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# FEDERAL RULE OF EVIDENCE 502(d) AND COMPELLED QUICK PEEK PRODUCTIONS

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## INTRODUCTION

In 2006, the e-discovery amendments to the Federal Rules of Civil Procedure went into effect. These amendments provided a formal introduction of "quick peek" productions to the legal community. While quick peek productions lack a specific definition, the fundamental concept involves a party responding to document requests or a subpoena by producing its documents and data without performing a privilege or responsiveness review. The production itself, however, does not constitute a waiver of privilege. The producing party can later assert privilege over documents that the receiving party intends to use.

Despite this introduction and litigants' constant complaint about the costs of privilege review, quick peek productions are rarely undertaken. One reason litigants have avoided quick peek agreements is because they were not assured they could enforce the non-waiver agreement against non-parties in separate matters. The recent introduction of Federal Rule of Evidence 502, particularly subdivision (d), protects against this danger. According to Rule 502(d), a court may enter an order that holds any disclosure of privileged material made during that litigation does not constitute a waiver in that proceeding or a subsequent proceeding. The first part of this paper explains in more detail how Rule 502(d) covers quick peek productions, and how it relates to other subdivisions in Rule 502. In light of the viability of quick peek productions, the second part of the paper examines whether a court can compel quick peek productions on non-consenting parties.

## I. THE HEART OF FEDERAL RULE OF EVIDENCE 502.

Unbeknownst to the casual reader, subdivision (d) is the most important provision of Rule 502. Most lawyers read Rule 502 and surmise that the critical provision is subdivision (b), which establishes a uniform standard to determine what constitutes an inadvertent disclosure. While this provision is unquestionably important, subdivision (d) permits parties to essentially do away with privilege review without waiving privilege over any protected communications. That would be a major sea change from the status quo.

Before Rule 502(d), parties could not effectively enter into quick peek agreements because the parties had no protection from a non-party that later contended in a separate proceeding that the quick peek production constituted a waiver of privilege.[1] And Rule 502(b) only protects privilege for inadvertent disclosures made with reasonable care to prevent disclosure. Under Rule 502(d), however, parties may opt out of the default standard in subdivision (b) and disclose documents under any standard of care if that standard is memorialized by a court order. Specifically, Rule 502(d) provides:

1 *See, e.g., Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1418 (Fed. Cir. 1997) (finding waiver after production of documents in a separate matter even though the production was pursuant to a protective order). *See also* FED. R. EVID. 502, Advisory Committee Notes (2007) ("Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.").

> (d) Controlling effect of a court order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.

Thus, through a court order under Rule 502(d), parties may engage in quick peek productions without threat of any party later arguing—in a state or federal proceeding—that that production waived privileged.[2] Indeed, the Advisory Committee specifically envisioned quick peek agreements pursuant to Rule 502(d). "[T]he court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of 'claw-back' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product."[3]

Subdivisions (e) and (f) reinforce the general principle in subdivision (d). Rule 502(e) underscores the need for a court order, and not just an agreement between parties. Like some courts under the common law,[4] Rule 502(e) provides that a confidentiality agreement between parties is only binding on those parties. Thus, even if the parties agreed by themselves to quick peek productions, a non-party could later challenge disclosures made through those productions as waivers. A Rule 502(d) order, in contrast, applies to the world. Similarly, Rule 502(f) explicitly establishes that a court order under subdivision (d) applies to subsequent state proceedings.[5] If Rule 502(d) orders did not apply to subsequent state actions, "the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined."[6]

In sum, Rule 502(d) clearly and effectively allows parties to engage in whatever form of document production they want without fear of waiving privilege, as long as a court incorporates that process into an order. In fact, courts may even issue a Rule 502(d) order *sua sponte* and without party agreement.[7] And one court has already required parties in a discovery dispute to address Rule 502 for future production and cost issues.[8] This line of reasoning raises the more provocative question of whether courts can compel parties to engage in a quick peek production without the parties consent.

## II. CAN A COURT FORCE A QUICK PEEK DOCUMENT PRODUCTION ON NON-CONSENTING PARTIES?

One question that has arisen since Rule 502 took effect is whether a court may require parties to produce documents according to a court-ordered quick peek. In a strict sense, this issue is one of first impression. The analysis is two-fold. The first issue is whether the courts have the authority to compel quick peek productions on non-consenting litigants. If they do, the second issue is whether and when courts should invoke that authority. The following discussion addresses each issue.

### A. Courts Can Likely Achieve at Least the Result of Forcing Quick Peek Productions on Non-Consenting Parties.

The question over whether a United States district court judge can require a quick peek production pits two longstanding principles against each other: the power of a district court to manage its cases versus the sanctity of the confidential relationship between attorney and client. Both proponents and opponents of forced quick peek productions have a basis for their position. Ultimately, however, a court may likely succeed in at least issuing such a short schedule for document production that it leaves no other choice on the parties but to adopt a quick peek format.

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2 *See, e.g.*, Gregory P. Joseph, *The Impact of Rule 502(d) on Protective Orders*, Minnesota State Bar Association CLE, Pressure on the Privilege, at 4 (2008).
3 FED. R. EVID. 502, Advisory Committee Notes (2007).
4 *See Hopson v. City of Baltimore*, 232 F.R.D. 228, 234-36 (D. Md. 2005) (discussing split in case law regarding whether non-waiver agreements were enforceable).
5 Some question the constitutionality of this provision. *See generally* Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH. & LEE L. REV. 673 (2009).
6 FED. R. EVID. 502, Advisory Committee Notes (2007).
7 FED. R. EVID. 502, Advisory Committee Notes (2007) ("Party Agreement should not be a condition of enforceability of a federal court's order").
8 *Spieker v. Quest Cherokee, LLC*, No. 07-1225-EFM, 2008 WL 4758604, at *4 (D. Kan. Oct. 30, 2008).

**1. A Proposed Basis of Authority to Require Quick Peek Productions.**

The confidential nature of the attorney-client privilege has never absolutely trumped a district court's authority to review the privileged communication. The most obvious example, of course, is the *in camera* review procedure. Courts historically and routinely have required parties to disclose allegedly privileged communications for a court-only review to determine if the communication is properly privileged.[9] Despite the disclosure, the privilege is maintained if the court concludes that the communication is privileged.[10] The *in camera* review procedure underscores that the privilege is not absolutely confidential between attorney and client. But the issue of forcing a party to disclose its privileged communications–not just to the court–but to its adversary is a substantial step further, and requires a review of a court's authority to issue that order.

Rule 502 does not provide that authority. While Rule 502(d) permits a court to enter an order allowing parties to engage in a quick peek productions, Rule 502 provides no explicit grant of power to district courts authorizing them to force parties to produce documents in such a format. Rule 502 does not offer an independent basis for a court to force parties to do away with privilege review.

A court's authority to control the manner in which parties produce documents would likely come from its inherent authority over case management. "Courts are invested with inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"[11] Within this context of a court's authority to manage discovery in its cases lies support for proponents who will argue that a court can require quick peek productions.

The leading case in this regard is *Transamerica Computer Company, Inc. v. International Business Machines, Corp*.[12] The Ninth Circuit decided the *Transamerica* case on interlocutory appeal. It involved an underlying antitrust action in the Northern District of California, which was the subject of multi-district litigation centered in the District of Minnesota.[13] The District of Minnesota managed discovery for the cases, and issued an order that required IBM, the defendant, to produce documents within three months.[14] This required extraordinary effort because IBM had seventeen million documents to prepare for inspection.[15] In order to relieve the burden placed on IBM, the district court ruled that inadvertently produced privileged documents did not constitute waiver.[16]

In a decision ahead of its time, the Ninth Circuit addressed a party's contention that the documents produced in litigation in the District of Minnesota waived attorney-client privilege in regards to separate litigation in another jurisdiction. Essentially, the issue was whether the court's order requiring accelerated document review and production while preventing waiver was valid.[17] Through its analysis, the Ninth Circuit concluded that the court had "in a very practical way, 'compelled' [IBM] to produce privileged documents" under the court's pretrial discovery order.[18] The Ninth Circuit, nonetheless, approved of the pretrial order because it preserved the attorney-client privilege.[19] In upholding the finding of non-waiver, the Ninth Circuit indicated that "[o]ne reasonable method of accelerating the discovery proceedings without impinging upon the parties' right to prepare their cases properly was to do precisely what Judge Neville did, that is, to issue an order preserving claims of privilege."[20]

9 *See, e.g.*, *United States v. Zolin*, 491 U.S. 554, 568 (1989) ("Indeed, this Court has approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for in camera inspection, and the practice is well established in the federal courts.").
10 *Id.* (explaining that "disclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege").
11 *See, e.g.*, *Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)); *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 783, (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1210 (1983) (explaining that "a district court has broad discretion in its resolution of discovery problems that arise in cases pending before it").
12 573 F.2d 646 (9th Cir. 1978).
13 *See id.* at 648.
14 *See id.*
15 *See id.*
16 *See id.* at 649-50.
17 *See id.* at 647.
18 *See id.* at 651-52. Other courts view the underlying facts as "compelled disclosure." *See, e.g.*, *In re Sealed Cases*, 877 F.2d 976, 980 (D.C. Cir. 1989) (classifying *Transamerica* as "court-compelled disclosure").
19 Importantly, the Ninth Circuit indicated that had the district failed to preserve the privilege, the pretrial order would have exceeded the trial court's discretion. *See id.* at 652.
20 *Id.* at 653.

The teaching point in *Transamerica*, therefore, is that a district court's discovery order will be upheld even if it effectively requires a party to produce privileged documents to its adversary, as long as the privilege is not lost. Proponents of allowing courts to force quick peek production format on parties will use this reasoning as their basis for authority and precedent.

**2. An Opposition to Forced Quick Peek Productions.**

Parties unwilling to agree to a quick peek production, however, will unlikely accept a court's authority to impose a quick peek production upon them. Opponents of compelled disclosure will likely assert that compelled disclosure violates a party's fundamental Due Process rights. Even though the attorney-client privilege is not a constitutional right,[21] courts have found the Due Process clause implicated when privileged communications are required to be disclosed.[22] More generally, in fact, case law addressing whether a crime or fraud has vitiated the attorney-client privilege establishes that parties have rights to prevent disclosure of privileged communications—even to the court *in camera*.

The United States Supreme Court held in *United States v. Zolin* that a court cannot compel a party to disclose privileged communications for *in camera* inspection without the requesting party making a showing of a factual basis adequate to support a good faith belief that a reasonable person would conclude a review of the privileged communications may reveal evidence of a crime or fraud.[23] The Court reached this conclusion because a blanket rule allowing *in camera* review "would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk."[24]

The *Zolin* Court also held that a more stringent test than the "reasonable party" test would be required if a party sought outright disclosure of the privileged communication, and not just *in camera* review.[25] To justify invading the privilege, courts require that the requesting party make a *prima facie* showing of a crime or fraud.[26] The Ninth Circuit recently held that this *prima facie* showing must be made by a preponderance of the evidence standard.[27] In addition to the required *prima facie* showing by the requesting party, moreover, courts hold that the party invoking the privilege has an absolute right to offer evidence supporting the privilege.[28] "The importance of the privilege [] as well as fundamental concepts of due process require that a party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege."[29]

The solid precedent that articulates the burden of proof and procedure for vitiating an attorney-client communication due to the commission of a crime or fraud is a powerful obstacle to a court forcing a quick peek production format on non-consenting parties. If a court cannot require disclosure of a privileged communication *in camera* unless the "reasonable person" standard has been met showing that a crime or fraud took place, then, *a fortiori*, a court will not be able to compel parties to produce their files—including privileged communications—upon no showing. Quite simply, this case law establishes that the attorney-client privilege cannot be broken in a cavalier manner. As a result, it provides a strong basis to maintain that a quick peek production cannot be forced upon a non-consenting party.

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21 *See, e.g.*, *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir.1985), *cert. denied*, 475 U.S. 1088 (1986).
22 *See, e.g.*, *In re John Doe Corp.*, 675 F.2d 482, 489-90 (2d Cir. 1982) (explaining that routine *in camera* proceedings would violate due process). *See also In re Grand Jury Proceedings (Doe)*, No. 91-56139, 1993 WL 6598, at *3 (9th Cir. Jan. 15, 1993).
23 491 U.S. 554, 572 (1989).
24 *Id.* at 571.
25 *Id.* at 572.
26 *In re Feldberg*, 862 F.2d 622, 625-26 (7th Cir. 1988).
27 *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1094-95 (9th Cir. 2007) (explaining that "judicious use of in camera review, combined with a preponderance burden for terminating privilege, strikes a better balance between the importance of the attorney-client privilege and deterrence of its abuse than a low threshold for outright disclosure.").
28 *See Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992). *See also Napster*, 479 F.3d at 1093 ("We hold that in civil cases where outright disclosure is requested the party seeking to preserve the privilege has the right to introduce countervailing evidence."); *In re General Motors Corp.*, 153 F.3d 714, 716 (8th Cir. 1998) ("This being a civil case, the district court may not, however, compel production without permitting the party asserting the privilege, to present evidence and argument.").
29 *Haines*, 975 F.2d at 96-97.

### 3. A Court May Indirectly Require Parties to Produce Documents in a Quick Peek Format.

Even if a litigant succeeds in avoiding a direct order to produce documents in a quick peek format, that litigant can probably not avoid a *de facto* order that results in a quick peek production. As discussed above, courts enjoy broad discretion to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[30] A court very well could order document production to be completed within one or two months, along with a Rule 502(d) order stating that if the parties agree to a quick peek format that no waiver will result. Such a timeframe in a massive and complex litigation may indirectly force the parties to forgo a privilege review and produce their documents in a quick peek format.

## B. Forced Quick Peek Productions Unfairly Prejudice and Harm Litigants.

Forced quick peek productions raise a number of concerns for litigants. Quick peek productions jeopardize the sanctity of the attorney-client privilege and undermine the policy justifying the privilege, may prejudice the privilege holder in litigation, are at odds with litigants' business considerations, and improperly and ineffectively shift the burden of document production to the receiving party. These concerns are all compounded when the quick peek production is involuntary.

### 1. Quick Peek Productions Are Inimical to the Attorney-Client Privilege.

The attorney-client privilege is the oldest privilege known to the common law.[31] The existence of the privilege dates back to Roman law through "[t]he notion that the loyalty owed by the lawyer to his client's case disables him from being a witness in his client's case."[32] Similarly, the first trace of the privilege in the English common law dated back to Queen Elizabeth's time, in which "the oath and honor of the barrister and the attorney protect them from being required to disclose, upon examination in court, the secrets of the client."[33] This code of honor justification later shifted to the current basis: a client cannot be expected to put forth all necessary facts without the assurance that the lawyer will not be compelled to reveal those confidences over the client's objection.[34] The United States adopted the privilege and this justification from the common law,[35] and the United States Supreme Court lucidly defined the policy behind the privilege in *Upjohn Co. v. United States* as encouraging "full and frank communications between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice."[36] The sanctity of the privilege is a bedrock principle of our system of justice.

The fundamental element of the privilege is that communications are confidential. In light of this confidentiality, clients tell their lawyer the most intimate and personal things in their lives. For that reason, attorneys are ethically bound to keep client communications in confidence, save specific exceptions.[37] The very notion of quick peek productions, therefore, is fundamentally foreign to attorneys, even if the approach is approved of by a federal court. And despite a court's approval, the long-term consequences to the privilege must be assessed before quick peek productions are regularly undertaken.

In order to be effective, the United States Supreme Court explained that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[38] A quick peek production is at odds with this aspiration. In the long-run,

30 *Unigard Security Ins., Co. v. Lakewood Eng'r & Manuf., Corp.*, 982 F.2d 363, 368 (9th Cir. 1992).
31 *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
32 John W. Strong, MCCORMICK ON EVIDENCE, Section 87 at pg. 134 (5th Ed. 1999).
33 *Id.*
34 *See id.*
35 In 1776, Delaware was the first colony to codify the attorney-client privilege in its Constitution.
36 *Upjohn*, 449 U.S. at 389.
37 ABA Model Rule of Processional Conduct Section 1.6. An attorney does not violate his ethical obligations by disclosing confidential information pursuant to a court order. *See id.* Section 1.6(6).
38 *Upjohn*, 449 U.S. at 393.

then, it seems likely that clients will be reluctant to either turn over all their documents to their attorneys out of concern that their attorneys will not protect privileged information, or the clients will withhold relevant information while consulting with their attorneys, or both. These possibilities are diametrically opposed to the policy of encouraging "full and frank" communications between client and attorney.

Quick peek productions not only threaten the theory for the privilege, but the productions also raise practical concerns for attorneys and clients. The first concern is the inability to "unring the bell."

**2. Litigants Suffer Unfair Prejudice Through Disclosure of Privileged Communication to Their Adversaries.**

Even though a party may be able to preserve privilege over a document produced in a quick peek format sanctioned by court order, the producing party may still bear unfair prejudice through the disclosure of the privileged communication alone, which cannot be undone. This refers to the proverbial bell that cannot be un-rung. Indeed, this was the basis for the strict approach to inadvertent disclosures. No matter what precautions were taken, the damage associated with the disclosure cannot be cured. One court explained, for instance, that "regardless of how painstaking the precautions, there is no order I can enter which erases from defendant's counsel's knowledge what has been disclosed. There is no remedy which can remedy what has occurred, regardless of whether or not the precautions were sufficient."[39]

While the law on inadvertent disclosure has changed, the peril identified by the court remains true today. There is nothing that a court or a party can do to prevent a receiving party from utilizing privileged information later in the litigation, even if the party does not use the privileged document. A party may, for instance, submit a request for admission that is based on review of a privileged document. Or a party may adjust its settlement position in light of its privileged review of information. The possibilities of prejudice are endless, and the stakes are often too high in complex litigation to gamble with these possibilities.

**3. Litigants Will Also Oppose Open-file Productions.**

Litigants will also oppose quick peek productions because clients do not want to produce non-responsive business-sensitive documents. Clients are concerned about producing documents to their competitors that disclose trade secrets and competitive information, as well as documents that may lead to additional causes of actions, like antitrust or employment class action suits. A protective order alone, moreover, will not assuage this concern. Courts, for example, will deny proposed experts access to an opposing party's confidential information if there is a risk that the expert will misuse the confidential information, even if the proposed expert agrees to be bound by the protective order. Both conscious and subconscious abuse of the opponent's confidential information can be real concerns that justify denying a party its expert of choice.[40] Likewise, even subconscious abuse by those privy to produced privileged documents is a real danger. This danger is compounded in quick peek productions where entire files of data are disclosed without any pre-production screening. Similarly, while many protective orders are meant to protect against use of the documents in a separate proceeding, including the commencement of a new proceeding,[41] the fact remains that the more documents that are produced, the higher the possibility that they will become public or abused.

Litigants also risk violating privacy laws and confidentiality agreements through quick peek productions.

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39 *Genentech, Inc. v. U.S. Int'l Trade Comm.*,120 F.R.D. 445, 449 (D. Mass. 1988).

40 *See, e.g.*, *Safe Flight Instrument, Corp. v. Sundstrand Data Control, Inc.*, 682 F. Supp. 20, 21 (D. Del. 1988); *IP Innovation, LLC, v. Thomson, Inc.*, No. 1:03-CV-0216, 2004 WL 771233, at *3 (S.D. Ind. Apr. 8, 2004).

41 *See, e.g.*, *Del Giudice v. S.A.C. Capital Mgt.*, LLC, No. 06-1413, 2009 WL 424368 (D.N.J. Feb. 19, 2009) (dismissing complaint where basis came from documents disclosed in separate litigation pursuant to a protective order).

**4. Quick Peek Productions Shift The Burden of Review to The Receiving Party.**

Quick Peek productions are meant to reduce costs associated not only with privilege review, but also review for responsiveness. In the latter sense, quick peek productions reverse the traditional rule that the producing party bears the expense of its own document production. The receiving party must bear the expense of reviewing its adversary's documents. This is particularly troubling in the context of massive amounts of e-discovery. As the Sedona Conference Best Practices suggest, "Responding parties are best suited to evaluate the procedures, methodologies, and technologies for preserving and producing their own electronically stored information."[42] It follows naturally that a receiving party will have difficulty reviewing the ESI efficiently and effectively, given the party's lack of familiarity with the ESI.[43]

Quick peek productions, moreover, encourage rather than discourage data dumps. In light of the fact that reviewing an adversary's ESI is a heightened expense for the reviewing party, parties will likely use a quick peek production as a strategic weapon; a way of increasing litigation costs and burying the most relevant documents. While this is not a new practice, at least before quick peek productions producing parties had to review the large amount of ESI and incur the corresponding expense before it could unload gigabytes and terabytes of data on its opponent. The result of placing the burden on the receiving party, moreover, is that it will need to utilize analytic software search tools to cull out the wheat from the shaft. But if the quick peek productions require the use of analytic software, there is no reason why the searches should not be done on the front-end and protect privileged materials through the process.

**C. Courts Should Compel Quick Peek Productions in Rare Circumstances.**

The legal and practical considerations identified above make clear that courts should not casually compel quick peek productions on non-consenting parties. In fact, quick peek productions may actually decrease efficiency and increase costs and expenses. In addition, quick peek productions threaten the basis and vitality of the attorney-client privilege. But this is not to say that courts should never compel parties to produce their documents in quick peek form.

Courts should reserve the option to compel quick peek productions as a sanction on parties that are found to egregiously violate their discovery obligations. The tobacco litigation in Minnesota, for instance, would have been a candidate for a compelled quick peek production on the defendants. Throughout the course of the litigation, the defendants repeatedly withheld highly relevant documents on improper claims of privilege.[44] While the eventual conclusion resulted in waiver of privilege for related documents, the extreme costs and delay associated with the extended special master review was unacceptable. Unfortunately, improper privilege designation and similar discovery abuses occur all too frequently in courts across the country. Court-compelled quick peek productions are one means to address this problem, short of the expense and delay associated with special masters and *in camera* review.

If parties are repeatedly refusing to produce relevant documents or grossly over-designating documents as privilege, then courts should find that those parties forfeited their right to review their documents and the court should require those parties to produce their files without a privilege review. Under these extreme circumstances, the court has authority to take extreme action, not only to manage its docket, but also to curb discovery abuses.[45] The party (or parties) that is required to produce documents through a quick peek manner, moreover, has little to complain about because the party had the opportunity to review its documents and it abused that privilege.

42 *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, Principle 6 (2d ed. June 2007).
43 *See id.* at comment 6.c.
44 *See Minnesota v. Philip Morris, Inc.*, No. C1-94-8565, 1998 WL 257214, at *7 (Minn. Dist. Ct. Mar. 7, 1998) (highlighting "the intentional and repeated misuse of claims of privilege").
45 Districts courts may even dismiss a case in its entirety for egregious discovery violations. *See, e.g.*, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

## CONCLUSION

The concept of quick peek productions is not new. But the use of quick peek productions is. Now that quick peek productions are more viable in light of Rule 502, courts, attorneys, and parties will have to address a number of additional issues that will arise if quick peek productions are used. These issues will always present a fundamental tension of competing vital values. On the one hand, the burden and costs associated with twenty-first century "e-discovery" has the danger of excluding many parties from the civil justice system. In order to keep the courthouse's doors open to all, there needs to a system that allows disputes to be decided on the merits and not precluded by exorbitant discovery costs. On the other hand, however, the attorney-client relationship is justified by confidentiality between lawyer and client. Any changes to our system that fractures the confidentiality of this relationship risk severe and dangerous long-term consequences. These issues, therefore, require thorough discussion and analysis in seeking the proper balance between controlling litigation costs and protecting the attorney-client privilege. Parties, nonetheless, should be able to discuss, analyze, and decide the proper balance for themselves. Courts that force quick peek productions—in addition to risking mandamus appeals and reversal—unfairly remove that decision from the parties.