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***VIA* EMAIL**

October 15, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Submission to Advisory Committee on Civil Rules in Support of Examining Rulemaking Regarding Privilege Logs

Dear Ms. Womeldorf:

I write to encourage and support the Advisory Committee's examination of rulemaking regarding Federal Rule of Civil Procedure 26(b)(5) and Federal Rule of Civil Procedure 45(e)(2).[1] In short, I believe that such examination is needed to address inconsistent application of the current rules and will lead to amended rules that would provide better guidance for parties, counsel, and courts with respect to the identification of documents, ESI, and information that are withheld from production on the basis of a privilege or protection from discovery.

I am currently the Managing Partner of Redgrave LLP, a law firm founded in 2010 that specializes in e-discovery, information governance, data protection, and data privacy and provides legal counsel to its clients on those matters. Chambers USA has ranked Redgrave LLP as the only top tier (Band 1) law firm in America in the areas of E-Discovery and Information Governance. Our practice includes, inter alia, managing document and privilege reviews, principally for corporate clients in complex litigation, and representing clients in disputes regarding privilege logs and privilege claims. Since completing my appellate clerkship in 1992, I have worked at a number of national law firms and I have been involved in civil litigation

[1] On August 4, 2020, Lawyers for Civil Justice ("LCJ") submitted a suggestion for rulemaking to the Advisory Committee "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. By way of disclosure, my colleague Ted Hiser and I participated in the preparation of the August 4, 2020 LCJ submission.

across a wide variety of claims, parties, industries, and jurisdictions. In this context, I have personal experience with of the challenges presented by privilege logs, including the burdens of privilege reviews and preparing privilege logs, the challenges presented by receiving insufficient privilege logs, as well as the diversion of judicial and party resources to address unnecessary collateral disputes about the sufficiency of privilege logs and privilege claims.

Based on my personal (and our firm's experience), I have observed:

1. Although the Advisory Committee Note to the 1993 adoption of Rule 26(b)(c) suggested that logging privileged and work product protected materials by category where large numbers of documents are at issue is appropriate, the *de facto* default in many, if not most, courts is document-by-document logs. Indeed, the current Rule facially implies the need for document-by-document logs.[2]
2. Judges (and parties) consistently find that document-by-document logs do not meet the 26(b)(5)(ii) standard to "enable other parties to assess the claim."[3]
3. The burdens – time, legal personnel, and costs – of privilege reviews and preparing document-by-document logs for all withheld documents are substantial, often the costliest component of document productions.
4. Those burdens have grown exponentially with the explosion of electronically stored information ("ESI") in terms of both the quantity of information at issue and the complexities that accompany new forms and structures of ESI that differ from traditional paper documents.[4]
5. Quantitatively while the burdens are greatest for entities in complex matters that have large volumes of documents subject to production they are proportionally equally as burdensome for smaller businesses and individual persons and in less complex matters.
6. The challenge to create extensive document-by-document logs while protecting privilege often yields robotic and insufficient log entries that fail to elucidate enough information to assess the claims.

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[2] Rule 26(b)(5)(A) requires that the party must (i) "expressly make the claim" and (ii) "describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Taken together, these requirements appear to mandate that a claim of privilege or protection must be made for each document or communication withheld and a description prepared for each. And even though the 1993 Advisory Committee Note opens a door to alternatives, there is a meaningful difference as to the important an effect of text in a rule versus what appears in an Advisory Committee Note.

[3] Identifying and supporting privilege claims, particularly (but not exclusively) for corporations and other entities, involve analyzing complex privileged relationships between in-house and outside counsel, executives, managers, employees, advisors, consultants, agents, and experts. Describing such relationships for each withheld document (or for each message in a thread of emails) is unreasonable, if not impossible as a practical matter in even modest-sized matters.

[4] For example, emails and other serial digital forms of messaging, are often linked in chains, and pose problems in how to log where there are different authors and recipients to discrete messages in the chain. Metadata and "hidden" or embedded text not readily apparent on the face of a document must accessed and assessed for privilege.

7. Motion practice regarding the sufficiency of logs and broad challenges to privilege claims increase the risk of waiver and impose additional burdens on the court and parties. The result is often serial orders to "re-do" logs that still fail to meet the expectations of opposing parties or the court. And parties often seek *in camera* review of challenged documents.

In sum, traditional document-by-document privilege logs, in most cases, are unnecessary, waste resources, and are contrary to the intent of civil rules as stated in Rule 1 – "to secure the just, speedy, and inexpensive determination of every action and proceeding." In addition, the current text of the rule itself ("expressly make the claim") sets up a paradigm that seemingly leaves little room for the express consideration of proportionality being a guide as to what withheld documents need to be identified, and the manner of identification, notwithstanding the 1993 Advisory Committee Note and best practices guidance.

In our experience, sophisticated parties and their counsel often can and do negotiate and devise alternatives to document-by-document logs where counsel have a requisite understanding of technology and act in good faith and with due diligence to provide a proportional solution that meets the needs of the case (on all sides). And courts can and do provide guidance and support the parties in reaching reasonable accords. The withholding party and their counsel, if diligent, has the knowledge of their documents, privileged relationships, and applicable privilege law to employ processes and procedures to make reasonable and defensible claims and, absent evidence to contrary, can be granted deference in asserting claims. The parties can devise methods, including the use of technology, to provide notice of withholding, and procedures for challenging claims for documents and communications that are proportional to the needs of their case. Such procedures include exclusions of defined categories of documents and communications from logging, categorical logs, metadata-based logging of ESI, sampling procedures, and iterative logging.[5] The application of these practices is, however, idiosyncratic and this results in very different experiences in different jurisdictions.

I recognize that the issue of privilege logging has been raised in the past as to whether further amendments to the language of Rules 26(b)(5)(A) and 45(e)(2). In drafting this letter submission, I reviewed the Agenda Book for the October 16, 2020 meeting of the Advisory Committee, including Steven Gensler's October 13, 2008 memorandum. Professor Gensler's 2008 memorandum posited three basic questions regarding compliance with Rule 25(b)(5): "(1) What must be furnished in order to meet is requirements?; (2) When must that materials be furnished"; and (3) What is the consequence of failing to timely furnish the requested information?" I also reviewed Professor Rick Marcus' October 11, 2008 memorandum that was included in the Agenda Book.

[5] Iterative logging refers to procedures whereby initial categorical or metadata logs are employed and, if issues arise concerning the basis of claims regarding specific categories or groups of documents, detailed document-by-document logs are prepared for samples or groups of documents.

As detailed in the LCJ submissions, and based on my anecdotal research and experience, there are an increasing number of privilege challenges arising today, many of which are rooted in the insufficiency of a privilege logging process that, as Professor Gensler notes, evolved to meet the rule language requirements but is not actually dictated by the text of Rule. Indeed, I respectfully submit that the experience of the last twelve years, especially in the world of ever-evolving ESI and increasing volumes, leads to a conclusion that all three aspects identified by Professor Gensler in 2008 and the observations of Professor Marcus are all apt should be examined in more depth now. While the "manner of logging" and the timing for providing additional information fit together within the concerns detailed in more depth in the LCJ submission, the proper and consistent application of Federal Rule of Evidence 502 in the context of withholding (and logging) privileged information is also worthy of additional study as it relates to the "consequence" question. And while the discussion in the Agenda Book for the October 2020 meeting notes that the advent of new technologies may be a potential solution to the burdens posed, there are inherent limits to the available technologies that must be understood[6] and the text of the rules need to be assessed in any event to ensure that the use of any technological solutions will be sufficient to meet the objectives of the rules (and be accepted by courts).[7]

In making this personal submission to encourage further consideration of potential amendments to Rules 26(b)(5)(A) and 45(e)(2) at this time, I am mindful of the fact that drafting the language of amended rules to address these issues is challenging. That said, looking back at the efforts to craft language that was ultimately adopted in the 2006 and 2015 civil rules amendments, there were a multitude of ideas and drafts that were examined, refined, and revised before the final language emerged. During those incubation periods, additional study as well as submissions from the bench and bar yielded helpful suggestions that helped lead to the ultimate formulations. While I cannot predict the path for this rulemaking endeavor, I respectfully submit that we have reached a time to undertake that serious effort to be ahead of the curve where four or five years from now an amended rule can meet the needs of a world with even more varieties (and volumes) of ESI will be generated on a daily basis.

Very truly yours,

Jonathan M. Redgrave

[6] For example, while a "metadata" log can provide basic "objective" information that is recorded in a computer file accompanying a file (which may or may not be accurate), without more such a log does not address the basis for the claims being asserted to justify withholding the document or file from production.

[7] I am wary of presuming that any existing or yet-to-be developed technologies will be fully able to provide a complete solution to the challenges and issues that have been identified.