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## Rules 26 and/or 34: Protection Against Inadvertent Privilege Waiver

### Cover Page Footnote

Thomas M. Cooley Professor of Law, University of Michigan Law School; Reporter, Advisory Committee on Civil Rules of the Judicial Conference of the United States \*Partner, Skadden, Arps, Slate, Meagher & Flom LLP \*Philip D. Reed Professor of Law, Fordham University School of Law \*Partner, Jones Day \*Partner, Lief, Cabraser, Heimann & Bernstein, LLP

## CONFERENCE ON ELECTRONIC DISCOVERY

### PANEL SIX: RULES 26 AND/OR 34: PROTECTION AGAINST INADVERTENT PRIVILEGE WAIVER

#### MODERATOR

*Edward H. Cooper\**

#### PANELISTS

*Sheila L. Birnbaum\*\**

*Daniel J. Capra\*\*\**

*Jonathan M. Redgrave†*

*Joseph R. Saveri‡*

PROF. COOPER: This panel deals with inadvertent privilege waiver through the production of documents—or perhaps something else—that include privileged information.

The topic of inadvertent privilege waiver is one that spans both electronic production and of course paper production. It is a topic that first was brought at least to my attention in an earlier discovery conference that the Committee held at Boston College Law, now quite some years ago, as people started to talk about it. My reaction as a total innocent—and that’s a nice word for saying totally ignorant of these problems—was: I don’t believe it! What are you telling me courts do? You inadvertently turn over one thing that is not on its face obviously privileged, you did not realize that it was in the chain of a privileged communication, and the answer is that there is waiver of all privilege with respect to the entire subject matter and that, whatever you try to do among the parties to avoid that result, non-

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parties are not bound and you may have lost the privilege anyway? I just don't believe it!

Well, I stand to be informed. The way we are going to offer it in this panel, at least at the beginning, is going to be in essentially two stages. First, a stage that is designed with the idea that this conference is, among other things, a very important vehicle for informing the Advisory Committee, and the Standing Committee beyond the Advisory Committee, as to what is going on, what the problems are, and how lawyers are reacting to them in fact. That will be essentially the first stage. And then a second stage, looking at a number of proposals that have been identified—I'm not sure how far any of them have been developed, although some are actually implemented in practice here or there—to consider how well they might work in addressing these problems.

My hope is that as we go through these two stages the panel discussion itself will become increasingly disorderly—that is, one of us says something, someone else says, "Wait, wait a minute, I have a different story to tell." We'll see how that goes.

So for the first question I am going to ask Jonathan Redgrave to describe what it is that lawyers are so afraid of, why indeed this problem of inadvertent privilege waiver through production of something that ought not to have been produced raises such ripples of fear as they go through the discovery process.

MR. REDGRAVE: Thanks.

The meeting started yesterday with Professor Marcus talking about newness, the concept of newness, and I'm glad to say that we are going to talk about something that is royal and ancient—unfortunately, it's not golf—it's the idea of privilege. In many ways, this is something that obviously has affected us in the paper world forever.

So what is the driver of waiver concerns now and why should we consider Rules changes?

Obviously, mistakes can and will happen in productions. They happen in the paper world. They happen in the electronic world. The consequences of those mistakes have always been governed by various rules that come out of different jurisdictions, and of course have different things.

There are three different tests: a strict, a lenient, and a middle-of-the-road balancing test. That last one is the one that is in most jurisdictions, but not all.

But in terms of these mistakes, what is going on out there in the real practice? Professor Cooper says, "Is this really an issue and a problem?" In many cases, both sides really sit down and they agree on a protective order, a non-waiver order, a return order, which takes care of this. So why do we really need to step in with Rules changes if people are able to do that? Well, there are a number of reasons.

First, just to those agreements and accommodations among parties, those are not uniform and those are not universal. One could ask: why should inexperienced counsel—or, more particularly, why should a client, whose privilege it is anyway for the most part—not get the benefit that experienced counsel may get through doing agreements and protective orders entered by the court?

Secondly, the reality of the lowest common denominator comes into play. What I mean by that is that you may have a jurisdiction, let's say in the Northeast, where the parties agree and the judge enters an order. But you may have a jurisdiction in some other part of the country where the court there entertains a motion by a plaintiff that says,

It was great that the parties up in the northeast had this agreement, they had inadvertent waivers, they gave it back; but too bad, so sad, the bell was rung. Another party who was not an owner or a party to have privilege saw the document. It is lost. None of this mumbo jumbo. Give it back. Pretend it didn't happen.

It's like putting a bag over the head of a child and saying the child is not there. It's there, the person saw it, the waiver is exact, it is unforgiving, and the document should be produced. And a judge in the southeast or southwest says, "Okay, it's a waiver, I don't care what that judge in the northeast says."

So that lowest common denominator is what drives law firms, it's what drives corporate counsel, to say, "I've really got to spend a lot of money to make sure I don't get privileged documents inadvertently produced." Okay, so that drives cost.

Now, then we get to this electronic discovery world and the rule of real estate, which is "location, location, location," but of course let's change that to "volume, volume, volume." That is what we heard a lot about yesterday, and it is very real. So you are increasing the amount of information going out.

Now, electronic discovery is great because there are a lot of tools you can apply to help you find the privileged documents, to try to guard against inadvertent disclosures. But the reality is that with that volume, large productions, you will still have mistakes, and if you multiply those together you still have a big problem.

Which then drives us to: What do you do? Is there really a problem in the law as far as this being litigated? Are people really taking advantage of mistakes?

The answer is yes. I have seen and been involved in privileged motions that deal with waiver documents both on the documents and the subject matter; for privilege logs that say too little, for privilege logs that say too much; for documents that were inadvertently produced by my party, my client; and for documents that my client is

claiming privilege to as to which another party inadvertently produced a copy of. I mean there are all sorts of variations.

And it is driven by the concept of zealous advocacy. There are a number of bar opinions out there that tell lawyers in certain jurisdictions if they were to get a privileged document and the other side didn't take proper steps: "That's their problem. You have a duty to your client in zealous advocacy to go out and use it."

There are also countervailing jurisdictions where the bar authorities have put out ethics opinions that say: "You shouldn't be doing that. You should be returning it."<sup>1</sup>

So there is a lot of variance out there among both the ethical boards and the courts. So with that world of non-uniformity, with the concerns about waiver and subject matter waiver driving in-house counsel, and the volume, I think it is a good time to look at the issue—it is very real—and say: Is there something that the Rules can do to address it?

I will leave the "quick peek" and what is behind that to our second discussion.

PROF. COOPER: Another part of the question, particularly for electronic discovery, but more generally, again from my innocent view, would have been something like this: Well, for heaven's sake, when you are being asked to produce documents—to take the core illustration of this—you are going to review them for relevance, you are going to review them for confidentiality, for possible grounds for seeking protective orders, a variety of things you are going to screen for. Why is it that screening for a privilege waiver adds so much more to the burden than you would have to undertake anyway? And then, why is e-discovery somehow, if it is, something that increases the risk?

And then, surrounding that, something that Mary Sue Henifin said yesterday, and that was, if you remember the exchange, "Well, yes"—and I think it was meant to be more embedded data than metadata. The embedded data in a document may itself reveal information that is privileged in some sorts of litigation, some sorts of documents. Which leads to the question: Has anybody ever thought if you are going to be exchanging information in native format about screening the embedded data—and, if it is possible, in metadata—for privilege?

Sheila, why does the privilege waiver thing augment the burden so much?

MS. BIRNBAUM: Ed, as usual, has asked three questions in one. He does that so well.

Let me just try to do the last one first, embedded data/metadata. When all these young people are reviewing all these things, usually we up until now have not given documents with the embedded data and

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1. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-382 (Jul. 5, 1994).

metadata; we have usually given the .tiff image or the image that you see on your computer. So if we were adding in any way the fact that you had to hand over embedded data or metadata, I think then you would increase the cost exponentially because that would have to all be reviewed for privilege as well: Did that piece of document go to the counsel's office at some point, did the counsel have input into changing some of the language, and is that subject to work product or attorney-client privilege?

So I think what you would have is a situation where now one of the more expensive—or most expensive, in my opinion—parts of discovery is the reviewing of these documents for privilege. That would increase the cost exponentially.

Now what happens? When you're looking at relevancy, why are the privilege aspects of this so important? When you're looking for relevancy, it is pretty easy to determine whether it is relevant or not, in the sense that you can look at certain computers or certain people's servers or certain names and you can do the searches and that cuts down on the relevancy. But if you give an irrelevant document, so what? You know, it has no meaning in the process usually. So that's not a very big problem and you can do that quite quickly, and if you make a mistake it's no big deal.

But if you hand over a privileged document, it may be an important privileged document or an unimportant document, but you can't do it, because then I think you're setting yourself up for your client being upset, possibly malpractice, and possibly creating this waiver problem in many other places.

So I think more time is spent on the privilege issues. And it's not so easy. It's not every document that says "privileged and confidential" on the front of it. I mean you have to give people a whole list of all the people, all the names of all of the lawyers in-house, all the lawyers outside. There may be e-mail going back and forth. It is a very time-consuming, difficult process, someone sitting with a bunch of names—you know, does that name appear anywhere on the sheet of paper?

So I really do think that the time has come to really look at this issue. The whole game it appears, one of the big games, of discovery is "Gotcha!"—you know, "I got you, you made a mistake. I got this attorney-client privileged document. I'm going to make a lot of hay out of it one way or another."

As we'll talk about some of the solutions that states are considering and operating under, I think it's that experiment that is going on in the states that is very helpful, I think, for the Committee to examine and see how they are working, and I think we are going to talk about some of them.

But I think the problem is very real, it's one of the most expensive parts of discovery, and it will only get worse as we get more and more data that is going to have to be reviewed.

PROF. COOPER: Another range of this phenomenon is captured perhaps in a talk I had just a week ago at lunch with a now-senior New York litigator, who asked what the Committee was up to. Ever alert for a chance to learn something, I said, "Well gee, one of the things we're talking about . . . and what's your experience?"

His response was,

Well, I used to take a very hard line with privilege waiver. You gave me something privileged and I kept it and I pushed for waiver with respect to everything. Not so long ago, I had a case in which the other side advertently produced a dozen privileged documents, and I told the young people who were actually running the discovery, "Good, let's keep them." They said, "Oh no, we can't do that. We don't do that anymore. We have to give them back." I said, "Oh well, okay." And then that turned out to be a good thing because later on we inadvertently produced a dozen privileged documents and we got them back. Maybe this isn't such a bad idea after all.

That opens up a question that is also touched on. The District of New Jersey Local Rule 26.1(d)(3)(a) lists privileged waiver protections among the topics for the 26(f) conference.<sup>2</sup>

What is actually going on out there? We have the horror story, the great fear of waiver. Are lawyers actually insisting on this? What is the practice? Are people in fact, by agreement or by simple understanding that this is the way we behave, returning privileged things?

Joseph Saveri, what is going on?

MR. SAVERI: I think my experience has been generally that we are moving past an era where we are trying to find an opportunity to engage in, as Sheila says, a "Gotcha!" litigation. I think that from my perspective—and I focus on antitrust cases and big document cases—we want to move cases as quickly as possible to resolution on the merits. It is important for us, particularly when we deal with electronic discovery, and it is also true with respect to the paper discovery that I deal with, just because the volume is so big, that we want to eliminate the transaction costs associated with discovery.

Consistent with what I think we heard yesterday, it is important to get access to the relevant information and to begin as quickly as possible to identify what sources of information there are, and particularly with respect to electronic data, to know the nature and the form of the information that is there.

One of the most frustrating parts about trying to achieve that is the delay that is engendered, I think, in the process as a result of the privilege review. The documents and the materials that—well, there are really two things that happen. One, as a general matter, the whole privilege review slows down the process. In fact, the privilege review I

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2. D.N.J. Local Civ. R. 26.1(d)(3)(a).



think delays the process as much as any single part of what the defendants do in organizing their materials to turn over to the plaintiffs.

So I am interested in doing anything to cut through that. If I can get an agreement that we will not keep privileged materials, or if there has been a disclosure we will turn them back, it seems to me one of the easiest things for me to offer to expedite the process. My experience has been as a plaintiffs' lawyer that we are more than willing to do that to move the process along.

I come from California, where in fact I think I have an ethical obligation that if I do find one of those documents I will turn them over. And what's good for the goose is good for the gander, and ultimately I think, because I am a repeat player, that if the same thing happens to me, then I'll be afforded the same courtesy.

So I think generally my experience has been that we are being very reasonable about not insisting on keeping the benefits of inadvertently disclosed documents.

MS. BIRNBAUM: Can I just respond a minute to that?

I think there are two types of cases. There are the commercial cases where you have two players who have lots of documents. In those cases, it's very simple: people stipulate, because what's good for the goose is good for the gander, and everybody wants to be on an even playing field. Everyone got lots of documents. They want to cut through and get some agreements. In those cases, you usually have a stipulated approach to all of this. That seems to work pretty well. You know, "I'm going to produce privileged documents, you're going to produce them, we want to cut the costs, we both have documents."

In the kinds of cases that I am in—mass tort cases, products liability cases—there is only one-sided discovery. There are no real documents that the plaintiff has, except medical records, and it's all my records, it's all my documents. In certain places, in certain parts of the country, there are not reasonable lawyers because they want to make a case over the discovery because that is part of how they are going to get the case to settle. If they make discovery expensive, difficult, create sanctions problems, this is all part of the methodology to get to the settlement.

And so there are different types of cases. The big commercial cases are not a problem, in the sense that people will work it out. But the rule can't necessarily be for those cases. It's for the case where it is a problem, and it is continuing to be a problem, and it's going to continue to be a bigger problem as we have more data. So I think you have to keep that in mind.

And there are repeat players that, like Joseph, are going to play by certain rules, and then there are many other people who are going to play by no rules.

PROF. COOPER: Before turning to the range of questions, is

there some rules approach that might be effective, that ought to be considered by the Advisory Committee and on up to the Enabling Act<sup>3</sup> process?

One of the questions that is continually put is the question whether those of the Rules dealing with privilege, however indirectly, however tightly tied to the discovery process, are subject to the special statutory provision that in a way qualifies the Enabling Act.<sup>4</sup>

It is set out in § 2074(b),<sup>5</sup> which says that any rule “creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”

Now, this is a departure from the ordinary Enabling Act process, and although it seems to me pretty clear that a rule dealing with inadvertent privilege waiver is not a rule that either creates or abolishes a privilege, it might well be seen as a rule modifying a privilege. So you’ve got that question.

Then you have a rather broader question. Reporter Capra is ever alert—indeed, sensitive—to the division of authority and subjects between the Civil Rules and the Evidence Rules. It’s an ongoing issue with respect to some of the Discovery Rules that have provisions that overlap and depart from the Evidence Rules at the same time. He is sensitive to both of those things. I will ask him about that.

But I will also add a twist to it. I don’t see Dan Coquillette here this morning, so I will do his part of this responsibility. We have been reminded that bar groups dealing with Rules of Professional Responsibility are concerned about a duty either to exploit to the maximum advantage anything they foolishly turn over to you, or honorably and decently to return it to them. There is considerable sensitivity about the overlap between Rules of Procedure and Rules of Professional Responsibility, an overlap encountered rather more often than I think we sometimes pause to reflect on. That is another sensitivity.

Dan, is there anything we can do even if we want to?

PROF. CAPRA: Sheila, wasn’t that just three questions again?

MS. BIRNBAUM: Yes.

PROF. COOPER: At least.

PROF. CAPRA: He added the third one with that twist.

MS. BIRNBAUM: He always does that.

PROF. CAPRA: Well, I proceed from what I contend to be two unassailable positions.

The first one is that there are already too many evidence rules in the Civil Rules because where you look for evidence rules is in the Evidence Rules; you don’t look for evidence rules in the Civil Rules.

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3. 28 U.S.C. § 2071 (2000).

4. *Id.*

5. *Id.* § 2074(b).

It can only be a cause for confusion, misapplication. So I proceed from that premise.

The second premise I proceed from is that it makes no sense to get Congress involved in privilege work. The reason for that is when Congress gets involved with privilege work they will be affected by lobbyists. You'll have all sorts of lobbyists coming down on Washington and talking about various things. And even if it's in the course of this very limited point of forfeiture, it will be pretty much a disaster.

That is why the Evidence Rules Committee has never gone forth with proposed rulemaking in this area, because of § 2074(b), and the knowledge that once it gets up into Congress it's not your work anymore. They don't benignly neglect it, they have to actually enact it, and if they actually have to get up off their keesters and enact something, it is going to be a disaster.

So in that respect I have just a couple of comments.

Would this rulemaking modify an evidentiary privilege? I don't see how you can say it would not modify an evidentiary privilege. In jurisdictions where forfeiture is automatic, it modifies the evidentiary privilege. It means that the privilege can or cannot be asserted. What more could that be than modification?

There are jurisdictions which have what was called "the easy rule," which is to say you always get it back, no matter how bad you were or no matter how negligent you were. Well, any rule that you are going to draft is going to modify that rule in those jurisdictions. To argue that the waiver rule is somehow not a modification of the rule of privilege itself—well, how could you address a privilege without thinking about waiver issues? That's inherently related.

When the Advisory Committee on Evidence Rules first proposed rules on privilege, one of the rules that they proposed was a waiver rule, and that was one of the rules that was rejected by Congress and led to § 2074(b). So how can you say that that is not a matter of concern that gave rise to the statute in the first place? I just cannot see how it could not be modifying.

At any rate, it is not for me to answer that; it is for some court to answer that once this rule gets passed and Congress isn't alerted to the problem and then it becomes a part of a litigation. I don't know, maybe ten or fifteen years later, you will actually have some determination that this rule, which is intended to regulate and basically provide some kind of concrete guidance for lawyers, will actually be concrete. I guess I don't see how that works.

The next point I would like to make is that this rule, if it were in the Civil Rules, would have to, I assume, be attendant to discovery. But not all of the advertent disclosure problems occur in discovery. There are missent faxes, there are letters sent to the wrong place, there is a lawyer responding to e-mail and he hits "reply to all" instead of "reply

to sender.” That is an inadvertent disclosure of privileged information that doesn’t occur during discovery. What rule governs that? The federal common law governs that, the federal common law that exists today.

So what you would have if you established a rule, whatever the rule would be—I am not even talking about the content of the rule right now—is a rule that would govern one aspect of inadvertent disclosure, the aspect that occurs during discovery. There would be a conflict, no question about it, with some common law somewhere—with some federal common law somewhere—that deals with this second-tier kind of disclosure outside of the discovery situation. I don’t see how that is beneficial to any practitioner or any court.

Further, this rule would not apply to criminal cases. There is a good number of cases in which inadvertent disclosure occurs in criminal cases. It has happened to the government in the Southern District of New York, I think, four or five times. This rule, I assume, cannot cover that.

So you are not dealing with basically all of the problem, and if you’re not dealing with all of the problem, what results is a balkanization of the law. To me, therefore, the only thing that can be done if you really want to regulate this area is to have an Evidence Rule, because an Evidence Rule deals with whether the information is admissible at a trial. That governs criminal cases, that governs civil cases, that governs the missent fax cases.

But, unfortunately, there will never be an Evidence Rule on this issue, and the reason for that is because we know that it would modify a privilege, and we wouldn’t propose it because we know that Congress—it’s kind of a circular thing. There will never be an Evidence Rule on this point.

So I realize that it’s a knotty problem, but I don’t think that it can be solved by a civil rule.

Finally, just in passing, if the Committee is going to deal with what has been called “inadvertent disclosure” or “inadvertent waiver,” the language that is proposed—it is really not a waiver when you think about it, it’s a forfeiture. Judge Posner has a long disquisition on the difference between waivers and forfeitures.<sup>6</sup>

But just speaking in an elementary sense, a waiver is an intentional relinquishment of a known right, and this is not what is happening with an inadvertent disclosure.

It’s a forfeiture. The reason it is considered a forfeiture is because counsel has done something that disentitles counsel from invoking the privilege. That’s what a forfeiture is. So I submit that this is a forfeiture rule, not a waiver rule.

PROF. COOPER: What Dan has just proved is that we cannot get

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6. See *United States v. Richardson*, 238 F.3d 837, 841-42 (7th Cir. 2001).

away from the style project. One of the many fights I have lost was the effort to substitute “forfeit” for “waive” throughout the Rules for precisely the reason that Dan has just given.

PROF. CAPRA: I did not know this. He did not brief me on this.

PROF. COOPER: You can’t escape it.

MS. BIRNBAUM: But he wasn’t any more successful than you have been.

PROF. COOPER: The word down the line is that Jonathan wants to respond.

MR. REDGRAVE: Yes, that’s correct.

I disagree with respect to what the Rules Committee could do if it so chose with respect to the inadvertent waiver. You can substitute other words, but certainly the case law has developed with the concept of waiver in mind for the privilege and the rights.

We have procedural rules that affect substantive rights. That’s just what they do, they affect substantive rights. Do they create or do they destroy the privilege rights? I think that’s what you need to look at.

And I think you can craft a rule that sets forth ways in which privilege claims can be made, sets forth ways in which parties can go about situations where mistakes happen and what do you do to return a document, to adjudicate any challenges to the privilege, and do that all within the purview of the procedural rules and not run afoul of the Rules Enabling Act.<sup>7</sup>

PROF. CAPRA: I need to respond to that, because the issue is not whether it is procedural or not. That’s a misnomer. The issue is whether it “modifies a privilege,” that’s the statutory language, so getting into issues of whether it is substantive or procedure—

MR. REDGRAVE: You’re not modifying the privilege if you do it right. You are affecting the way in which a person claims a privilege. And right now on privilege logging requirements, if you don’t turn in a timely privilege log, a court can say, “you’re toast.” Well, that was a procedure. Putting forth the defense of that privilege was set forth by a procedure by the court under Rule 26(b)(5).<sup>8</sup> If you didn’t follow the procedure, you lost your right. Well, are you saying then we can’t even have that?

It’s a procedure that affects the substantive right. It is not changing/modifying that right, the existence of that privilege, but that procedure. That’s why I say we can look at a rule and discuss a rule, but you’ve got to be very careful in drafting that rule not to create, modify, or destroy a right that otherwise exists in the common law of the states or the federal common law.

MS. BIRNBAUM: Can I just add also?

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7. § 2071.

8. Fed. R. Civ. P. 26(b)(5).

The fact, Dan, that I think we are looking at this only through a discovery prism rather than criminal law, evidentiary, admissibility, etc., I think that also is very limiting. It's not wrong, because I think what the attempt is to try to do is to solve a problem that is creating enormous costs, inefficiencies, time consumption, that can be resolved in a way that says if I do this quick—and we'll talk about the "quick peek"—and I get my papers to Lief Cabraser's office earlier, I'm not going to be punished for that. I'm helping my client, hopefully—it's costing them less. I'm taking a risk, but by taking that risk and getting this done in an efficient, cost-effective way, I don't want to lose my privilege—otherwise, I can't do it.

So I think that you can separate this discovery issue from perhaps all the other issues that you are concerned about.

PROF. COOPER: What that does is get us directly into the second wave of this panel.

MS. BIRNBAUM: We planned this.

PROF. COOPER: Well, we planned it because Sheila is the one I am going to call on first.

The generic set of questions is: Well, supposing that in their imperious wisdom the Committees decide that, yes, there is something that may be within the process that would perhaps have to be transmitted to Congress, with the advice that the Supreme Court thinks this is § 2072 and not § 2074(b),<sup>9</sup> and that would lie down the road. How far would any one of a number of the suggested approaches actually change practice? How far would a lawyer protected by a claw-back or a "quick peek" or some other approach in fact be able to reduce the screening time, their screening cost?

One approach has the benefit of being an actual real-life rule, is the Texas Rule. This is 193.3(d).<sup>10</sup> That provides protection against privilege waiver. The comment to it suggests that it provides protection even if the party who produced was not diligent in seeking to protect the privilege.<sup>11</sup> The comment is a very rich source of information about this. I commend it to you because it addresses another real problem that may arise.

But, Sheila—and this may come as a surprise to you—has some experience with the Texas Rule and might be the first to comment on it.

MS. BIRNBAUM: Thank you.

The Texas Rule goes far beyond electronic discovery and far beyond just discovery. It would fit into all categories, and I think that makes it broader than what may be discussed by the Committee.

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9. See §§ 2072, 2074(b).

10. Tex. R. Civ. P. 193.3

11. Tex. R. Civ. P. 193.3 advisory committee's notes.

What it provides is—and it takes away the word “inadvertent,” by the way, which is probably a good thing at this point, because it talks about “without intending.”<sup>12</sup> It says,

A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days, or a shorter time ordered by the court, after the producing party actually discovers that such production is made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.<sup>13</sup>

Actually we are in a case which was hotly contested on discovery. I mean there were eight sanctions motions pending at one time, all over discovery, and all of course going in one direction. There was an inadvertently produced clear attorney-client privileged document. This took effect immediately and the document was returned immediately and it never went to court to determine whether it was an attorney-client privilege because it clearly was an attorney-client privilege. So I have seen this work, and work well, in a case where nobody was giving quarter to any other person in the litigation.

I think it does several things if you have something like this. People can spend less time and money in doing this. Now, in hotly contested cases people are going to do a privilege review because there really is a concern that some document is going to get out and you can't either put the bag over the child's head or un-ring a bell. In those kinds of litigations, that's the parties' choice to spend the money if they want to do that.

But if we had something that made it easier, and everybody knew what the rule was and it was clear, I think people in many instances would do either a “quick peek” which will look at that, or spend less time and money doing it, because they knew if they made a mistake they were going to get it back, and it would help the process, at least to some extent.

MR. SAVERI: Excuse me. One of the problems, though, I have with the Texas Rule is that it eliminates this diligence requirement. I think that diligence is important because, after all, the material we are talking about is relevant, it is otherwise discoverable, but we have decided that there is another reason for not making it part of the adjudicative process.

I have a real concern if the privileged information just comes to light at trial. You know, how does that affect the parties' rights who

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12. Tex. R. Civ. P. 193.3(d).

13. *Id.*

have spent the money, prepared for trial, and then all of a sudden this document comes out and they say, "Well, despite the fact that we really didn't pay much attention and we weren't diligent, the Rule says we get it back"? Now we have to do all sorts of things to try to un-ring that bell, and I think that is potentially unfair to the parties.

PROF. COOPER: This is another wonderful advertisement for a sort of Reporter's secret part of the rule process, and that is look at the Committee Note. The Comment to the Texas Rule addresses that.<sup>14</sup> The question, Joseph, is, what do you think about this provision in it?

What it says is, "To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to assert any overlooked privilege under this rule. A trial court may also order this procedure."<sup>15</sup>

In effect, it changes the burden to you've got the thing now and the way you can protect yourself against that trial surprise is list before trial every document you intend to use at trial.

PROF. CAPRA: But there is no question that's not to be in a Committee Note, that's to be in the Rule.

There is another problem with the Rule. Another problem with the Rule is that it basically puts a burden on the receiving party of having to show that any argument that they make, any pleading that they amend, any witness that they call, is not derived from privileged information.

But I assume that means you cannot use the fruits as well. The Rule doesn't actually say that, but I assume that that's the ordinary rule. So how do you deal with fruits in this situation? You've invited a fruits argument in every case.

MS. BIRNBAUM: I've never seen the fruits argument made, but I guess it's a good one, because I think what really happens in real life is the document is given back. Usually the document is not an important document. I mean usually it isn't *the* crucial document, that one and only smoking gun document. So as a practical matter, it may in some instances be important, but that's the rare case.

PROF. CAPRA: I was involved in a case where a law firm disclosed inadvertently part of Board minutes at which said firm gave some advice. It got turned over to the plaintiff. The plaintiff read it, turned it back because it was found to be an inadvertent disclosure under the six- or eight-factor Inadvertent Disclosure Rule that that court was applying at that particular time, and then the plaintiff amended the complaint. The defendant moved to strike the amendment. The plaintiff argued, "I could deduce this change of fact through otherwise ordinary channels." The judge spent maybe about

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14. Tex. R. Civ. P. 193.3 advisory committee's notes.

15. *Id.*



six months trying to figure that out. So that's how the fruits arguments come up—and that's under current law, and that's not even under the Texas Rule.

PROF. COOPER: Okay. We've got to keep this moving.

Lawyers often stipulate to a protective order that provides a sort of two-step process: the first step is the requesting party looks at everything, identifies what is typically a quite small fraction of the total of potentially responsive material that it is actually interested in, and then the producing party screens and the discovery process goes on.

There may be some thought that something like that could reduce to some extent those concerns about where within the Enabling Act process that fits. Is it something that comes too close to modifying a privilege?

Jonathan Redgrave, you have some thoughts about “quick peek” and some experience. What do you think of it?

MR. REDGRAVE: Well, I do have some thoughts on the “quick peek” approach.

Before I lose my train of thought on the last discussion, though, I just want to throw out two things.

You heard something about the balkanization. I'm not sure I fully like that term as best to describe what goes on in this world as far as inadvertent production or how you deal with privilege issues on a “quick peek” approach or whatever.

But the reality is you've got a variety of approaches being employed by various federal courts all throughout the country, whether a standing local rule now says “you've got to discuss it,” or judges have their nice little “in their back pocket” order, so they go out there. So it is an inconsistent practice already, and the idea behind a rule would be bring some consistency to that.

Secondly—and this is just a thought to throw out there; I'd be happy to discuss it with anyone later—I think Rule 26<sup>16</sup> is a much better place for any inadvertent production rule, because you would try to get it to the broadest possible application to the discovery process. I think you see in the Texas Rule, and I'm not an expert on the Texas Rule, but it's in the Discovery Rules generally, so it applies to all the discovery exchanges.

I think that is better than just Rule 34<sup>17</sup> because, as my intro into the “quick peek” approach, my practice is much like the game I bought for my kids, the worst case scenario game. I don't know if any of you have done this. It tells you how to run away from killer bees, it tells you how to kill a rattlesnake. And I guess now I know the question of how to kill a copperhead, so I'm ahead of my kids when I next play it.

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16. Fed. R. Civ. P. 26.

17. Fed. R. Civ. P. 34.

But the reality is I have seen an argument in the case where we had a privilege log where we inadvertently turned over the attorney comment field as well as the other privilege log fields on a database. The other side said, "Well, that wasn't a Rule 34, so your non-waiver order doesn't apply. Ha, ha, we get to keep it." Well, we litigated it. We won, but we had to litigate it at great cost.

So I think Rule 26 is a better place for it, to just be as broad as possible within what the Rules can do.

Now the "quick peek." I don't know how many of you understand what this is, so I am going to take two seconds to explain it.

Instead of doing this privilege review, I will say to you that I've got a large set of backup tapes. I've loaded them on the computer. I will ask you whether you want to see all the e-mails. I'm going to bring you into a room and I'm going to let you see it. I haven't pulled anyone out. The general counsel e-mail is on there, all the employees' e-mail. It would cost me millions of dollars to go through it. I will tell you that the case should be simple. I'm going to let you come in, you can spend ten days, you go through it, and at the end of the ten days I am going to now go through what you've selected and that's where I'm going to focus my money. If you selected some privileged documents, I'm going to put them on a privilege log.

Is this a good idea? Is this a good idea? And, even if it is a good idea, will anyone out there actually do it?

Back to the worst case scenario game, I have actually been in a case where someone has done it. The opposing party did this with respect to both paper production and an electronic production of e-mails. I'm not sure they'd do it again, but quite frankly I don't think they actually ran a waiver risk, I don't think they had a bad experience with it, and it allowed them to save millions of dollars in discovery costs because they didn't have to review it. And the number of documents we actually selected from that process was very few.

But the problem in this is that lowest common denominator again. Remember? We could have a rule that says "quick peek' is great in the federal courts" and there's this non-waiver concept, but as long as you have other jurisdictions in states or territories that say, look, we're not going to recognize that. The bell has rung. You can't ignore the child in the bag. It's over, you've waived it, and I don't care if this quirky "quick peek" thing was adopted by the Federal Rules. We don't follow that here in this state and you're done.

So until there is absolute assurance, you've still got the client saying, "Well, there's this risk, and if the document gets out there I still need to spend the money." We're trying to untie that Gordian knot, because what Sheila very well explained is that in this privilege review process it is very hard to explain to associates how to find privilege.

And the electronic age has made it worse, because what used to be maybe the memo to the client reflecting the client's request for legal

advice and then the attorney responding to that request, the prima facie privilege—now, the e-mails go back and forth, the associate picks up the e-mail in the middle of the string, how do you know it's privileged? You've got to do all the contextual research. It is very difficult. So I submit it is getting more and more expensive to do this, and as a result of the volume I think your privilege logs are getting worse.

Now, with that, if you were to adopt a "quick peek" approach, I think it should be something that is just a voluntary matter. In our case, the party voluntarily said, "We want to do this to save the money," and then entered into the restrictions for both sides with respect to their review. I think, given the uncertainty and the fact that you can't give an absolute assurance with regard to waiver, it would be a mistake to make this a mandatory event, and I think it would also be a mistake to have it out there in the Rules in such a way that a judge feels that they could put a lot of pressure on the party to get the case to trial—"We need to do this regardless of your privilege."

Now, I say that, and I realize a lot of jurisdictions have rocket docket and there are a lot of pressures and sometimes you need to do creative things to get the case to trial.

Last thing on the "quick peek" approach. If you do this—and I don't think the rule would necessarily reflect it, and obviously I'm hearing a lot of things, that the comments aren't going to say anything except "we discussed something and we're not going to tell you what it was"—you've got to have a very strict review process whereby there are no notes taken, and you completely guard as best you can against the bell anyone ever being able to remember what the bell sounded like. And I think you really can do that.

And it's sad. We had a lot of associates and other people review this production on this "quick peek" approach. If I ask people who were there—I mean they couldn't talk to us about what they saw; all we got was a privilege log—we actually got a non-responsive log, if you can believe that, and we got the other documents, the responsive non-privileged documents. If I ask people now what they saw, they don't know. I mean that bell has long faded in the forest.

PROF. COOPER: I simply first observe that "quick peek" as described could be modified as "quick peek lite"—that is, you would clearly remove everything that was manifestly privileged or otherwise protectable before you entered the "quick peek" process, and of course log it. So it doesn't have to be all or nothing.

Another approach that is also described in the materials is to suggest that, well, one thing rules can do—and indeed it is often supposed that the soundest rules are those that build on well-developed practice, bringing regularity and uniformity to things the courts have been doing for some time, trying out and working out—is take a look at what courts are doing now about inadvertent privilege

waiver, recognizing that this would likely test still further the line between a discovery-only civil rule and a broader evidentiary rule.

PROF. CAPRA: I would like to note something. A seven- or eight-factor test in a rule makes no sense to me. Why would you have a Rule like that?

For one thing, most courts in the United States have such a rule, but some are five-factor tests, some are eight-factor tests, some are seven-factor tests. So you are going to change, I guess, the law in all of those jurisdictions except for the one that you codify, I guess, even if you do that.

Secondly, whenever you add the “interest of justice,” you might as well just forget about any kind of balancing test at all. If you’ve read any of these cases, it was totally not diligent, it was a lot of information, the person was an innocent bystander, but the interest of justice required it to be returned. All factors point against return, but the interest of justice—okay, you know.

So how do you write it? Writing a rule is not going to regulate courts in this way. They’ve got their own multi-factor balancing tests as they exist. It just doesn’t seem to me to be appropriate for rulemaking.

PROF. COOPER: Joseph?

MR. SAVERI: I guess the question is whether you set forth the factors or you just allow as a general matter that there will be these kinds of protections for inadvertent production. I think you get to the same place.

I think in any event judges can handle this and I think it would be—I mean it has a lot of benefits for the system. I don’t care if it’s a five-factor test or an eight-factor test or a two-factor test. I think there should be some test, and I think there should be some rule that permits it. I think everybody would benefit from it.

MR. REDGRAVE: I would just add on that obviously Rule 26(b)(2)(i), (ii), (iii) sets forth a three-factor test,<sup>18</sup> but under 26(c) you set forth a number of other factors for protective orders.<sup>19</sup> I don’t think the fact that there may be a test that you set forth that has different factors should be a deciding factor on whether or not this is a good idea or a bad idea. If it is determined that it is a good idea for uniformity, it falls within the Rules Enabling Act, I’d go ahead and see if you can come up with a factors test that could help all the courts.

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18. Fed. R. Civ. P. 26(b).

19. Fed. R. Civ. P. 26(c).