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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
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Invitation for Comment on Privilege Log Practice

The Judicial Conference Advisory Committee on Civil Rules has received a suggestion that rule changes be adopted to address difficulties in complying with Rule 26(b)(5)(A) in some cases. Its Discovery Subcommittee is in the early stages of considering possible changes to the rules responsive to these concerns, and now invites comments from the bench and bar about this topic. No decision has been made about whether any rule change should be formally considered, and the eventual conclusion may be that no rule change is needed.

Owing to the schedule of Advisory Committee meetings, it would be most helpful if comments were received by August 1, 2021. Comments should be submitted electronically to RulesCommittee_Secretary@ao.uscourts.gov.

Background

Before 1993, there was no requirement in the rules that any information be provided when materials were withheld on privilege or work product grounds during discovery. In that year, Rule 26(b)(5)(A) was added to the rules. It requires that, when a party withholds otherwise discoverable materials on such grounds, it must "expressly make the claim," and also describe the materials not produced in a manner that "will enable other parties to assess the claim." The committee note accompanying this rule change said:

> 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.

According to submissions received by the Advisory Committee, many courts have insisted on a document-by-document privilege log to satisfy Rule 26(b)(5)(A). With the growing centrality of digital material in discovery, the burdens of preparing such a log reportedly have increased. Furthermore, some say that the resulting logs (perhaps partly prepared by software) are often too

"generic," or rely on "boilerplate" explanations that do not serve the goals of the rule or enable the parties or court to assess the claim of protection.

The Current Invitation for Comment

The Discovery Subcommittee seeks input that will assist it in determining whether there are significant issues impacting the goals of just, speedy, and inexpensive resolution of litigation with current practice under Rule 26(b)(5)(A), and whether rule changes could have positive effects. In particular, it seeks input on two sorts of subjects:

1. Problems Under the Current Rule

It may be that problems under the current rule occur principally in what might be called "large document" cases, and not in most civil litigation in federal court. The subcommittee is therefore interested in whether those who comment have experienced problems in complying with the rule. If so, are those problems arising in all cases or only in some cases? Have similar difficulties occurred in state-court litigation, and do those state courts have rules similar to Rule 26(b)(5)(A)?

Specific examples of problems encountered (or not encountered) in litigation under the rule would be particularly valuable. Have the parties been able to work out methods of satisfying the rule that are not unduly burdensome? Has judicial involvement in developing those methods been useful? Could solutions of the sort parties and courts have devised in individual cases be usefully required for all cases by a rule revision?

In this connection, it would be helpful if members of the bar who comment can describe the general nature of their practice experience. For example, do they generally represent plaintiffs or defendants? Do they work in large firms, small firms, or in solo practice? Do they generally represent individuals or corporate or other entities in litigation? What areas of law do their cases involve?

2. Possible Rule Changes to Solve Problems

The nature of a rule change to solve a problem would depend upon the nature of the problem to be solved. But it seems useful now to invite comment also on whether those who have encountered problems under the current rule would regard possible rule amendments as potential solutions to the problems they have encountered. In the same vein, would those who have not encountered problems under the current rule expect that amending the rules could cause new problems?

Though this discussion is at a very preliminary point, at least the following possibilities might be considered:

- A revision to Rule 26(b)(5)(A) indicating that a document-by-document listing is not routinely required, perhaps referring in the rule to the possibility of describing categories of documents.

- A revision to Rule 26(f)(3)(D) directing the parties to discuss the method for complying with Rule 26(b)(5)(A) when preparing their discovery plan, and a revision to Rule 16 inviting the court to include provisions about that method in its scheduling order.
- A revision to Rule 26(b)(5)(A) to specify that it only requires parties to identify "categories" of documents. Alternatively or additionally, a revision to the rule might enumerate "categories" of documents that need not be identified.

Additional suggestions about possible rule changes are welcome. With any of these general amendment ideas, concerns include at least: (a) whether making such changes would resolve or reduce the problems that have arisen under the current rule, and (b) whether making any of these revisions would create difficulties or impose burdens in cases in which complying with the current rule has not proven difficult.

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The Discovery Subcommittee has not made any decision about whether any rule amendments should be seriously considered, much less what focus would be best if some amendments seem promising. The possibilities mentioned above are intended only to focus comment. The subcommittee expresses its gratitude to all who comment.