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Flipping the Script on Privilege Logging: What You Need to Know (and Do) About New Privilege Log Rules

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Privilege logs are expensive, time-consuming, and fertile ground for a multitude of discovery disputes. Recent amendments to Rules 26(f) and 16(b) provide new opportunities for counsel to press for case-specific outcomes that can yield significant savings to parties involved in privilege challenges of time, cost, and expended effort. Importantly, the onus is now on counsel to know about and leverage these opportunities earlier in their cases to benefit their clients.

What do the amendments state?

On December 1, 2025, amendments to the Federal Rules of Civil Procedure took effect, with significant implications on how parties address privilege claims. The two rules at issue—Rules 26(f) and 16(b)—now require parties to tee up disputes early.

Rule 26(f) sets out the specific requirements for mandatory early discussions between parties and initial planning required for discovery. The Rule 26(f) conference must take place "as soon as practicable" and in any event no later than 21 days before the Rule 16(b) scheduling conference or a scheduling order is due under Rule 16(b).[1] As amended, Rule 26(f)(3)(D) requires that the parties attempt to negotiate solutions related to "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)" (requirements for claiming privilege) "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"[2] (parties may agree to clawbacks and limitations on waiver of privilege; court can also endorse and enter a non-waiver order).

Rule 16 applies to pretrial conferences and scheduling management. The court must issue an initial scheduling order "as soon as practicable" and in any event within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared (unless the court finds good cause for delay).[3] As amended, Rule 16(b)(3)(B)(iv) now permits court scheduling orders to "include the timing and method for complying with Rule 26(b)(5)(A) and any

[1] Fed. R. Civ. P. 26(f)(1).

[2] Fed. R. Civ. P. 26(f)(3)(D).

[3] Fed. R. Civ. P. 16(b)(2).

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agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502."[4]

In short, this means that parties ***must*** be prepared to negotiate the specifics of the privilege logging process at early Rule 26(f) conferences, and courts ***may*** incorporate parties' agreements into scheduling orders.

This is a pragmatic solution to an increasingly burdensome problem. There will be an opportunity to agree on less burdensome privilege log formats and privilege logging exclusions, which can make claiming privilege much less burdensome. Early negotiation will also hopefully limit eleventh-hour privilege log disputes, motions, and related discovery disputes. Negotiating early will also benefit both the parties *and* the courts, but only if litigants understand what they need to negotiate.

Background

Since 1993, Rule 26(b)(5)(A) required parties withholding materials on the basis of privilege to detail the nature of the withheld information with enough specificity to allow assessment, and without revealing privileged content. Much has changed in the last thirty years. Document-by-document logging is no easy feat when parties are routinely dealing with millions of pages of electronically stored information (ESI). And the volume of digital communications today simply could not have been fathomed in 1993.

In 2020, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States began considering amendment of Rule 26(b)(5). In December 2021, the Advisory Committee issued a report noting the split between plaintiffs and defendants over virtually every aspect of privilege logging, including format, specificity, costs, and timing of production.[5] Advocacy during the rules-amendment process, including a submission by one of the authors of this article and Hon. John M. Facciola (ret.), ultimately persuaded the Advisory Committee to take action and to approve the new rules, which the U.S. Supreme Court subsequently approved.

These amendments aim to address the competing concerns and streamline the privilege logging process.

Key Changes

The amendments to Rules 16(b) and 26(f) now require parties to address the timing and method for Rule 26(b)(5)(A) compliance before the start of discovery. Privilege logs are not a technical requirement of the Federal Rules, and the amendments do not change this, but they are the *de facto* means for complying with Rule 26(b)(5)(a), which specifically governs how privilege claims are to be asserted and described.

- **Mandatory Early Negotiation**: Privilege logging and attendant disputes previously came towards the tail end of discovery. Now, parties must begin to address these issues at the inception of litigation.

[4] Fed. R. Civ. P. 16(b)(3)(B)(iv).

[5] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Report of the Advisory Committee on Civil Rules, at 17 (Dec. 14, 2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_civil_rules_-_december_2021_0.pdf.

- **Increased Flexibility**: The amended rules reflect a realization that discovery has changed dramatically over the course of the last thirty years. The Committee noted that the amendments afford parties flexibility to determine what is appropriate for the case at hand. Today, traditional privilege logs listing many types of information and subject matter descriptions may not be the answer for all types of disputes. Categorical logs and metadata-only logs are on the rise, and given the burdens associated with traditional logs, we can expect to see more of these types of creative approaches.
    - **Categorical logs** – these logs list related items by category and are typically organized by subject matter or communication type. Defining categories early on can lead to significant cost savings—especially if the parties can agree that entire categories need not be logged. Automation tools can also help with logging once categories are set.
        - **Exclusions by category** – parties may agree to exclude certain categories, such as communications with outside counsel, documents post-dating the complaint, and/or redacted documents.
        - **Carve-outs** – parties may agree to separately log particular types of documents, and not other categories or types of information.
    - **Metadata logs** – these are typically automatically generated logs that provide information on various metadata fields. Another point of negotiation will be which metadata fields to include in a log. Typically, logs include fields for data, author, recipient(s), document type, and title or subject line. In addition to the automatically generated fields, these logs can also include a field for privilege claims based on human coding.
- **Earlier Judicial Involvement**: These rule amendments not only impact parties and their counsel, but also courts. Courts may incorporate parties' agreed-upon terms into scheduling orders. Disputes over forms of privilege logs, exclusions, and other privilege process issues, if they arise, will also be teed up earlier, and courts will have an opportunity to take a proactive rather than reactive approach to addressing privilege logging issues.

Timeframe

The amendments took effect on December 1, 2025. Courts may also apply the new requirements to cases that were pending prior to December 1, 2025, where "just and practicable."

Looking Ahead

Litigants should have a thorough understanding of the privilege logging landscape and their clients' data as they negotiate privilege log format, content, and timing shortly after a case is filed. Finally, a few additional topics for parties to consider:

- ***Understand all potential areas for negotiation***. Consider the various types of privilege logs and types of information you propose including or excluding from a privilege log based on what is best for your client. Be prepared to understand competing proposals and potential ramifications.

- ***Understand your client's data***. Conduct custodial and non-custodial data-source interviews as early as practicable to understand where potentially privileged communications or attorney work product may exist. Assess all potential data sources. Consider sampling data to identify potential categories for proposed exclusion.
- ***Update your Rule 26(f) checklist***. Include specific proposals for logging method, timing, escalation procedures for challenges, and Rule 502(d) clawback procedures.
- ***Ensure that you have a vibrant and effective Fed. R. Evid. 502(d) clawback order***. Be sure to propose (and fight for) a Rule 502(d) order that eliminates the requirements of proving up any elements of Rule 502(b) in the event of a privilege clawback and that also provides nationwide protection against waiver arguments.
- ***Utilize technology***. Assess how to best utilize review technology and analytics, and whether those tools need to be addressed in terms of the privilege logging output that will be memorialized in any privilege logging order.
- ***Consider all applicable rules***. Do not forget to adhere to local and individual judicial rules which may have additional related requirements.
- ***Consider a Privilege-Logging Order***. In cases where you anticipate a large volume of potentially privileged documents, consider creating a separate section of a Case Management Order or entering a free-standing order addressing the privilege-logging and challenge process.

A shift of the timing of privilege-logging negotiations to the outset of a case and the memorialization of agreements (or obtaining judicial guidance/rulings in the event of disputes), will leave much less room for misinterpretation and late-stage disputes that can upend the discovery schedule and create excess costs plus unwarranted risks to the privilege claims themselves. In short, the new paradigm presents counsel with a great opportunity to advocate for clients with significant overlapping cost and time savings potential.

