Hon. John M. Facciola (ret.)
Jonathan M. Redgrave

November 24, 2021

***VIA* EMAIL**

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: Facciola – Redgrave Personal Submission to Advisory Committee on Civil Rules Regarding Potential Rulemaking Regarding Privilege Logs

The undersigned assembled in September 2021, by invitation only, skilled and experienced practitioners and judges for a two-day virtual symposium on the current state of the modern privilege log. During our time together, we facilitated a discussion on whether the Advisory Committee on Civil Rules should consider amendments to the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") to ease the burden and expense of asserting privilege claims in discovery as well as improve the output of the process. After taking time to reflect on the dialogue, and considering the open question of whether there is continued merit in pursuing rules changes to address privilege logging requirements and expectations, we are writing to provide the Advisory Committee (and its Discovery Subcommittee (some members and reporters of which were present for parts of our virtual symposium)) our *personal* observations regarding the symposium and the question of rulemaking regarding privilege logs.[1]

In our own subjective views, consensus emerged on some issues that would support two potential amendments that we will discuss shortly, but we want to preface our personal views as to consensus with a brief introduction.[2]

[1] The symposium invoked the "Chatham House" rules, and thus there is no attribution of comments or observation to any particular attendee. Further, the views and thoughts expressed in this correspondence are those solely of the authors, and it does not necessarily reflect the views, opinions, or thoughts of any participant, firm, or organization.
[2] While we note that there seems to be adversity on the question of adequate privilege logs (and appropriate privilege logging requirements) between "traditional plaintiffs" and "traditional defendants," our experience prior to the symposium was consistent with the discussions we observed during the symposium – both sides of the aisle have substantial frustration with the status quo. Thus, we respectfully submit that there are areas to find common ground to improve the process for all parties in cases of all sizes and the courts that address privilege logs issues. We also respectfully submit that further investigation of this common ground is warranted as the challenges we have

Introduction: The Problem Presented

The burden and expense of asserting privilege claims have grown dramatically. First, the world is producing data at rates that are hard to believe. It is estimated that human beings produce 2.5 quintillion bytes of data every day. Ninety percent of the data was produced in the past two years. Second, it is also much cheaper to keep data. A four terabyte drive costs about $150, and cloud storage by subscription costs less. Demands are therefore testing the present rule designed for a world of paper that it cannot satisfy. Participants in the conference generally agreed on these observations, although there were concerns raised as to whether these changes impacted all cases, equally or proportionally, such that change in the rule would be trans-substantive.

Our conference also corroborated that, while artificial intelligence is increasing the capability and efficiency of finding *potentially* privileged documents, litigants cannot use it alone to assert their privilege claims in accordance with the present rule, Fed. R. Civ. P. 26(5)(A)(ii). Instead, the participants at our conference indicated that creating the document claiming the privilege, the so-called privilege log, is still often a manual process, delegated in the first instance to junior members of the law firm review teams or contract reviewers. When in doubt as to whether a document is privileged, those individuals will almost always default to claiming it as privileged because of the negative implications of inadvertent productions – notwithstanding the availability of Fed. R. Evid. 502(d) non-waiver orders. This action, in turn, increases the burden of creating the log, the frequent inadequacy of the log, and subsequent serial proceedings challenging the log (regardless of whether the underlying document itself will truly "matter" for the case in the end even if it is not privileged).

Our participants also told us that they had encountered judges who, in our view, mistakenly superimpose their own requirements on agreements the parties have reached pursuant to Fed. R. Evid. 502(e) to effectuate more efficient processes. Thus, even if the parties have agreed absolutely that a certain behavior or failing is not a waiver (and asked for that agreement to be memorialized in a Fed. R. Evid. 502(d) order), a court may nevertheless hold that it is. These rulings create uncertainty and complicate the environment in which logs are generated.

Our Personal Suggested Amendments for Consideration[3]

Despite the complexity of the issue and the good faith disagreements among the participants regarding potential solutions, we perceived a broad (but not universal) consensus that

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catalogued will become more complex over time with the continued evolution of new technologies where privileged communications and information will exist in ever-increasing volumes.

[3] The suggested amendments discussed herein were <u>not</u> drafted or discussed during the symposium, much less vetted or approved by any participant. Rather, these potential amendments reflect our personal suggestions based on our experience that has been supplemented by the recent dialogue at the symposium and thereafter. Indeed, based on the discussions at the symposium, we expect that a number of participants would have varying reactions to our personal analysis and suggestions, and we are not suggesting or implying in any way that there would be agreement regarding our personal suggestion of potential amendments. Further, we expressly recommended and encouraged that each participant become involved (if they are not already) in the rulemaking process to express their personal views.

amendments to the privilege rule, Fed. R. Civ. P. 26(b)(5)(A)(ii), and the meet and confer rule, Fed. R. Civ. P. 26(f)(3)(D) *could* be beneficial and, as such, we think they should be explored further.

Many participants explained that they encounter judges who insist that the rule requires that a party must log each privileged document individually. It was also mentioned that some judges even hold that the rule rigidly requires a separate log entry for each email in a chain of emails, regardless of circumstances.

These holdings are not correct. Nothing in the present rule justifies a bright line requirement that every claim of privilege must be individually logged. The undersigned are hard-pressed to understand why courts should not permit a less burdensome means of claiming privilege if it is either acceptable to the parties or reasonable and proportional in the circumstances. We, therefore, respectfully propose that the following language (in red text below) be added to the end of the present Fed. R. Civ. P. 26(b)(5)(A)(ii) to reflect that the intent of the 1993 Amendment (as reflected in the 1993 Advisory Committee Note) is pulled into the text to make it operative – the manner of "logging" should be flexible to the circumstances:

"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 privilege or protected, will enable other parties to assess the claim. The description may be by category or by a separate description for each withheld item, unless otherwise agreed upon or ordered by the Court."

We would also suggest that an accompanying Advisory Committee Note reiterate that the rule never required an axiomatic item-by-item log in the first place, and we also submit that Note could reflect that the Court should ordinarily defer to the agreement of the parties, or, if there is no agreement, the manner chosen by the producing party unless the Court orders otherwise. The Note could also reflect that parties should consider agreements to exclude types or categories of documents from any logging requirements in certain cases, based on considerations such as date range (e.g., after the date of the complaint) and source (emails to/from outside and in-house litigation attorneys involved in the matter). We also respectfully suggest that the Note reflect the fact that the manner of the identification or logging in any given matter should be proportional to the needs of the matter in the same manner as any aspect of discovery that is governed by the standard set forth in Rule 26(b). Finally, we note that to the extent that there is incorporation of a "category" approach into the rule (as we suggest), the Advisory Committee Note should also reflect that while narrowly defined categories can permit generalized findings (e.g., whether a specific third party to privileged communications waives in all factual circumstances) caution should be applied to any sampling of withheld documents in a category such that the results, in

the first instance, should be used to refine claims or challenges and not result in immediate loss of privilege as to documents in a category that have not been reviewed.[4]

Our second proposed amendment language (also in red text below) meets the concern of many participants that the present rule does not require counsel to discuss how they will make their privilege claims in their meet and confer. We, therefore, suggest that the following be added to the conclusion of Fed. R. Civ. P. 26(f)(3)(D):

"(D) any issues about claims of privilege or of protection as trial-preparation materials, including—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 and how the parties intend to comply with Fed. R. Civ. P. 26(5)(A)(ii);"[5]

Reasons for the Amendments

We believe that these targeted amendments are neutral and should not be subject to the often-bruising battle between counsel for the demanding and the responding parties regarding other privilege issues or other matters brought forward to the Advisory Committee for potential amendments to the Federal Rules of Civil Procedure.

First, the amendment to the meet and confer rule only adds a more precise topic as important as the other topics that the parties must discuss at the Rule 26(f) conference.

Second, the amendment to the logging rule would not be necessary if a number of courts had not mistakenly imposed a logging obligation on counsel that is not there. Free of that misinterpretation of the rule, lawyers can engage in negotiations that can relieve their clients from paying fortunes for logging that neither party to a lawsuit want or will benefit from. For example, they could agree that certain documents are so obviously privileged that they need not be logged or the exact converse. Their agreement that any privilege as to documents provided voluntarily to a government agency has been waived and these documents are not to be logged would be another example of a responsible agreement. There are certainly others. A misapprehension of the rule or fear of its misapplication should not stifle counsel's creativity in reducing the number of documents to be logged or relieving unnecessary burdens provided that the necessary disclosure requirements are met. Our proposed amendment, which clarifies that item-by-item logging is not a fixed mandate, would free counsel to cooperate and reduce the logging burden while focusing the efforts of all parties on the documents and privilege claims

[4] We respectfully submit that our proposed language presents a potential rule change akin to the 2015 amendment to Rule 26(b)(1) regarding proportionality – principally repackaging concepts already embodied in the existing rules and comments so that there can be better adoption of the proper standards while dissuading parties (and courts) from misinterpreting and misapplying the existing rule language as we have observed.

[5] In this respect, we respectfully suggest that the Advisory Committee Note to such an amendment could encourage the parties to discuss, in the context of each matter, what would be required to "enable other parties to assess the claim" in each case so that they can reach agreement or, if necessary, bring any disagreement to the Court's attention early in the case management process.

that truly matter in a case. It also expressly recognizes the Court's powers to order a manner of logging if the parties are unable to agree or if there is a need to vary from the manner chosen by the producing party.

Other Issues

While the discussion at the conference did not yield consensus suggestions for proposed amendments, it did explore other issues that may be of interest to the Advisory Committee. We address them here briefly.

Categorical Logging

A number of participants insisted that separating the privileged documents into categories and dealing with them as categories was counterproductive. These individuals believed that the wrangling of the definition of a category was taking more time than it was worth. Others reflected that using categories to either exclude logging of certain types of documents or group others was beneficial to cases.

As the authors of the article that endorsed and promoted categorical logging more than a decade ago, we ask to be heard before we are sentenced. Our thesis was that lawyers should be able to identify categories of documents that are either so clearly privileged or not and then agree that counsel need not log them. Other categories, we suggested, could be identified in bulk and addressed in a more summary fashion with respect to providing the identification of the privilege. We appreciate that the use of categories requires careful drafting and negotiation. That said, we still believe that it is time well spent in many cases, and we believe the rule (and the Advisory Committee Note) should continue to enable such practices as parties may elect. Indeed, given the continued rise in the sheer volumes of data and documents where privilege claims may be raised in matters, we think the need for express recognition and authorization of categorical logging options will become critical over the next decade.

Attestation

As we explained, too much privilege review and logging decisions are done in the first (and many times only) instance by very junior members of the review team. They default to claiming privilege when there is any doubt as to the proper classification of a document. However, there was little enthusiasm for requiring counsel to make an attestation such as the following in the hopes that it will lead to more useful supervision: "I certify that I supervised that process which was done by lawyers and other persons employed to prepare this log. I certify that, based on my review of their work, that the documents listed on the log are properly identified as privileged." Some participants feared that a near-absolute attestation or certification would create satellite litigation, and it was asking too much of the lawyers who were forced to supervise an admittedly

arduous and challenging process.[6] We concur that an unqualified certification process could lead to unnecessary collateral challenges that would not necessarily advance better logging or help the litigation move forward more generally.

Challenge Procedure

There was universal agreement that privilege issues should be promptly addressed and not left to the conclusion of discovery, although some participants were concerned that advancing challenges to the front of the discovery period could yield premature or needless disputes. There was a discussion of shortening the time within which a party challenging the log must make that challenge or answer that challenge. Also, there was dialogue as to whether the length of the submissions regarding privilege disputes could be truncated. However, there was a concern that lessening the time for submission had to be a function of how many entries were in dispute. Furthermore, there was concurrent concern that artificially limiting the space allotted to provide the context for privilege claims could fundamentally impair the invocation of legitimate privilege rights.

However, there appeared to be broad agreement regarding the potential value of the referral of substantial privilege controversies to a magistrate judge or special master during the discovery period, with the requirement that the parties meet with that person and attempt to resolve their differences in the first instance.

Metadata Log

One of our participants referenced the use of a "carrot and stick approach." In short, the parties agree to exchange metadata-only logs of documents claimed to be privileged that reflect objective data (e.g., sender, recipient, date, etc.) about each document. This log can be produced mechanically. The validity of the assertion of privilege is then tested by looking at a sample drawn from these documents. If they all "pass" the test of being, in fact, privileged, the producing party gets the carrot - the other party agrees that the metadata log is sufficient, and there the matter ends. If they "flunk," the producing party gets the stick. The logging party may have to pay costs, do additional and more detailed logging, or, in an extreme case, lose the privilege as to all the documents on the metadata log. Of course, this approach has pros and cons, and participants had mixed views on its feasibility, utility, and defensibility.[7] Personally,

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[6] Another problem that tends to get overlooked in the privilege review process is that the substantive law of privilege (including federal common law of privilege), particularly with respect to the scope of the privilege for entities sued in multiple jurisdictions, is unsettled, jurisdictionally variable, and dynamic. In addition, corporations (and other entities) are generally outsourcing functions more, using consultants for traditional employee functions, using contract employees, and even independent non-contract "gig" economy providers. These substantial challenges and uncertainties regarding the application of law to the facts are a significant impediment to a certification process, and to asserting privilege claims in the first instance.

[7] Metadata logs may be agreed to by the parties as an initial protocol with options for more detailed logging for subsets or categories of claims. For example, metadata-only logs may be sufficient for communications between

we are concerned that any approach that jeopardizes legitimate privilege claims based on a "sampling" process could lead to significant due process challenges that could then lead to substantial collateral proceedings.

Conclusion

Thanks to the superb professionalism of our participants, we accomplished more than we thought we would despite the challenges of a virtual symposium in the context of COVID-19. We are indebted to their contributions to our understanding of the issues, and we are hopeful that they will each lend their own voice to the process to best inform the Advisory Committee's deliberations. We also note that robust dialogue continues in the legal community regarding the exploration of potential privilege logging rule changes, and we respectfully submit that while getting to a "better" rule may be very difficult work, there are substantial potential benefits, and we urge the Advisory Committee to continue its exploration in this area.

Thank you for the opportunity to respectfully submit our personal observations and suggested amendments.

/s/

John M. Facciola

/s/

Jonathan M. Redgrave

legal counsel only, but more detailed logs may be required where an entity's employees are included in the communication.