Complex Litigation eDiscovery Forum
March 23, 2023

Policy Updates

1. Amendments to the FRCP regarding Privilege Logs

a. Comments: In 2021, CLEF and other members of the plaintiffs bar submitted extensive comments on the consideration of amendments to Rule 26(b)(5).

b. Status:

i. Original proposal: Amend Rule 26(b)(5)(A) to endorse "categorical" listing in the rule. The Discovery Subcommittee studied that idea and concluded it was not promising.

ii. October 2022: Proposed Rule and Committee note developed and proposed to Standing Committee for publication for comment.

iii. Jan. 2023: Standing Committee directed Advisory Committee on Civil Rules to bring proposed rule back to the Standing Committee at its June 2023 Meeting.

iv. Next Advisory Committee Meeting: March 28, 2023

c. Minutes: Jan 4. 2023 Committee on Rules of Practice & Procedure

"The original submissions advocated revising the rule to call for the identification of withheld materials by category rather than identifying individual documents. The Advisory Committee examined that proposal as well as competing arguments for logging individual documents. Judge Rosenberg noted that there is a divide between the views of "requesting" and "producing" parties. The Advisory Committee concluded that the best resolution was to direct the parties to address the question in their Rule 26(f) conference, which would give the parties the greatest flexibility to tailor a privilege-log solution appropriate for their case. Thus, the proposed amendment to Rule 26(f)(3)(D) would add "the timing and method for complying with Rule 26(b)(5)(A)" to the list of topics to be covered in the proposed discovery plan.

. . . .

"[T]he privilege-log problem stems from Rule 26(b)(5)(A)'s text, which requires the withholding party to "describe the nature of" the items withheld "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." That is a beautiful statement of the rule's purpose but

it gives no guidance on how to comply. The Civil Rules Committee's Discovery Subcommittee acknowledged the complex policy concerns at play and it consulted widely and at length. The picture that emerged is one in which the producing parties can face significant compliance costs, while the receiving parties are concerned about overdesignation and that the descriptions they receive do not enable them to make informed choices about whether to challenge an assertion of privilege. In addition, problems may surface belatedly because the privilege log is provided late in the discovery process. The subcommittee realized that there would be no easy prescription for every case, and it concluded that parties are in the best position to solve the problem by working together in good faith. The proposed amendment adds only a few words, but it is intended to start a very important process.

. . . .

Judge Bates observed that, although the changes to the rules' text are modest, the proposed amendments are accompanied by three or four pages of committee notes. Some of that note discussion is historical, and some is explanatory, but some looks like best-practices guidance. He wondered whether this was unusual or a matter of concern.

. . . .

Another practitioner member thought . . . [t]he note would help parties in privilege-log negotiations to push back against a view that all communications must be logged. A short note runs the risk of accomplishing little.

d. January 2023 Meeting and Proposed Amendment

Proposed Rule

Rule 26. Duty to Disclose; General Provisions Regarding Discovery

(f) Conference of the Parties; Planning for Discovery

* * * * *

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

* * * * *

(D) any issues about claims of privilege or of protection as trial-preparation materials, including the timing and method for complying with Rule 26(b)(5)(A) and — 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.

Excerpts from Proposed Committee Note

This amendment provides that the parties must address the question how they will comply with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. . . . 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. . . . 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.

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. . . . But the use of categories calls for careful drafting and application keyed to the specifics of the action.

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. . . . 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. . . . .

e. Jan. 31, 2023 Redgrave/Facciola Proposal (at p. 103 of Committee Book)
test

i. Proposes to amend Rule 26(b)(5) to Require the Parties, not the Court, to determine appropriate format.
ii. Suggests "tiered" discovery on documents from sources more likely to be material to the case.

"[T]he omission of any proposed amendments to Fed. R. Civ. P. 26(b)(5)(A)(ii) itself in the rules package unfortunately fails to address directly the progeny of cases that misapply this rule and axiomatically insist that the rule requires that a party must log each privileged document individually, including courts holding that the rule rigidly requires a separate log entry for each email in a chain of emails, regardless of circumstances.

. . .

The framing of Rule 26(b)(5)(A)(i) and the standard set forth in subpart (ii) continue to support a de facto default to the traditional, document-by-document privilege logs.

[W]ithout addressing Fed. R. Civ. P. 26(b)(5)(A)(ii), we are concerned that changes to the other Rule components (even with extended proposed Advisory Committee Notes) will not achieve the intended objective of improving practice. To this end, we respectfully suggest that the Advisory Committee revisit the package and include a modest, neutral addition to Fed. R. Civ. P. 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).*

[T]he vast majority of items withheld as privileged or trial-preparation materials are immaterial to the resolution of a claim or issue in the case. Challenges to claims are thus often a waste of the time, effort, and resources of the parties and the court as they do not move the matter closer to resolution. The authors recommend that the Advisory Committee consider including in the Committee Notes language that the parties and court address possible methods to focus compliance on the documents or information that have the highest likelihood of being material to the underlying dispute. **An example is tiered discovery that places priority on initially producing documents from sources that are more likely to be material to the claims and defenses**. Withheld documents in this subgroup, or a sample, could be subject to a more detailed method of compliance to assess whether claims are properly asserted and increase the prospects of employing more efficient and effective compliance methods for less important discovery tiers.

2. Cost Shifting

a. The Presumption: *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978)

b. 2015 Amendments:

i. **Old Rule 26(b)(2)(C)(iii) (adopted in 2006):** interpreted to permit cost-sharing if the court determined that "the burden or expense of the proposed discovery outweigh[ed] its likely benefit[.]"

Removed and incorporated into 26(b)(1) by the December 1, 2015 amendments.

ii. New Rule 26(c)(1)(B):

1. When entering a protective order, a court may specify terms "including time and place *or the allocation of expenses*, for the disclosure or discovery[.]"

2. **Advisory Committee Note:** "Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding."

c. **Alex Dale & John Vail, *Discovery Cost Shifting: Has Its Time Come*, Juridicature, October 2015:** "The explosion in discovery costs over the last two decades — evidenced in part by the rise of a new multibillion dollar e-discovery industry — reveals the inherent flaw in the producer-pays system: that it fails to provide a meaningful mechanism for cost/benefit considerations. . . . Critics of the . . . [amended Rule 26(b)(1) argue] the amended rule would newly make proportionality a criterion of entitlement to discovery. That could narrow the applicability of the presumption of *Oppenheimer* and justify a judge's conditioning entitlement on cost shifting. I think I am about to see my friends in the business community endorse my view of the proposed rule."

d. **The New Poster Child**: Lawson v. Spirit AeroSystems, No. 18-CV-1100, 2020 U.S. Dist. LEXIS 106817, 2020 WL 3288058 (D. Kan. June 18, 2020)

e. **17th Meeting of American College of Business Court Judges Conference, Oct. 2022** (Hosted by Antonin Scalia Law School): *Session 2: Developments in Discovery: Proportionality and Cost Allocation Issues* (LCJ, Weil Gotschal)

f. **Rabiej Litigation Law Center**

i. **Upcoming GW Conference: "eDiscovery at a Crossroads Conference", April 13-14, 2023** ("The Center's teams of volunteer judges and lawyers have been developing guidance addressing two separate approaches" including a "voluntary protocol, which provides both parties a financial incentive to request and produce ediscovery more precisely. In return for agreeing to set a fixed cap on the sum spent on

ediscovery, the requesting party is provided a certain degree of control over whom, how, and what is discovered.")

ii. Guidelines and Best Practices Adapting Marginal Utility Test to Proportionality Analysis

iii. Maintaining and Updating The New Framework

iv. Bold New Discovery Protocol:

1. "Set a cap on the amount of money expended by the producing party on discovery; Allow discovery beyond the cap only if the requesting party pays for it (cost-shifting)"

2. The costs of discovery will be estimated on a per-gigabyte and objective basis under the New Framework's cost calculators.

g. Taxable Costs: Sedona Conference Mid-Year Conference Topic "Recovering the Costs of eDiscovery"

"[M]ost federal courts confronting the issue [of taxing costs under 28 U.S.C. 1920] . . . often have determined that eDiscovery costs are recoverable only in very limited circumstances. The analysis tends to ask whether the costs—either literally or by analogy—are akin to "making a copy," although how that is defined may vary by court and Circuit. Join us for a session exploring the varied approaches to recovery of costs, including in the settlement context, *and a conversation about whether this conceptual framework makes sense in 2023*.

3. Sedona's Effort to Redefine "Document" – "Linked" Attachments, Chats, etc.

Sedona Drafting Committee: *Commentary on Conducting eDiscovery of Modern Communication and Collaboration Platforms*.

Evolving technologies have caused legal practitioners to reconsider traditional notions of what constitutes a "document" for the purpose of conducting eDiscovery. . . . Customary document-centric approaches to eDiscovery are becoming quickly outmoded, and collaboration platforms create challenges relating to chat messages, channels, links to files, and document versions.

4. Nascent Efforts to Apply Rule 37(e) to *all* evidence not just ESI

a. 2015 Amendments Rule 37(e):

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, **may order measures no greater than necessary to cure the prejudice**; or

(2) **only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation** may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

b. Committee Notes: Intended to address discovery costs unique to ESI

Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

c. Inherent Authority to Sanction (applies to spoliation of physical evidence)

Requires only a showing of bad faith or other culpability, not intent to deprive in litigation.

5. Other Sedona Conference Efforts

a. Update to the *Commentary on Possession, Custody, and Control*
b. Ephemeral Messaging - *Working Group 1 Virtual Town Hall: Ephemeral Messaging -- Is Traditional eDiscovery Gone Forever*?