AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

February 14, 2024

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendments to Rules 16(b)(3) and 26(f)(3) on Privilege Logs

Dear Members of the Committee on Rules of Practice and Procedure:

The American Association for Justice ("AAJ") submits this comment regarding the consideration of rulemaking related to amendments to Rules 16(b)(3) and 26(f)(3) on privilege logs by the Advisory Committee on Civil Rules ("Advisory Committee"). AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, consumer cases, class actions, and other civil actions, and regularly rely on the producing party to provide a reliable privilege log as part of document productions. AAJ supports the proposed rule as early discussion about how to address claims of privilege or protection may assist in case management and prevent problems regarding over-designation.

I. The Rule Must Work for All Parties, Regardless of the Number of Documents Subject to Production in Any Given Case.

Some defense-side commenters have focused on a minority of cases involving huge document productions. Of course, there is an objection to document-by-document logs in these cases, but it would be a mistake to draft a rule based on mega-document productions. As discussed during the 2021 Invitation for Comment on Privilege Log Practice, there are AAJ members litigating state-based tort claims in federal court exclusively due to diversity jurisdiction, such as trucking crash or bad-faith insurance cases. These cases may involve only a handful of privileged documents where an individual log is not burdensome for the producing party and a categorical log could result in denying the plaintiff access to key documents that are neither privileged nor attorney work product. Production needs to reflect the number of documents involved in any given

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case, and the rules governing privilege logs should not assume that document-by-document logging is too expensive, burdensome, or inefficient. As written, the proposed amendments strike the right balance.

Further, AAJ urges the Advisory Committee to retain key language in the Committee Note that reinforces the importance of flexibility within document productions. These essential statements include:

- "No one-size-fits-all approach would actually be suitable in all cases." *[End of fourth paragraph of Rule 26 Committee Note.]*
- "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." *[Beginning of fifth paragraph of Rule 26 Committee Note.]*
- "Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front." *[Beginning of third paragraph of Rule 16 Committee Note.]*

II. Over-Designation Should Be Recalibrated in the Committee Note.

Regardless of practice area, AAJ members consistently grapple with issues of over-designation. Members report that corporate counsel are frequently copied on production and design emails (and business-related emails more generally) that do not relate to legal issues in a misguided attempt to protect them from discovery.[1] Communications involving counsel in anticipation of litigation do not protect from discovery the underlying facts that led to the litigation being brought in the first place. Moreover, contract lawyers frequently over-designate documents in a rush not to give away any privileged documents accidentally.[2] Often, this work is not supervised until very

[1] *In re: Marriott Int'l Customer Data Sec. Breach Litig.*, No. 19-MD-2879, 2021 WL 2910541, at *5 (D. Md. July 12, 2021) (holding that pre-incident vendor's "primary function was for business purposes—namely cybersecurity incidence response, identifying compromises, and remediating them" which "work would occur regardless of the presence of' attorneys and was primarily business activity); s*ee* Submitted Testimony, *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Advisory Committee on Civil Rules, [hereinafter February 6th Testimony] at 171 (Feb. 6, 2024) (written submission of Brian D. Clark, Lockridge Grindal Nauen PLLP) (citing *Kleen Products v. International Paper et al.*, No. 10-C-5711, 2014 WL 6475558 (N.D. Ill Nov. 12, 2014)); *see also* informal comments filed by Kate Baxter-Kauf, Lockridge Grindal Nuen (PRIV-0005) and Jasper Abbott, Warshauer Group, P.C. (PRIV-0016), available at https://www.uscourts.gov/sites/default/files/comments_on_privilege_log_practice.pdf.

[2] Defense- and plaintiff-side practitioners alike have expressed their frustration with the unreliability of contract attorneys' review of documents for privilege objections. *See, e.g.*, Transcript of Proceedings, *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Advisory Committee on Civil Rules, at 193 (Jan. 16, 2024) [hereinafter January 16th Transcript] (statement of David Cohen, Reed Smith), https://www.uscourts.gov/sites/default/files/jan_16_hearing_transcript.pdf ("I am aware that sometimes clients overdesignate privileged documents, and one reason for that is there's so many of them and there's so much time that goes into it, we have to go out and hire temp attorneys to go through 50 documents an hour on relevance and privilege and they make quick decisions.

late in the litigation, after key witnesses have been deposed.[3] When documents are not properly logged, this over-designation can lead to additional expense and delay for *all* parties.

While there is a near-constant struggle with over-designation, there is only one reference to it in the Rule 26 Committee Note, somewhat buried in the second sentence of the seventh paragraph: "Production of a privilege log near the close of the discovery period can create serious problems." The placement of over-designation near the bottom of the Rule 26 Committee Note, coupled with the prefatory emphasis on the burdens of costs of document-by-document logs in the first paragraph, creates asymmetry by prioritizing costs and relegating the very real problem of over-designation to an afterthought.

A. Revisions to the First Paragraph of the Committee Note in Rule 26(f)(3)(D).

The original draft Committee Note presented to the Standing Committee in January 2023 provided a summary of the costs, essential information, and over-designation concern associated with privilege logs succinctly in the first paragraph.

> 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 ground 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.' These 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.[4]

However, the proposed Committee Note retains only the first two sentences and drops the last two sentences that served to balance the concerns raised by the plaintiff and defense bars. Mindful of the direction provided by the Standing Committee to shorten the Committee Note to

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They're not the most highly trained attorneys."); February 6th Testimony, *supra* note 1, at 148–49 (written submission of Aaron J. Marks, Cohen Milstein Sellers & Toll PLLC) ("In practice, document review decisions are often delegated to teams of junior attorneys or contract attorneys. Where these attorneys may be unsure of whether to withhold a document, they are likely to err on the side of withholding documents—even where the claim of privilege may be questionable at best.").

[3] There are potential delays and costs resulting from these decisions, such as whether to re-depose a witness. *See* informal comments of Brandon L. Peak, Butler Wooten & Peak LLP (PRIV-0014) and Samantha Heuring, Douglas, Leonard & Garvey (PRIV-0012), available at https://www.uscourts.gov/sites/default/files/comments_on_privilege_log_practice.pdf.

[4] Hon. Robin L. Rosenberg, *Advisory Committee on Civil Rules Report to the Standing Committee*, *in Comm. on Rules of Practice and Procedure Agenda Book* 208 (Jan. 4, 2023), https://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-january-2023.

keep it proportional to the length of the proposed textual change in Rule 26(f)(3)(D), AAJ proposes that the last two sentences could be restored and combined as follows to make the same point:

> These logs sometimes may not provide sufficient or detailed information to allow parties or the court to assess the justification for withholding the materials. And on occasion, producing parties may over-designate and withhold materials not entitled to protection from discovery.

Should the Committee decide that it does not want to add additional text to the first paragraph of the Committee Note, then AAJ alternatively recommends the Committee delete the following sentence from that paragraph: "Compliance with Rule 26(b)(5)(A) can involve very large costs, often including a document-by-document "privilege log."[5]

B. Revisions to the Last Paragraph of the Committee Note in Rule 26(F)(3)(D).

AAJ recommends the removal of the following sentence found in the last paragraph of Committee Note: "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."[6] The purpose of the rule is to encourage early communication. Blaming both parties for over-designation is not helpful, as it does not further the goal of the amendment and assumes that both parties are equally responsible for over-designation, which in the experience of AAJ members simply is not the case.

III. Consider Adding a Definition of Privilege Log.

Douglas McNamara, who testified at the October 16 hearing on privilege logs, provided a thoughtful definition to the Committee Note in his testimony[7] based on templates for former

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[5] *See, e.g.*, Submitted Testimony, *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Advisory Committee on Civil Rules, at 22 (Jan. 16, 2024) [hereinafter January 16th Testimony] (written submission of Lori Andrus, Andrus Anderson LLP), https://www.uscourts.gov/sites/default/files/testimony_outlines_for_jan_16_final.pdf (supporting the removal of this sentence, as it "isn't necessarily accurate today and likely won't be accurate in the future" because "[t]echnological advances have made privilege logs much cheaper to generate"); February 6th Testimony, *supra* note 1, at 95 (written submission of Kate Baxter-Kauf, Lockridge Grindal Nauen PLLP), https://www.uscourts.gov/sites/default/files/2024-02-06_hearing_testimony_packet_final.pdf (suggesting removal of the phrase "can involve very large costs" from this sentence). AAJ suggests adding language rather than subtracting it as a possibly less controversial solution although both adequately address the imbalance found in the first paragraph.

[6] This suggestion was made by AAJ's President-Elect Lori Andrus during the public hearing on January 16, 2024. January 16th Transcript, *supra* note 5, at 21 (statement of Lori Andrus, Andrus Anderson LLP).

[7] In his written testimony submitted for the October hearing, Douglas McNamara suggested the following edit to the Committee Note:

> 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.~~ privilege log. Courts have found as adequate privilege logs that provide a brief description or summary of the contents of

federal Judge Paul W. Grimm and Judge David J. Waxse. AAJ suggests a slightly refined definition here:

> In some cases, it may be suitable to have the producing party deliver a document-by-document privilege log that includes a brief description or summary of the document, the number of pages and type of document, who prepared and who received the document, the purpose in preparing the document, and the specific basis for withholding the document.[8]

This proposed definition is concise, consistent with the overall direction of the Committee Note, and does not raise new issues not previously considered by the Advisory Committee.

IV. Suggestions by the Defense Bar Tilt the Balanced Rule Crafted by the Discovery Subcommittee and Should Be Rejected.

Overall, the suggestions made by the defense bar fit into the category of a wish list sought by those engaging in complex litigation with thousands of documents. This is not representative of many cases handled by AAJ members, which involve an average amount of documents and where categorical logging can sweep away a swath of documents without providing either an adequate explanation of what the documents are or why a particular document is privileged.

A. Proposed Amendments to Rule 26(b)(5)(A) Are Unnecessary and Should Be Rejected.

A submission by Judge Facciola and Jonathan Redgrave and echoed by Lawyers for Civil Justice ("LCJ") recommends an amendment to Rule 26(b)(5)(A) itself.[9] Proponents argue that such a reference is required because Rule 26(b)(5)(A) is the source of the problem that the proposed amendments aim to solve. While AAJ itself has on occasion proposed cross-referencing in other rulemaking, it believes that cross-referencing is most suitable when there is a *choice* between two rules to apply, in which case the reference provides guidance regarding which rule is most

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> the document; the number of pages and type of document; the date the document was prepared; who prepared and received the documents; the purpose in preparing the document; and the specific basis for withholding the document. *See, e.g.*, Paul W. Grimm, Charles S. Fax, & Paul Mark Sandler, *Discovery Problems and Their Solutions*, 62–64 (2005); *Hill v. McHenry*, No. CIV.A. 99-2026-CM, 2002 WL 598331, at *2–3 (D. Kan. Apr. 10, 2002).

Submitted Testimony, *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure*, Advisory Comm. on Civ. Rules, at 26 (Oct. 16, 2023) (written submission of Douglas McNamara, Cohen Milstein Sellers & Toll) (emphasis in original), https://www.uscourts.gov/sites/default/files/testimony_packet_for_october_16_2023_final_10-11.pdf.

[8] Paul W. Grimm et al., *Discovery Problems and Their Solutions*, 62–64 (2005); *Hill v. McHenry*, No. CIV.A.99-2026-CM, 2002 WL 598331, at *2–3 (D. Kan. Apr. 10, 2002).

[9] Judge Facciola and Mr. Redgrave propose adding the following at the end of Rule 26(b)(5)(A)(ii): "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)." Letter from Hon. John M. Facciola and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Comm. On Rules of Practice and Procedure (Nov. 24, 2021).

applicable.[10] This is not the case here. In this instance, the proposed text is unnecessary, and the Committee Note proposed by LCJ would be strongly opposed by AAJ and its members.

In particular, the rule text proposed by Judge Facciola and Mr. Redgrave and the Committee Note proposed by LCJ would create unnecessary controversy, and Rule 26(b)(5)(A) cannot be changed to remove the burden of reviewing documents for privilege.[11] Since the suggestion was not part of the published rule, AAJ members and the plaintiff-side practitioners generally are not focused on commenting on it, believing that it is not part of the amendments under consideration. However, AAJ urges the Advisory Committee to avoid unnecessary controversy and refrain from inserting into the rule unnecessary provisions previously rejected by the Committee.

Another proposed submission from members of the Council and Federal Practice Task Force of the ABA Section on Litigation[12] takes the proposed amendment to Rule 26(b)(5)(A) a step further by advocating for the inclusion of one-sided language providing for the court to determine the method of compliance.[13] The proposed text, which actively encourages court involvement, is the antithesis of the Committee Note proposed by LCJ, which reads: "The privilege log form and process should not require judicial attention or intervention in the ordinary course."[14] Although AAJ opposes the Committee Note from LCJ, we do agree with the sentiment that it would be better to let parties work out a plan for discovery, including a plan to manage privileged documents, before going to the judge. Not only will it help the parties develop a working relationship, but the court should also not waste time on matters that do not require judicial involvement.

AAJ strongly urges the Advisory Committee to avoid language that would add "undue burden," "proportional to the needs of the case," or similar language into the Committee Note. In many types of wrongful death and personal injury litigation, there are issues with asymmetrical information, such that the defense has more information about the facts and issues in the case than

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[10] For example, AAJ's comment on the proposed illustrative aids rule, subsequently adopted by the Advisory Committee on Evidence, encouraged adding a reference to FRE 1006 on voluminous aids to distinguish illustrative aids from those qualifying as evidence under the voluminous aids rule. This provided symmetry to the rules since the amendments to FRE 1006 on voluminous summaries already provided a prompt to the new illustrative aids rule.

[11] As Lea Bays said in her comment, "The fact that a producing party has withheld a large amount of documents on the basis of privilege, or the fact that the litigation is 'asymmetrical,' should not eradicate the receiving party's ability to have sufficient information to understand what is being withheld, on what basis, and to assess the claim of privilege for withheld documents." Lea Bays, Comment Letter on Proposed Amendments to Civil Rules 16(b)(3) and 26(f)(3), at 3 (Dec. 12, 2023), https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0016.

[12] This submission written by Anne Marie Seibel, a partner at Bradley, should not be confused with an official submission from the ABA.

[13] The proposed language would add the following sentence after Rule 26(b)(5)(A)(ii): "Where necessary to prevent undue burden, the method of compliance with (A)(i) and (A)(ii) shall be determined by the court after consultation with the parties."

[14] Lawyers for Civil Justice, Comment Letter on Proposed Amendments to Civil Rules 16(b)(3) and 26(f)(3), at 7 (Oct. 4, 2023), https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0007.

the plaintiff. The references suggested by the LCJ are an unhelpful addition to the proportionality analysis already required by Rule 26(b)(1), while failing to provide guidance to the assessment of privilege. Similarly, AAJ opposes any version of the Committee Note that would diminish the role of the court in assisting the parties with discovery management or presume that certain documents or communications are always privileged. Such Committee Notes are overly broad, undermine judicial authority, and can lead to mischief where in-house counsel are routinely copied on documents in order to assert privilege regardless of whether it is related to ongoing litigation.[15] For example, while communications involving counsel may be protected, underlying facts uncovered during an investigation are discoverable,[16] as are post-incident reports used for business purposes.[17]

B. A Suggestion for Addressing Ongoing Production in the Committee Note.

AAJ notes that many defense interests are pushing for the Advisory Committee to remove the reference to the "rolling" logs in the Committee Note and replace it with "tiered" or "staged" logging. While this may cause some disagreement between the plaintiff and defense bars, it is likely an issue that the rule is designed to address through early discussion. It makes no sense from a time or cost perspective for plaintiffs to wait until the end of discovery to begin viewing documents,[18] especially if documents are needed for depositions. If the requested production is capturing irrelevant or unimportant documents, then knowing this early can save the defendant costs as well. Contrary to defense-side commenters, AAJ members like and understand the term "rolling" and have concerns that a rule emphasizing "tiered" logging will result in a more general

[15] For example, documents between in-house and outside counsel created after the initiation of litigation could be about that litigation or another legal matter so a blanket presumption of privilege based on a temporal description only is too limited.

[16] *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney[.]").

[17] *Adams v. Gateway, Inc.*, No. 2:02-CV-106, 2003 WL 23787856, at *5–6 (D. Utah Dec. 30, 2003) (finding that, while Gateway may have become aware of product performance issues as a result of a litigation, "the investigation had at its core the diagnosis and resolution of potential problems" and was motivated by "Gateway's self-interest as a retailer of computer products.").

[18] The February 6, 2024, testimony from the Committee to Support Antitrust Laws ("COSAL") provides numerous examples of how categorical logging failed to save time or costs for the parties or the court:

> But the consequences of that categorical approach, rather than the traditional document-by-document log proposal initially offered by the plaintiffs, led to expensive consequences: multiple motions and in camera reviews for the Court to undertake, dozens if not hundreds of hours of attorney time, improperly withheld documents (which, even if inadvertent, are still a problem), and the case being delayed for months while the defendants conducted a wholesale privilege re-review. The great majority of that additional expense and time could have been saved by sticking to a traditional, document-by-document log.

February 6th Testimony, *supra* note 1, at 142–43 (written submission of Aaron J. Marks, Cohen Milstein Sellers & Toll PLLC).

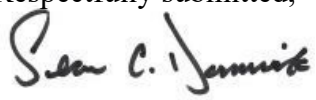
log that fails to provide the details to determine whether the document is privileged.[19] Given the discussion elicited at the hearings, it seems useful to define what a rolling log is, rather than leaving the term in quotes, by providing a description that enhances optionality and flexibility in the rule. The sentence could look like this:

> Requiring that discussion of this topic begin at the outset of the litigation and that the court be advised of the parties' plans or disagreements 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"~~ An ongoing or scheduled production of materials, sometimes referred to as a rolling log or a staged production, along with ~~and~~ an appropriate description of the nature of the withheld material can identify areas of potential dispute early,~~.~~ ~~In that way, areas of potential dispute may be identified~~ and, if the parties cannot resolve them, be presented to the court for resolution.

V. Conclusion.

AAJ supports the proposed rule amendments as drafted with minor edits to the Committee Note in Rule 26(f)(3)(D). Suggestions to expand the proposed text and include a cross-reference within Rule 26(b)(5)(A) do not improve the proposed rules, and indeed will only create controversy where none currently exists. Please direct any questions regarding these comments to Susan Steinman, Senior Director of Policy & Senior Counsel, at susan.steinman@justice.org.

Respectfully submitted,



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[19] Jeannine Kenney, Hausfeld LLP, summarizes this additional layer of bureaucracy in her January 16, 2024, testimony, "a 'tiered' approach would add yet another layer of subjectivity to that review: reviewers would not only have to make judgments about whether a document is privileged and why but also whether each document is material and why." January 16th Testimony, *supra* note 5, at 11. As Kate Baxter-Kauf wrote in her submitted testimony, "In addition, 'tiered' logging seems to contemplate that almost all documents will be reviewed by the producing party before either documents or a privilege log is produced, which is likely to exacerbate delay and push disputes later in the litigation, rather than achieving the goals outlined by the Committee." February 6th Testimony, *supra* note 1, at 94.