

## THE RULEMAKERS' LAMENTS

Richard Marcus\*

"I suppose that even the most pleasurable of imaginable occupations, that of batting baseballs through the windows of the R.C.A. Building, would pall a little as the days ran on."

—James Thurber, *Memoirs of a Drudge*<sup>1</sup>

One would hope that the work of rulemakers could rank right up there with batting baseballs through a skyscraper's windows, but recognize also that the rulemakers' favored lot might sometimes pall as well. It looks so inviting because, no doubt, significant portions of the everyday work of judges and lawyers can seem like drudgery, at least some of the time. Perhaps that is one reason why many of them welcome the opportunity to become rulemakers. For judges and lawyers, that opportunity comes with a significant dollop of additional work, but it offers the alluring possibility of actually changing how the day-to-day work of the courts is done. Sometimes it may even offer a chance for a breakthrough, a transformative accomplishment that marks a watershed in American litigation. This is a heady prospect.

Breakthroughs do not always occur as hoped, however, or at least not immediately. The Symposium on Rule 502 that is included in this issue of the *Fordham Law Review* provides an example of the occasional frustration rulemakers may feel.<sup>2</sup> The panelists at the Symposium were assembled to provide an assessment—some might even hint darkly that it was more of an autopsy—of a hopeful rule improvement that had not had as much impact as its proponents had hoped. That mild sense of exasperation is what prompted me to remark during the Symposium that it illustrated the rulemakers' laments,<sup>3</sup> something I had found to be an occasional postpartum reaction from the work of the Civil Rules Advisory Committee.

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1. James Thurber, *Memoirs of a Drudge*, in *THE THURBER CARNIVAL* 18, 18 (First Modern Library ed., Random House 1957) (1931). The stimulus behind the piece was a description of Mr. Thurber that asserted he had endured "drudgery on several newspapers." Thurber went to some pains to show that the drudgery was actually pretty pleasing.

2. See Symposium, *Evidence Rules Committee: Symposium on Rule 502*, 81 *FORDHAM L. REV.* 1533 (2013).

3. See Panel Discussion, *Reinvigorating Rule 502*, 81 *FORDHAM L. REV.* 1533, 1548 (2013) (referring to the rulemakers' "cry of pain").

The editors have kindly permitted me to expand a bit on those thoughts, something that seems useful because a clear-eyed assessment of rulemaking must take account of this reaction. Ultimately, this risk of disappointment is no reason not to put in the time and energy necessary to achieve rule changes. Not all changes are followed by laments, and even those that are may pay dividends eventually, although not immediately.

Focusing on the civil rules, on which I've worked, I will try to identify the sorts of laments that sometimes befall the rulemakers: (1) Judges don't follow our rules; (2) Lawyers don't read our rules; and (3) We nevertheless must deal with overstated opposition to make even modest rule changes.

### I. A BRIEF BACKGROUND ON THE WAIVER PROBLEM

With particular reference to Rule 502, the makings of great success seemed within grasp, perhaps even easy grasp. The stimulus to reform was, as one judge recognized more than twenty years ago, the reality that "[t]he inadvertent production of a privileged document is a specter that haunts every document intensive case."<sup>4</sup> That specter created difficulties for most participants in the litigation process, because the party providing discovery operated under the specter of waiver and had to spend lots of time and money to try to avoid mistakes that would be punished as waivers, while the other side had to wait while the seemingly wasteful review before production was completed.<sup>5</sup> The advent in the last twenty years of e-discovery has magnified these wasteful burdens.

There were several easy-to-grasp reasons why this situation existed. One was the prevalent notion that any waiver destroyed privilege protection as to all materials on the same subject matter; small errors could have large consequences. Another was the fact that recognizing something as privileged was often difficult, making mistakes likely to occur. Altogether, these difficulties had preoccupied the Civil Rules Committee for some time. So, in the late 1990s, the Committee explored ways to eliminate or reduce them through rule amendments.<sup>6</sup> But this effort existed in the shadow of a statute Congress passed at the time it enacted the Federal Rules of Evidence that raised questions about whether effective protection against waiver could be accomplished by rule amendment.<sup>7</sup> Whether the statute really

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4. *FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 479–80 (E.D. Va. 1991).

5. For a review of these problems, see Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605 (1986).

6. See Civil Rules Advisory Comm., Meeting Minutes 19–22 (Oct. 14–15, 1999), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/1099mn CV.pdf> (describing extended discussion of methods of addressing the privilege-waiver problem by amending the Civil Rules).

7. See 28 U.S.C. § 2074(b) (2006) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”).

limited the rulemakers that much could be debated,<sup>8</sup> but the doubt was sufficient to chill the rulemakers' ardor.

Despite these concerns, one full panel during the Civil Rules Advisory Committee's 2004 Conference on E-Discovery at Fordham University School of Law directly focused on the privilege-waiver problem.<sup>9</sup> That panel highlighted the extent to which waiver difficulties tax parties on both sides of the litigation. Sheila Birnbaum, a prominent defense-side litigator (and former member of the Advisory Committee) explained why privilege review is riskier and more difficult than responsiveness review:

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.<sup>10</sup>

This time is costly for plaintiffs as well as defendants, as stressed by Joseph Saveri, a leading plaintiff-side litigator during the same panel:

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.

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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. . . . In fact, the privilege review I 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.

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8. If it were applied as energetically as it could have been, the statute might have been invoked against the adoption of Federal Rule of Civil Procedure 26(b)(5)(A), which was interpreted to waive the privilege of documents not listed on a "privilege log," and also Federal Rule of Civil Procedure 26(a)(2)(B), which came with a Committee Note asserting that it directed that showing a privileged document to an expert witness waived the privilege. *See* FED. R. CIV. P. 26(a)(2)(B) advisory committee's note. Yet no statutory challenges were directed at these amendments.

9. *See* Panel Discussion, *Panel Six: Rules 26 and/or 34: Protection Against Inadvertent Privilege Waiver*, 73 *FORDHAM L. REV.* 101, 101–18 (2004).

10. *Id.* at 105.

So I am interested in doing anything to cut through that.<sup>11</sup>

Another rule-based approach to the problem did occur in the 2002–2006 period, when the Civil Rules were amended to provide a procedure in Rule 26(b)(5)(B) for recalling a mistakenly produced privileged item.<sup>12</sup> The goal was clearly to make significant improvements in handling the problem of waiver.<sup>13</sup> But the eventual rule change came with a chaste Committee Note that declaimed any effort to alter rules of waiver,<sup>14</sup> although other amendments in the same package invited the parties to agree upon a procedure for protecting against waiver (and expediting production) and authorized the judge to implement such a procedure by order.<sup>15</sup> After nearly a decade of pursuing a solution, the Civil Rules Committee still could not say it had managed to find one.

Then the impasse broke with a letter from Representative Sensenbrenner, who chaired the House Judiciary Committee, inviting rulemaking to be followed by congressional action. As Professor Capra revealed during the Symposium, he wrote the letter for Representative Sensenbrenner, which was actually directed to Capra himself—“I wrote myself a letter.”<sup>16</sup>

That beginning provided the breakthrough. The Evidence Rules Committee developed a draft and convened a conference that presented the opinions of many judges and leading lawyers on how best to approach the issues.<sup>17</sup> The drafting process moved forward, and a preliminary draft was published, refined, and submitted to Congress. It was eventually adopted by Congress without any change, and supported on the floor of both Houses by statements recognizing how important it was to remove the specter of waiver and reduce the costly consequences of waiver doctrine.<sup>18</sup>

In sum, rulemaking had been arduous, perhaps even drudgery, but it had finally achieved its objectives. There was much reason for congratulation; lamentation came only later.

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11. *Id.* at 106–07.

12. *See* FED. R. CIV. P. 26(b)(5)(B).

13. Thus, the Committee Note begins by observing: “The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery.” FED. R. CIV. P. 26(b)(5)(B) advisory committee’s note.

14. “Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues.” *Id.*

15. *See* FED. R. CIV. P. 26(f)(3)(D), 16(b)(3)(B)(iv).

16. *See* Panel Discussion, *supra* note 3, at 1543.

17. *See* Advisory Comm. on Evidence Rules, Hearing on Proposal 502 (April 24, 2006), available at [http://federalevidence.com/pdf/2008/06-June/MiniConf\\_April\\_2006.pdf](http://federalevidence.com/pdf/2008/06-June/MiniConf_April_2006.pdf).

18. *See* S. REP. NO. 110-264, at 2 (2008) (noting Sen. Specter’s support for the rule); 154 CONG. REC. 18,015–18 (2008) (statement of Rep. Sheila Jackson-Lee); 154 CONG. REC. 2776–78 (2008) (statement of Sen. Patrick Leahy).

## II. JUDGES DON'T FOLLOW OUR RULES

The title to this section is far too broad. Judges *do* follow the rules. The rules often provide specifics that assure uniformity throughout the federal system. They also offer a good way to keep up with technological change; the Civil Rules' handling of privacy in connection with court filings accessible online is but one example.<sup>19</sup>

But not all rule changes are accepted with such equanimity. With some frequency, rules address topics on which judges already have divergent views. The rulemakers may endorse one view and disapprove another; for judges who embraced the disapproved view, there may be a tendency to resist the rule, or at least not to embrace its full potential impact. Perhaps the most prominent example of that sort of resistance occurred with the initial disclosure provision first proposed for Civil Rule 26(a)(1) in 1991. That proposal hit a wall of resistance from the bench and bar.<sup>20</sup> When the rulemakers persisted, they provided that districts could "opt out" of initial disclosure, and the proposal nevertheless drew a dissent when the Supreme Court adopted the rule change.<sup>21</sup>

The upshot was that by the middle of the 1990s the divergence of initial disclosure practices had prompted the Federal Judicial Center to issue annual reports on what was required in which district. By 1998, it was clear that national uniformity had to be restored, and the method for doing so was to soften the rule but also to give it nationwide application. And even that softer rule drew howls of opposition from federal judges.<sup>22</sup>

Rule 502 was not up against such impassioned opposition, but it did address a topic on which courts had strong feelings and strong positions. For a very long time, suspicion of privileges had made waiver a welcome antidote to what many judges viewed as an undesirable impediment to the search for truth. Professor McCormick's treatise declared, for example, that privilege's "obstructive effect has been substantially lessened by the development of liberal doctrines as to waiver."<sup>23</sup> Some courts were unforgiving; strict liability prevailed, and any mistake waived all privilege protection.<sup>24</sup> Most courts were more forgiving and developed what came to

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19. See FED. R. CIV. P. 5.2 (allowing a party to redact certain private information, such as a social-security or financial-account number, from electronic court filings).

20. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 805–12 (1993) (describing the controversy).

21. See Communication from the Chief Justice of the United States Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. 2072 (Apr. 22, 1993), reprinted in 146 F.R.D. 401, 511 (Scalia, J., dissenting).

22. See Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 915 (2002) (quoting objections from federal judges).

23. MCCORMICK ON EVIDENCE § 87 (Edward W. Cleary ed., 3d ed. 1984).

24. See, e.g., *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006) (any work product objection to statements of bishop in a letter was waived by production of the letter); *Wichita Land & Cattle Co. v. Am. Fed. Bank, F.S.B.*, 148 F.R.D. 456, 457 (D.D.C. 1992) ("[T]he rule in this Circuit is clear. Disclosure of otherwise-privileged materials, even where the disclosure was inadvertent, serves as a waiver of the privilege.").

be known as the “middle rule”—that inadvertent disclosure would not work a waiver if reasonable precautions were taken—which was something of a negligence standard.<sup>25</sup> Rule 502 adhered to this middle ground.

It may be that courts already adhering to the middle ground were not unanimous in their views about how it should be applied. For example, there was always some room for courts to disagree about what constituted reasonable efforts to avoid disclosing privileged materials. And there may have been room to disagree about what disclosure was “inadvertent.” But the rulemakers fairly clearly intended to adopt a forgiving waiver doctrine. Yet as Judge Grimm’s recent and very thorough review of the courts’ actual handling of the rule proves, too many courts seem to take too stingy a view of the rule’s protections. Not only are they probably too demanding about the efforts to guard against disclosure, but they even permit that concern to intrude into the determination whether the disclosure was “inadvertent,” a place where it hardly seems important.<sup>26</sup> Judge Grimm asks whether the rule has “lived up to its potential.”<sup>27</sup> One reason for thinking it has not is that judges have stuck to their old ways.

### III. LAWYERS DON’T READ OUR RULES

But Rule 502 did not really depend on judges to live up to its potential. To the contrary, Rules 502(d) and 502(e) invite lawyers to use the rule to fulfill its potential even if judges do not entirely embrace it. These provisions can work in tandem with Civil Rules 26(f)(3) and 16(c)(3) to permit the parties to make agreements and ask the judge to base orders on those agreements. Such orders provide relatively ironclad protection against a finding of waiver by any judge in America, even in state court. Nothing in the rule commands the judge to enter an order she deplors, but much in the rule (and the Civil Rule analogues) encourages use of such orders to expedite the case before the court. And even if the judge bridles at the proposed order, Rule 502(e) makes the parties’ agreement binding on the judge without her assent.

The reality is that not very many lawyers have used these very flexible tools, however. It surely is true that significant issues may sometimes arise in the drafting of Rule 502(d) or 502(e) agreements.<sup>28</sup> As Judge Grimm has shown, however, it also seems that judges occasionally interpret such

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25. See 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2016.3, at 364–78 (3d ed. 2010).

26. See Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 RICHMOND J.L. & TECH. 8, at 1 (2011).

27. See *id.*

28. See, e.g., Daniel S. Smith, *Privilege Review in the Discovery Process: The Role of Federal Rule of Evidence 502*, U.S. ATT’YS’ BULL., May 2011, at 57, 59–62, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usab5903.pdf](http://www.justice.gov/usao/eousa/foia_reading_room/usab5903.pdf) (cataloging some of the issues that arise in considering and drafting such agreements).

agreements extremely strictly and in ways that may weaken or nullify their value.<sup>29</sup>

The much larger problem, however, is that lawyers simply have not noticed the rule. Owing to my longstanding involvement in developing Civil Rule provisions to deal with e-discovery, I frequently find myself addressing lawyer groups about the issues it presents. By definition, these are self-selected groups of lawyers who have focused on these general problems and gone to the trouble to attend these sessions. Yet when I ask how many know what Rule 502 is, almost always fewer than 5 percent put up their hands.

So the key problem is that lawyers do not read our rules. With Rule 502, there may well be a further problem that lawyers dealing with discovery do not think to look in the Evidence Rules to find help in dealing with the problems the Civil Rules tell them to address. But that explanation is incomplete. One of the members of the Civil Rules Advisory Committee, a district judge who sits in a major metropolitan area, repeatedly finds that lawyers appearing before him do not know about the discovery “moratorium” in Rule 26(d), even though that has been in the rule since 1993. Rule 502 is certainly not the only rule that lawyers overlook.

It's enough to make a rulemaker despair, or at least lament.

#### IV. SLINGS AND ARROWS OF UNJUSTIFIED OBJECTIONS

The public comment process, formally adopted in the 1988 amendments to the Rules Enabling Act,<sup>30</sup> provides invaluable insights into what lawyers will actually do with rule changes. Though the rulemakers are both experienced and smart, they are not smart enough to anticipate all the sorts of arguments or maneuvers lawyers will try under amended rules. So the public comment period is an invaluable “trial run” for the rule.

But often the public comment process is also an occasion for misdirected criticism.<sup>31</sup> Rule amendments are often presented in packages that include a variety of features. One reason for doing so is to avoid burdening the bench and bar with too-frequent rule changes that tax the ability of any but the cognoscenti to keep up with the new material. In those packages, there are likely to be provisions of differing importance. One problem is that those commenting may not focus on the provisions that are really most important. In the 1991 Civil Rules package, for example, the initial disclosure provision attracted the most attention.<sup>32</sup> But the most important provision—the addition of a requirement for automatic disclosure of expert witnesses and a very extensive report from them—was largely overlooked.

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29. See Grimm et al., *supra* note 26, at 68–70.

30. See Judicial Improvements and Access to Justice Act, Pub. L. 100-702, § 403; 102 Stat. 4642 (codified as amended at 28 U.S.C. § 2071(b) (2006)).

31. For further exploration of these points, see Richard Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 306–08 (2008).

32. See *supra* notes 20–22 and accompanying text.

Not only do comments sometimes seem to focus on the wrong thing, they may vastly overstate the importance of the change being proposed. A prime illustration is the modest 2000 revision to Civil Rule 26(b)(1) defining the scope of discovery. That revision recalibrated the scope of discovery so attorney-managed discovery extended only to “matter that is relevant to any party’s claim or defense” rather than (as before) to anything relevant to the “subject matter” of the action. This changed the rule only very slightly, but drew bombastic responses from segments of the bar. A member of the Standing Committee on Rules of Practice and Procedure denounced it as “revolutionary.”<sup>33</sup> Efforts to derail the amendment persisted into the highest reaches of the rulemaking process.

This outburst was unwarranted. As a district judge confirmed in 2008:

Even after the 2000 amendments to Rule 26, it is well established that courts must employ a liberal discovery standard in keeping with the spirit and purpose of the discovery rules. Accordingly, discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought has no possible bearing on the claims and defenses of the parties or otherwise on the subject matter of the action.<sup>34</sup>

Other judicial application of the amended rule confirmed this assessment.<sup>35</sup> Even academic commentators unsympathetic to the rule change remarked how limited its actual effect.<sup>36</sup> Arguably this very limited effect is an illustration of lament number one—judges don’t follow our rules—but it surely illustrates the drawbacks of overstatement about the consequences of rule changes.

Rule 502 may exhibit some similar features of unjustified suspicion. As noted above, it was submitted to Congress for affirmative enactment after going through the rule-amendment process.<sup>37</sup> The Symposium commentary details the arduous efforts to persuade Congress to adopt the rule change,<sup>38</sup> despite the virtually unanimous support of the bar. As Judge Rosenthal explained during the Symposium, this effort became for her “a full-time

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33. See Comm. on Rules of Practice & Procedure, Meeting Minute 23 (June 18–19, 1998), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-1998-min.pdf> (“One of the members expressed strong opposition to the proposed changes, especially the amendment limiting the scope of attorney-managed discovery, and he described the amendments as ‘revolutionary.’ He said they would ‘throw out’ the present discovery system, which was well understood by the bar and had worked very well, and replace it with a system that required judges, rather than lawyers, to make discovery decisions.”).

34. *Wrangen v. Pa. Lumbermens Mut. Ins. Co.*, 593 F. Supp. 2d 1273, 1278 (S.D. Fla. 2008) (citations omitted).

35. See generally 8 WRIGHT ET AL., *supra* note 25, § 2008, at 132–37.

36. See Thomas D. Rowe, Jr., *A Square Peg into a Round Hole? The 2000 Limitation on the Scope of Discovery*, 69 TENN. L. REV. 13, 25 (2001) (“[I]t is striking how little the courts’ opinions reflect any apparent serious effort by parties who are resisting discovery to make anything out of this new and perhaps still unfamiliar scope definition.”).

37. See *supra* notes 16–17 and accompanying text.

38. See Panel Discussion, *supra* note 3, at 1539–41.

second job.”<sup>39</sup> This experience may confirm Professor Capra’s 2004 forecast about rulemaking on this topic:

[I]t 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.<sup>40</sup>

So it took a ton of effort to move the new rule the final mile—through Congress—but finally even that was accomplished and the rule went into effect in 2008.

After all that effort, and given the widespread difficulties the rule could solve,<sup>41</sup> those who had achieved these heroic results might legitimately have expected an immediate and widespread payoff. That clearly did not happen, leading to the Rulemakers’ Laments. To that I say: have faith.

#### V. THE RULEMAKERS’ HAPPIER PROSPECTS: EVENTUAL VINDICATION

“To be a great lawyer one must first consent to be a great drudge.”

—Daniel Webster<sup>42</sup>

James Thurber was contrasting his “drudgery” as a newspaperman with the joy of batting baseballs through a skyscraper’s windows in a tongue-in-cheek manner. Daniel Webster was probably serious, and he lived before lawyers had to deal with broad discovery. Maybe rulemakers should foresee genuine drudgery, and often no payoff.

Actually, prospects are much brighter. The Rulemakers’ Laments are only occasionally justified. One important payoff is having the desired effect, even though it may not be immediate. Perhaps judges set in their ways will resist rule changes that seek to foist new ways on them. But new judges more familiar with new ways will join them or even replace them as time goes by. Maybe established lawyers will not even read the rule changes, but new lawyers—hopefully taught by law professors who do keep up with rule changes—will know about and may appreciate the value of the new rules. Maybe those who comment on proposed rule changes will realize eventually that they were focused on the wrong things or overstated

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39. *Id.* at 1541.

40. Panel Discussion, *supra* note 9, at 109.

41. *See supra* Part I.

42. ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 68 (1997) (internal quotation marks omitted).

their positions. Even if they do not, however, the great mass of lawyers and judges will probably come to grips with the new rules and abide by them.

In some ways, the conduct of litigation is like a large ocean liner or tanker—it turns but slowly, but it does turn. A prominent example is the “proportionality” provision now found in Civil Rule 26(b)(2)(C). Until that was added in 1983, a provision that had been in the Rules since 1938 said that the methods and extent of discovery were unlimited unless limited by the court under a protective order. When the proportionality plank was added, that invitation to do unlimited discovery was removed. Here is the confident explanation Reporter Arthur Miller offered at the time:

Until last August, the last sentence in rule 26(a) said: . . . Unless the court says otherwise, go ye forth and discover. That had been the message of the last sentence of rule 26(a). In 1984, we decided it was a lousy message. That sentence has been stricken and replaced, quite literally, by the reverse message, which you now find in rule 26(b). Rule 26(b) now says that the frequency and extent of use of discovery shall be limited by the court if certain conditions become manifest. Just realize the 180-degree shift between the last sentence of the old rule 26(a) and the new sentence. Judges now have the obligation to limit discovery if certain things become manifest.<sup>43</sup>

That sounds dandy. The problem is that it did not happen. Although the rule said judges had an independent and self-starting duty to curtail disproportionate discovery, they did not (perhaps, in a real sense, could not) do so all by themselves. And lawyers, whether aware of the change or not, did not urge judges to curtail proposed discovery as disproportionate. Writing a decade later in the second edition of the discovery volumes of the federal practice treatise co-authored by Professor Miller, I noted that “[t]he amendment itself seems to have created only a ripple in the caselaw.”<sup>44</sup>

But voices in favor of proportionality gradually came to seem less to be voices in the wilderness than the voice of the judicial majority. As I noted in the third edition of the same treatise in 2010, “attention to the proportionality provisions has grown since 1994, and endorsement of their use has widened.”<sup>45</sup> By 2010, the treatise offered many pages of citations to cases applying the proportionality provisions.<sup>46</sup> And the rulemakers continue to look to them as important guides to discovery. Thus, there is active consideration now of amplifying the focus on proportionality in the

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43. ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS IN THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 32–33 (1984), available at [http://www.fjc.gov/public/pdf.nsf/lookup/1983amnds.pdf/\\$file/1983amnds.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/1983amnds.pdf/$file/1983amnds.pdf).

44. 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2008.1, at 121 (2d ed. 1994).

45. 8 WRIGHT ET AL., *supra* note 25, § 2008.1, at 158.

46. *See id.* at 159–68.

definition of the scope of discovery.<sup>47</sup> In other words, the change Professor Miller foresaw in 1984 is happening gradually.

So also with Evidence Rule 502—its long-term effect is difficult to gauge yet. One reaction is like the old adage, “You can lead a horse to water, but you can’t make it drink.” The adoption of Rule 502 provided lawyers with an important new tool to solve a serious practical problem. Providing the solution is no guarantee, however, that people will use it. For judges, the tool is a solution to a related problem relevant also to the proportionality concern. To the extent the expense of privilege review is urged to be a reason for curtailing discovery, judges might well ask why the sort of protection a Rule 502(d) order provides would not be preferable to forbidding discovery altogether. Even if those asking such questions may seem like voices in the wilderness now, they may increasingly find that they are in the mainstream.

Moreover, the Evidence Rules Committee rulemakers can also provide leadership for other rulemakers. A prime recent example is the International Trade Commission’s publication of proposed amendments to the discovery procedures of Commission proceedings under section 377 of the Tariff Act, published for public comment on the very day the Evidence Rules Committee had its Rule 502 panel.<sup>48</sup> The proposed amendments would adopt proportionality provisions modeled on the Civil Rules for their own discovery,<sup>49</sup> further cementing the growing importance of that development, described just above. In addition, the amendments include provisions modeled on Rule 502 to facilitate the handling of privilege issues.<sup>50</sup>

As Arthur Vanderbilt said two generations ago, litigation reform is “no sport for the short-winded.”<sup>51</sup> Persistence often pays off eventually even if it does not pay off immediately. Although it may not be the most pleasurable of imaginable occupations, then, rulemaking is not drudgery. Along the way, there may be reason to lament on occasion. But rulemakers who take the long view and persist in their toil are often rewarded in the end with the knowledge theirs has been a job well done. Perhaps that is why the members of rules committees almost universally remark, when their terms

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47. See Advisory Comm. on Civil Rules, Agenda Materials 368–70 (Nov. 1–2, 2012) (sketching a variety of ways Rule 26(b)(1) might be amended to make proportionality more prominently a factor in defining the scope of discovery). Whether rule-amendment proposals along any of these lines actually goes forward is presently uncertain.

48. See International Trade Commission, Notice of Proposed Rulemaking, 77 Fed. Reg. 60,952 (Oct. 5, 2012) (to be codified at 19 C.F.R. pt. 210).

49. See *id.* at 60,954 (comparing the proposed rule to FED. R. CIV. P. 26(b)).

50. See *id.* § 210.27(e)(3), at 60,956. The Commission explained that its proposed rule was not identical to Rule 502 even though “the holder of the privilege or protection must take reasonable steps to prevent disclosure, as is required by Federal Rule of Evidence 502.” *Id.* at 60,955. Thus, administrative law judges applying the rule would “apply federal and common law when determining the consequences of any allegedly inadvertent disclosure. That law would include . . . considerations found in [Rule] 502.” *Id.*

51. ARTHUR T. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION, at xvii, xix (Arthur T. Vanderbilt ed., 1949).

on the committees come to an end, that this service has been a high point in their legal careers.