might identify methods to facilitate future productions.

Early design of methods to comply with Rule 26(b)(5)(A) may also reduce the frequency of claims that producing parties have over-designated responsive materials. Such concerns may arise, in part, due to failure of the parties to communicate meaningfully about the nature of the privileges and materials involved in the given case. It can be difficult to determine whether certain materials are subject to privilege protection, and candid early communication about the difficulties to be encountered in making and evaluating such determinations can avoid later disputes.

Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling <u>and Management</u>.

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(3) ***Contents of the Order.***

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(B) *Permitted Contents.*

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(iv) include the timing for and method to be used to comply 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;

COMMITTEE NOTE

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D), which directs the parties to discuss the method to be used to comply with Rule 26(b)(5)(A) in the action, and to report to the court about that issue. In addition, two words -- "and management" -- are added to the title of this subdivision in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs that the discovery plan address the timing for compliance with this requirement, in order to avoid problems that can arise if issues about compliance emerge only at the end of the discovery period.

Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front. 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. If the parties are unable to resolve those disputes between themselves, it is often desirable to have them resolved at an early stage by the court, in part so that the parties can apply the court's resolution of the issues in further discovery in the case.

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case -- type of materials being produced, volume of materials being produced, type of privilege or protection being invoked, and other specifics pertinent to a given case -- there is no overarching standard for all cases. For some cases involving a limited number of withheld items, a simple document-by-document listing may be the best choice. In some instances, it may be that certain categories of materials may be deemed exempt from the listing requirement, or listed by category. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) permit the court to provide constructive involvement early in the case. Though the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement.