HEARING

of the

ADVISORY COMMITTEE ON EVIDENCE RULES

BEFORE:

HON. JERRY E. SMITH, Chairman

HON. JOSEPH F. ANDERSON

HON. MICHAEL M. BAYLSON

PROF. KENNETH S. BROUN

PROF. DANIEL J CAPRA

WILLIAM T. HANGLEY, ESQ.

HON. ROBERT HINKLE

HON. ANDREW D. HURWITZ

HON. CHRISTOPHER M. KLEIN

MARJORIE A. MEYERS, ESQ.

WILLIAM W. TAYLOR, III, ESQ.

RONALD J. TENPAS, ESQ.

HON. DAVID G. TRAGER

January 29, 2007
8:30 a.m.

U.S. Courthouse
500 Pearl Street, Ctrm. 24A
New York, N.Y. 10007

SPEAKERS:

LINDA CHATMAN THOMSEN
Sec. and Exch. Comm.

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THEODORE B. VAN ITALLIE, JR.
Johnson & Johnson

LAWRENCE S. GOLDMAN
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PROCEEDINGS

JUDGE SMITH: We're ready to proceed with our presentations. There will be some flexibility on the time for each witness, and part of that will depend on how much time the committee has for the day's work. We have 25 witnesses signed up to testify. Of course, we encourage questions from any of the committee members. We ask that your testimony not be repetitious of the testimony of others.

Linda Chatman Thomsen, Securities and Exchange Commission.

MS. THOMSEN: Good morning all. I'm Linda Thomsen, the director of the United States Securities and Exchange Commission's division of enforcement. I want to thank the committee for its work on this very important topic, and especially for providing me the opportunity to comment on proposed Rule of Evidence 502. I should note that the views I'm expressing are my own and do not necessarily reflect the views of the Securities and Exchange Commission.

I would like to comment on subdivision (c) of the proposed rule, the selective waiver

provision.

JUDGE SMITH: For the members of the committee, the text is in the big fat white book that you have on page 397.

MS. THOMSEN: This provision, which would allow a person or entity to provide privileged or protected information to the commission without waiving that privilege or protection as to other persons or entities, is important to the committees's enforcement program.

The present uncertainty about the consequences of disclosure to commission investigators makes companies under investigation hesitate to disclose useful but privileged or protected information, because the companies fear that disclosing the information to the commission may make that information available to private plaintiffs suing them.

If adopted, enacted, and implement to assure parties that providing information to the commission would not otherwise waive applicable privileges or protections, the selective waver provision would help the commission gather

evidence in a more efficient manner by eliminating a strong disincentive to parties under investigation, who might otherwise be inclined to proceed important voluntarily.

Concerned that adopting the selective waiver provision would leave the division of enforcement to command that entities waive privilege and work product protection because the information would be protected from disclosure to private parties is unfounded. The division of enforcement does not demand that entities waive privilege and protections and would not do so if the selective waiver provision were adopted.

The commission recognizes that the attorney-client privilege and the work product protection doctrine serve important social interests. The commission does not feel a company's waiver of privilege or protection is an end in itself, but only as a means necessary to provide relevant and sometimes critical information to the company's staff.

When a company has voluntarily provided information to the commission pursuant

to a privilege waiver or otherwise, the production of that information is a factor the commission considers in assessing the company's cooperation. Reports to the SEC and the underlying documentation in connection with it prepared by retained counsel for companies conducting internal investigations are the privileged and protected materials that have been the most of the most interest and benefit to the commission.

The commission has argued in many amicus briefs that state and federal courts should find that companies under investigation by the SEC do not waive work product protection by disclosing such internal reports to the commission under a confidentiality agreement. The commission has always previously addressed this waiver issue in findings accompanying the commission's attorney conduct rules, in recommendations to Congress called for by the Sarbanes-Oxley Act, and in related testimony to Congress.

In these contexts, the admission has taken the position that allowing companies under

investigation to produce privileged or protected information without waiving otherwise applicable privileges serves the public interest, because it significantly enhances the commission's ability to conduct expeditious investigations and, where appropriate, to obtain prompt relief for defrauded investors.

While the commission must verify that internal reports are accurate and complete and must conduct its own investigation, doing so is far less time-consuming and let difficult than starting and conducting investigations without the internal reports.

It is difficult to quantify the time savings to the commission when companies provide privileged information and work product, but there is no question that the amount of time saved is significant. In complex cases it may save the commission months and sometimes even years of work.

I'd like to go through just a few examples. In a major, high-profile financial fraud investigation, counsel for the independent directors committee conducting the internal

investigation devoted almost 50,000 hours to a broad investigation of improper accounting at the company.

They reviewed nearly 2 million pages of documents, collected more than 1 million email messages, and interviewed more than 120 current and former company employees. They provided us with real-time progress reports of their investigation, binders containing key documents for witnesses, and a detailed annotated version of their 340-page investigative report.

The information provided was extremely valuable to the commission's investigation, and the staff was able to benefit fully from the work performed by dozens of attorneys and accountants who had conducted the internal investigation.

MR. TENPAS: In that circumstance, do you essentially forbear sometimes or allow private counsel to go forward?

MS. THOMSEN: We do a variety of things. When an investigation is being conducted by an independent committee and by

outside counsel, we to a certain extent forbear. We sometimes do some investigation but do less. So we are trying in all circumstances to be efficient.

One of the things that we capitalize on, frankly, is the fact that in internal investigations companies and firms can often deploy many more resources than we can, dozens of lawyers and accountants, as I said. Even in the largest investigations, where we will assemble large teams, we are rarely able to match those resources.

So we will to a certain extent be doing less. In some instances, depending on the scope of the internal investigation, we may do very much less in the initial phases.

MR. TENPAS: Similarly, are those sort of negotiated or something you get to to some degree with discussions with the company, that they welcome your approach in that fashion?

MS. THOMSEN: We have found that people very much appreciate the ability to do their investigation, to keep us apprised, so that we are not crawling all over everything and

tripping over the work that they are doing.

As I think is clear, if you have those resources from the company deployed initially, the investigation goes faster and the disruption to the company may be less under those circumstances. So it is generally speaking something that, when we can do it, companies welcome when they have committed to doing internal investigation on their own.

Moving on to another example, this is another high-profile financial fraud investigation, the commission received a 200-page report by the special investigative committee of the board of directors. The commission received copies of the interview memoranda, summarizing interviews with more than 75 company employees and totaling more than 700 pages. This was the result of the work of a very large team of lawyers from a very prominent law firm that worked for many, many hours over the course of several months.

Similarly, in another investigation, counsel for a company's audit committee provided the commission with 134 binders of backup

materials to an internal investigative report. The binders were prepared or collected by counsel or accountants at the direction of counsel. The binders included interview memoranda and analysis of financial documents. Accountants on that matter logged 29,000 hours over 16 weeks in assisting in the preparation and collection of the backup material.

Corporate counsel in yet another matter produced to the commission interview memoranda and notes and made presentations to the commission explaining in detail a complex scheme that occurred at the company. The information provided to the commission staff helped in explaining the 40 to 50 boxes of subpoenaed material that the commission had received from the company. The company's investigation required expert forensic assistance, two major accounting firms, and cost over $9 million.

I think it is reasonable to assume that if the commission had not obtained the work product in these matters, it would have needed to expend approximately the same number of hours

to gather, organize, and analyze the documents. So while it might not have expended the same amount of money in doing so, it would have expended considerable resources in doing so.

The selective waiver provision would be helpful to the commission in carrying out its mission because the commission is not currently receiving all the relevant information that parties want to provide due to the parties' concerns about waiver. The enforcement division's experience has been that entities and their counsel carefully consider whether to produce materials to us, and a significant consideration for them is the risk they run in waiving the privilege as to private parties if they do provide the information.

They also recognize that if they produce materials pursuant to a confidentiality agreement with the commission, a court may well find waiver as to private parties. Accordingly, sometimes they do not turn over any privileged material. If they do preserve privileged matters, it is rare for them to provide all of the privileged material related to the internal

investigation.

Instead, they typically limit what they disclose. Counsel may not give us a written report of the internal investigation and increasing may not even prepare one for their clients due to waiver concerns. Instead, they give us an abbreviated oral report or may provide only witness interview summaries rather than the interview notes or memoranda.

Sometimes they read their interview notes or provide witness interview summaries to us orally rather than in writing, because they are concerned about waiving privilege if they provide written materials to the staff. They have told us they would be more willing to provide privileged information to us if they could have greater assurance that the information would remain privileged.

While the advantage to the commission of obtaining internal reports I think is clear to us, a relevant issue is whether a rule preventing waiver harms private litigants by potentially limiting their access to the same protected documents.

However, I think it is fair that any rule of evidence establishing the producing privilege of protected documents to the commission does not waive privilege or protection to third parties, but would leave the private litigants in the exact same position they are in right now, where they couldn't get that material anyway. And at some level private litigants may benefit from the commission's ability to conduct more expeditious and thorough investigations and things would be gotten out on a more timely basis.

In summary, current law has created a substantial disincentive for anyone who might otherwise consider preserving privileged or protected information to the commission. The selective waiver provision in proposed Rule 502 would eliminate this disincentive and contribute to effective and sufficient law enforcement.

I would be delighted to take any questions.

JUDGE SMITH: Are you comfortable with the specific wording of the proposed rule?

MS. THOMSEN: I think we are.

JUDGE SMITH: Any questions? Thank you.

MS. THOMSEN: Thank you very much.

JUDGE SMITH: John Vail.

MR. VAIL: Good morning. Thank you for having me here. My name is John Vail. I'm the vice president and senior litigation counsel for the Center for Constitutional Litigation. I'm here representing my client the American Association for Justice, better known to you probably by its former name of the Association of Trial Lawyers of America.

I expect to be a lonely voice here today. I have looked at some of the prefiled testimony, and I have provided extensive detail and legal support for the testimony in the written document I've submitted. So I'll speak from the lectern in broader terms and be happy to respond to any questions people have.

I'm going to speak to inadvertent disclosure, selective disclosure, and to the sneak peek claw back provision. The inadvertent disclosure first.

The rule as drafted protects those

persons who are nonnegligent and are diligent. I think that, as such, the rule is unlikely to have much effect on people's pretrial behavior, because you cannot get the benefit of this rule unless you are, I have used "nonnegligent" rather than parse the terms of the rule itself.

I think that some of the prefiled testimony from the defense bar suggesting that the standard should be broader really bears out my prediction on this. I think the primary effect of the rule is not to change behavior in discovery but simply to change the result of an inadvertent disclosure, that is, that it would not be treated as a disclosure.

I think the committee has a conundrum here, because by drafting the rule the way it did, it attempts to accommodate the notion of fairness, the traditional notions that are in the rules in those states which do permit the take-back of an inadvertent disclosure, which is the majority of the states.

But in doing that, the narrower the rule, the more fair the rule, the less effect it has on discovery conduct, because you still have

to adhere to these standards of reasonable behavior, a standard of reasonable care. So I think the primary result of the rule is simply to change a piece of substantive state law for no real benefit to the administration of the courts themselves.

JUSTICE HURWITZ: Mr. Vail, I'm sensitive to changing substantive state law. How do you think the definition of inadvertent waiver changes substantive state law?

MR. VAIL: The preemption, the preemptive effect of the order.

JUSTICE HURWITZ: A federal court order would obviously be controlling in state court.

MR. VAIL: I'm going to take issue with that, because I don't think it is so obvious.

JUSTICE HURWITZ: I guess I'm asking you a question about the definition of inadvertent waiver. How do you think that affects state law? As I understand the definition, doesn't it begin in a federal proceeding?

MR. VAIL: No, I'm not speaking to that definition. What I really mean to be speaking to is the preemptive effect that the rule gives to a finding that a ruling was inadvertent and therefore --

PROF. CAPRA: Preemption is technical only, it is a technical argument you're making, if the laws are the same. In other words, if the inadvertent disclosure law in state X is the same as this law, then there is no preemption that we are really going to worry about, is that correct?

MR. VAIL: That is true. That is true I believe for the majority of the states.

PROF. CAPRA: If I may. Let's say that virtually every state, and I've done the research on 50 states, has this rule. What is the concern?

MR. VAIL: You're saying virtually all. Even if it's virtually all, I think you have at least five, six states, right, where it would have a preemptive effect.

PROF. CAPRA: It would not, because in the five or six states that you're talking

about, those are states where there can't be an inadvertent disclosure. In other words, they are more protective than the federal rule. So I don't see how you could ever have a conflict in that situation. In other words, if the federal court says that this is not negligent and therefore it's not a waiver, the state would agree, because it can't be a waiver in those states.

MR. VAIL: No, I think that there are certain states in which any disclosure, even if inadvertent, would be a waiver.

PROF. CAPRA: If you could find those states, we would appreciate it.

MR. VAIL: OK. We can follow up on that.

JUDGE SMITH: Just give us a submission on that.

MR. VAIL: OK.

JUSTICE HURWITZ: I want to follow up with my point. Assuming that is the case, assuming there are states in which any disclosure, even inadvertent, would be a complete waiver of the privilege, why is that a

good thing? If we are setting a rule for federal courts, why is that a good thing?

MR. VAIL: I don't think that that is the right question for this body to ask, frankly. That's one of my points. It's a good thing because it serves the federal structure.

MR. HANGLEY: I'm getting lost in the pronouns. What's the good part and what's the bad part?

MR. VAIL: The question is, is it good? My point is I don't think this body should be making or proposing rules of substantive state law that will govern actions in federal court which are three percent, approximately, of all cases litigated in the United States.

JUSTICE HURWITZ: That's what I'm still losing you. Forgive me. Sub(b) says it's not a waiver in a state proceeding if made in connection with federal litigation or federal administrative proceedings. So it only affects state law to the extent somebody is trying to use something that happened in federal court, let's say administrative proceedings.

MR. VAIL: That's correct.

JUSTICE HURWITZ: As a waiver in the subsequent state proceeding.

MR. VAIL: That's correct.

JUSTICE HURWITZ: Given your 3 percent startout number, it seems to me the effects -- and I think I'm here to protect federalism. I'm a state court justice on the committee. But it's hard for me to see the state court interest in playing gotcha with something that happened in federal court.

MR. VAIL: It's not a not a matter of playing gotcha. It's a matter of the state court applying the law of the state.

JUSTICE HURWITZ: To a disclosure that occurred in the state proceeding.

MR. VAIL: To a disclosure that occurs regardless of where it occurs.

JUSTICE HURWITZ: No. That's the point.

MR. PARKER: The general substantive state law would say wherever it occurs, it's a waiver. You're trying to carve out an exception that says if it happens in the course of a

federal proceeding, it's not a waiver.

JUSTICE HURWITZ: Correct.

MR. PARKER: And therefore it's preemptive.

JUSTICE HURWITZ: Correct.

MR. HANGLEY: All of this is in one of those hypothetical states which accepts your major premise.

MR. VAIL: Yes.

MR. HANGLEY: Which we haven't identified.

MR. VAIL:

JUSTICE HURWITZ: Go ahead.

MR. VAIL: I want to get it. I think that's an important point, if you have a state with a bursting bubble privilege law. Take, for example, a state prosecutor faced with a situation where there has been a disclosure made in federal court. Under the substantive law of the state, the disclosure would be a breach of the privilege.

Under this rule that prosecutor is precluded from using the evidence which the substantive law of the state says should be

available in the prosecution. That is a preemption of a core sovereign function of the state.

JUSTICE HURWITZ: That's where I'm having some difficulty. I'm having some difficulty figuring out why it is a core sovereign function of the state -- let me finish -- to dictate to people who are litigating in federal court the effect of disclosures to each other.

I'm all for state sovereign functions. I happen to think state courts are the most important part of our system. But I'm having a hard time figuring out why my state has a great interest in saying to a litigant in Montana in federal court, when you made this disclosure, by God, you've opened yourself to the Arizona prosecutor using it for some other purpose.

MR. VAIL: One of the items would be that if that case had been tried in Montana state court, the effect on the Arizona prosecutor would be different. You're proposing a rule that would violate the principle of neutrality of forum decision between federal

court and state court. You're giving people who go to federal court an advantage in that sentence, and particularly from the perspective of AAJ members who generally are not in federal court by there are own choosing --

PROF. CAPRA: So you prefer a rule that bound state courts initially then, in order for fairness to apply. You wouldn't have to have a law of forum selection. Maybe we should just go and regulate state courts in the first instance?

MR. VAIL: I don't believe you can do that. I don't believe you can do what you're proposing, either. And I can come to both of those points as a matter of constitutional analysis.

I would go to the significant practical problems and the potential for satellite litigation that the rule on inadvertent disclosure raises, because it is purporting to bind third parties. Now, there is a conceptual problem here, because there is a desire to bind state courts. Court orders generally bind parties, not courts. And federal

lower courts generally have no authority to bind state courts; they do have the authority to bind parties.

Let's take a typical situation, I think. You have the litigation, you have disclosure in federal court, you have a stipulation and a finding that disclosure was inadvertent. The defendant in the federal court action is subsequently sued by Plaintiff 2 in a state court action in a bursting bubble state. The Plaintiff 2 says, I want all this information. The defendant says this is privileged.

Note that this privilege is not automatic. The defendant always has to assert affirmatively that there is a privilege.

Plaintiff 2 said, I don't care, that order doesn't bind me, I was not a part to that action, I was not in active concert with that person, I think you made a sweetheart deal during discovery, you traded something off to get this ruling that the disclosure was in fact inadvertent, and I want a hearing on the factual premises for whether the disclosure was

inadvertent or not.

I think at that point the person is entitled to that in state court. In some states at least, given that this is a negligence standard, you have an arguable assertion that it would be a jury issue even though it is a collateral issue. Remember, even in federal courts you have jury issues appended to sometimes summary proceedings. I take the Federal Arbitration Act as a good example.

PROF. CAPRA: Couldn't the hypothetical you spin actually occur today?

JUSTICE HURWITZ: I was just going to ask that. Does it change the status quo. With whatever the federal standard happens to be today, since it's not codified, don't we have the possibility of exactly the same satellite litigation today?

MR. VAIL: In that situation, I think it's up to the defendant, if the defendant has made a disclosure, if the defendant feels comfortable with asserting that the privilege still exists. But if the defendant does make that assertion, certainly.

JUSTICE HURWITZ: Your hypothetical was somebody makes inadvertent disclosure in federal court, then somebody in state court asks for the document and you're litigating whether that was inadvertent.

PROF. CAPRA: You're doing that today under the majority rule.

JUSTICE HURWITZ: If that occurred today, wouldn't we have the exactly the same satellite litigation today?

MR. VAIL: I don't think exactly the same.

JUSTICE HURWITZ: Because he wouldn't know what the federal standard was?

MR. VAIL: Exactly.

PROF. CAPRA: It would be an even murkier problem than under this rule.

MR. VAIL: So I think that is my presentation on the policy issues on inadvertent disclosure.

On selective waiver, I don't want to say much. Other people have said much more. I think this issue has been well vetted before the Senate, before ABA commissions. And I think we

agree that the primary problem here is prosecutorial overreaching, and you don't address that by having a waiver of the attorney-client privilege.

JUSTICE HURWITZ: Mr. Vail, could I ask you a question about that?

MR. VAIL: Yes.

JUSTICE HURWITZ: If there were a federal law preventing prosecutors from demanding selective waiver, sort of along the lines of Senator Specter's proposed legislation --

MR. VAIL: Which was reintroduced already.

JUSTICE HURWITZ: Right. Would you then opposite the selective waiver provision? In other words, if the selective waiver were truly voluntary on the part of, for example --

MR. TENPAS: Objection.

JUSTICE HURWITZ: Mr. Tenpas will define the term. But I'm thinking of Ms. Thomsen's suggestion that sometimes, and it is true, companies would like to do it not simply to curry favor but also to keep the federal

government out of their business.

MR. VAIL: I think we would still oppose it, for reasons that are fairly well developed in fact in our testimony as well as those of others. I don't think I need to say more on this than it appears to me that in a environment that could make a Druid at Stonehenge quake, it appears that AAJ and the Chamber of Commerce are relying on this issue.

The sneak peek claw back provision is more problematic for us. I have polled a great number of AAJ members regarding this, and there is a general suspicion and a general bias against any kind of preemption.

There is, however, a recognition on the part of some persons who have used sneak peek and claw back agreements, that they have a tremendous potential to speed litigation and to actually aid in the administration of the courts because of quickening the pace of docket control.

So I want to say our support is qualified, and I think there is a significant constitutional issue regarding these. But I

think that their utility, potential utility, has the potential for distinguishing them as necessary and proper under an Article III analysis of congressional power to make regulations regarding the federal courts.

With that, I don't know how much time I have left --

JUDGE SMITH: It's about gone.

MR. VAIL: I am happy to stop. I am happy to take more questions.

JUDGE SMITH: Any other questions for Mr. Vail? Thank you, Mr. Vail.

Mr. Van Itallie.

MR. VAN ITALLIE: I'm Peter Van Itallie, head of litigation for Johnson & Johnson. Thank you very much for giving me the opportunity to briefly address Rule 502. I'd like to touch on 502(c), and if I get a chance I would like to address (e) and (d) as well.

With respect to 502(c), I do want to add my voice to the group or choir that sees selective waiver as significantly problematic in terms of the fundamental purposes of the attorney-client and work product privileges. I

certainly understand from the standpoint of DOJ and SEC the advantages in setting up a system that encourages or smooths the way towards waiver, but I think they are very, very substantial upstream consequences which I think have been addressed in a number of submissions.

JUDGE SMITH: Even if it is not being compelled?

MR. VAN ITALLIE: If it continues to be rewarded, which is what I gather is the case today -- it certainly occurred to the SEC just this morning -- if they continue to reward companies coming forward with waivers. That is certainly the case under the McNulty memo, as I read it.

Putting aside the compulsion, there is certainly an impetus as a function of the reward that's out there to just kind of, from my standpoint, grease the skids. I fundamentally believe that the critical compliance aspect here is not so much identifying something after it's occurred but avoiding it in the first place.

What that requires from your standpoint is the comfortable, free, easy

ability for business people and their lawyers to comfortably, readily get information so that companies can comply their conduct with the law. That creates the greatest possibility of avoiding problems.

MR. TENPAS: May I ask a question on that? We are comparing two worlds. I think DOJ and SEC folks would probably agree with you that that's the better world to be in. You have World A with no selective waiver provision and you've got World B with a selective waiver provision. How does the creation of a selective waiver provision affect that behavior?

Is it really the view that somehow business folks and in-house counsel, in deciding what communications they have, will decide at the margin not to have certain communications because a selective waiver provision now exists? They won't have those in the future, where they have them now where there isn't a selective waiver? Is that really the argument that at the margin this makes that much difference?

MR. VAN ITALLIE: Yes, that is precisely the issue. I do think at the margins

and it does and it will. There is a continuum here clearly that began with the Holder and Thompson sort of approach where there was possibility of actually compelling or seeking to strongly suggest a waiver. Then that continuum just continues to the current state, where it is rewarded.

MR. TENPAS: I'm not talking about the reward/punishment. I'm talking about we have a world right now where we don't have the selective waiver provision and tomorrow the world changes and we do have selective waiver. Are you maintaining that corporate conduct in how they consult with their lawyers is going to change because of that, that it's going to be less robust, that they're going to have fewer exchanges because the corporate CEO stops before he asks his lawyer a question and says, wait, before we have this conversation, tell me, does selective waiver exist or not? It doesn't work that way, does it?

MR. VAN ITALLIE: It is clearly not immediate. It is part of the atmosphere. I think it is part of the atmosphere. As business

people increasingly are experienced with the proposition of their conversations being considered for selective waiver, I think it is just part of the atmosphere.

I think the way that Thompson memo frankly, probably more in concept than reality, has become part of the atmosphere. Business people understand the risk and the threat. Whether they can particularly point to actual experience or not, it is out there, it's in the air. I think this selective waiver will simply contribute to that proposition.

I made the point in my submission about the situation in Europe with the EU as well as with the regimes in a number of European countries -- France, Spain, Italy, for example -- where there is no recognition of a legal privilege for in-house lawyers. Business people can still go to outside counsel, but they can't get protectable advice from their own in-house lawyer.

So it is not a perfect analogy, it's the degree that you freight the free and quick ability to access your counsel as is the case in

parts of European continent. With respect to the EU, you simply discourage the instinct, the impulse, to get advice.

So yes, I think atmospherically this will continue to add to the notion that the privilege doesn't have the status that it should and did have. Again, I think you've got to encourage this exchange.

My business is a perfect example. The pharmaceutical industry, medical device business, which is what J&J principally is, also it's known as a consumer business as well, anybody can take a look at our SEC filings. It's the case for the whole industry. We are under active investigation by multiple federal and state authorities. We are trying to conduct business in that setting. There is just no question that that requires this immediate feedback, lawyer to business person.

It is not insignificant that Jeff Kindler, who is now CEO of Pfizer, was the former general counsel. The merger, the significance of the kind of quick legal input to business decision making is just critical in our

industry.

Again, my sense is, freighting that with these additional concerns, it is going to be problematic, and the greatest good is allowing businesses to successfully conform their conduct by having that access.

PROF. CAPRA: May I? You maintain we are in a system now where waivers are being compelled.

MR. VAN ITALLIE: They have been compelled and they believe that they have been compelled. The fact is the belief may be of no significance.

PROF. CAPRA: A culture of waiver. What the committee was thinking, I believe, I'm not speaking for it, what I was thinking anyway when we are talking about selective waiver, if you're in a culture of waiver, let's assume that's true, then shouldn't there be some protection from the presumed waiver? And the protection from the presume waiver is that it couldn't be used in a private action. It's a protective device.

How does a protective device turn into

more compulsion? If you're already at the scale of zero to 100 and you're at 100 compulsion, how does selective waiver ratchet it any further? I've never been able to understand that. We have talked about this, I know.

MR. VAN ITALLIE: I think the selective waiver provision will encourage more waivers. I don't think there is any question about that. I think that is the interest of the enforcement authorities. There will be more waivers. As a consequence of there being more waivers, I think the inevitable deduction from that is that the privileged conversations that occur upstream are more vulnerable to those downstream decisions.

PROF. CAPRA: So waivers are always a bad thing, is that right? I can see how compelled waivers are a bad thing just on the merits, because there really is no such thing. It's not even a waiver if it's compelled. But a truly voluntary waiver is a bad thing?

MR. VAN ITALLIE: I would say that whatever it is that results in increased numbers of waivers of privilege, which are obviously

removed in time from when the original privileged conversations take place, you inevitably erode and corrode the proposition that those are valuable protected discussions.

MR. TAYLOR: There are occasionally times when the regulated entity wants to disclose to a regulator something that is beneficial to the entity but which is probably privileged, and is reluctant to do that because of a concern that its selective disclosure of something that is favorable would create a wholesale waiver.

Does that not resonate at all in the pharmaceutical industry, where you would like to be able to tell the regulators some things but are concerned that if you do, you may have a wholesale waiver in all other contexts?

MR. VAN ITALLIE: First of all, I think there is a tremendous amount of cooperation that can occur in any enforcement setting without a waiver. You can clearly give very detailed factual information resulting from your investigations without getting into classic privileged material fairly.

MR. TAYLOR: I agree.

MR. VAN ITALLIE: When you get to the precise question of whether in a particular setting a company would love to have the ability at that point in time to waive the privilege without downstream civil consequences, sure, in that narrow setting.

But the point that I'm trying to make is expediency there at that time is going to have this collateral over time effect of just making advice-seeking and advice-giving more at risk. So the expedient advantage of a privilege disclosure I see as long-term structurally problematic to the fundamental point of privilege.

JUSTICE HURWITZ: Can I ask a follow-up to Mr. Taylor's question. I'm concerned about the practical consequences of this. What makes the corporate setting interesting is that the holder of the privilege is the corporation and not the person who is speaking to the lawyer.

MR. VAN ITALLIE: Right.

JUSTICE HURWITZ: Isn't that person

always at risk that the corporation collectively will later decide that it's to its advantage?

MR. VAN ITALLIE: Yes.

JUSTICE HURWITZ: Do you perceive that this waiver rule will make the person speaking less comfortable with the possibility that his lawyer may later decide it's in the best interests of the corporation to disclose?

MR. VAN ITALLIE: Yes, I do. I think there are certainly settings where in conversations you make the point that it's not a privileged conversation because there may be potential divergence between the interests of the company and the person. But that's relatively infrequent. Fundamentally, I think you're giving advice to the business, to the business leaders, and there is no potential conflict there.

JUSTICE HURWITZ: But I take it now, if the CEO speaks to the general counsel and six months later the board of directors decides that it's in the corporation's interest to waive the privilege, it can do so.

MR. VAN ITALLIE: That is certainly

the case.

MR. TAYLOR: That's really not a realistic paradigm. The question that this rule is seeking to address is whether the company's investigation, its self-investigation or its investigation by counsel, in connection with a matter that is of interest to regulators can be disclosed. The notion that this rule will have an impact in the executive suite between the CEO and corporate counsel strikes me as very difficult to prove, although I'm sympathetic, since that's the nature of my practice.

Where you seem to me to have trouble making the case is that the policy that the rule is intended to promote is one that would permit a company to make presentations to an agency with some selectivity and not worry about being sued by third parties using that information. Why isn't that a positive thing for the company?

I'm just not persuaded that the selective waiver rule, in some variation as it exists today, would chill the in-house counsel's interaction with management.

MR. VAN ITALLIE: You're making a

distinction from a sort of formal internal investigation, where corporate witnesses are advised that the privilege may be waived downstream in the interests of the corporation. In that narrow setting, any further difficulty from a selective waiver wouldn't be enhanced. That's your point.

MR. TAYLOR: That's one paradigm, yes.

MR. VAN ITALLIE: I don't think a disclosure, first of all, a selective waiver, could be reasonably confined to that sort of formal investigation. There clearly are going to be discussions at the margin which, if you make a waiver with respect to aspects of your investigation in the formal sense, you won't be able to preserve.

So I don't think that lines will be drawn that narrowly. There are plenty of discussions that are had outside any kind of formal investigation which could be threatened if there's later an investigation that relates to the same subject matter.

Again, I think it is simply this prospect getting currency, increased numbers of

waivers.

MR. TAYLOR: Justice Hurwitz's point is right. If you had a bankruptcy and the privilege then belongs to the trustee, you're always at risk that something could happen to make the whole privilege ineffective.

MR. VAN ITALLIE: That's right. We're talking about the cumulative weight here. I think this would absolutely add to the cumulative weight of sort of pro-waiver points.

MR. TENPAS: It seems to me that the argument about the cumulative weight here in some respects runs counter to any corporate official's corporate duties. In some sense I hear you making the argument that a corporate official will decline to have the sort of communications he thinks he or she ought to have with counsel when making a decision to understand the legal implications, or will decline to push forward a robust internal investigation when they may think that there is some reason to believe corporate misconduct occurred, because of the fear that this will be disclosed.

It is a little hard for me to understand how that squares with an underlying duty which will never disappear to act in the best fiduciary capacity that a board member or corporate official can for the shareholders. Did you discuss that at all?

MR. VAN ITALLIE: Yes. But you are postulating a situation where the person necessarily knows that they need guidance on a particular topic.

MR. TENPAS: You're positing a world where they're thinking, I might want to talk to my lawyer about this, I might benefit from some quick advice, and then they stop and say, but no, I fear to get that because it might later be waived.

It strikes me as tricky to reconcile that with them also discharging an obligation that can't disappear, as to which they have no discretion and they are always under, to act in the best manner possible for the corporation. If they think they need legal advice, they need that whether there is a risk of waiver or not.

MR. VAN ITALLIE: What I'm concerned

about are discussions where there's lots of give-and-take back and forth where people consider a variety of options and explore what the appropriate outcome is. If you add the concept of someone reviewing that discussion, understanding that discussion after the fact, it creates a level of restraint, potential restraint, to the give-and-take.

I think the exploration of all the options, all the reasons -- it could be role playing, it could be devil's advocate -- this is an absolutely forthright effort to understand what is the appropriate outcome and can theoretically misconstrued after the fact as something that it wasn't.

I think you want free, vigorous advice giving and seeking without concern about how those will later be construed or misconstrued downstream.

JUDGE SMITH: I need you to wrap it up in about two minutes or less.

PROF. BROUN: Judge Smith, could I ask one question?

JUDGE SMITH: Sure.

PROF. BROUN: I'm concerned about the statement that you're making with regard to incremental loss of privilege, the incremental decrease in protection. The current state of the law in virtually all of the circuits is that there is no selective waiver, and companies are still waiving their privilege in certain investigations.

If the selective waiver law came in, would there not in any of those circuits be more protection than there is now? That is, now the corporate executive meets with counsel, makes a disclosure that they have a confidential communication. If the company waives the privilege in an SEC investigation, the privilege is gone not only with regard to the SEC but with regard to everybody else in the world, right? That's the state of the law.

If the selective waiver privilege exists, there is now at least protection against disclosure to someone other than the SEC. Why wouldn't that promote a free flow of information rather than deter it?

MR. VAN ITALLIE: It's going to

promote waivers, and that's really my point. There will be more waivers. I think that's the difficulty.

MR. HANGEY: Is there a concern that the in-house lawyers and management people will be, through the satellite litigation industry, attacked for a failure to waive?

MR. VAN ITALLIE: No.

MR. HANGEY: Is that one of the concerns?

MR. VAN ITALLIE: No.

MR. HANGEY: Without that kind of concern, what we just said, it is a little hard to figure out the cause and effect.

MR. VAN ITALLIE: Again, I think the increasing impulse towards waivers, the increased numbers of waivers, the continued proposition when dealing with enforcement authorities that waiver is rewarded, waiver is encouraged, waiver is made more easy, again repeating myself, the upstream consequences I think are less vigorous engagement with counsel. I think that's the greatest harm.

Two seconds on 502(b). I have a very

small point about that. The reasonable precautions language comes out of cases that are paper discovery cases. I and I think several others have made a modest suggestion for changing the language to "reasonable steps in light of the scope and schedule for the production."

The concern, as expressed by the committee, really is the e-discovery era, the massive amounts of production that are pertinent in the e-discovery era. I have a little concern about taking a paper discovery concept and applying it to this different world that we're in. I wouldn't want to encourage application of the law in that era to the new world that we are in. Thank you very much.

JUDGE SMITH: Thank you very much.

Mr. Goldman.

MR. GOLDMAN: Good morning. I am tempted to say, "May it please the Court." My name is Lawrence Goldman. I am a past president of the National Association of Criminal Defense Lawyers, co-chair of its white collar committee. I would like to speak on behalf of the NACDL and

focus on the partial labor provision 502(c) from the standpoint not so much of the corporation, because you've heard a good deal of that and because I really have no expertise in that, but from the standpoint of the employees, the individuals.

The NACDL opposes the partial waiver provision, because we believe it is both unwise and unfair. It's unwise for reasons you've heard before, because on balance it will erode the attorney-client privilege.

To be sure, it might benefit some corporations who do desire to provide information to government agencies and help them protect themselves. It would benefit the government certainly by giving them information, having others do their investigations for them so they don't have to do it themselves.

But it would undermine the very basis of the attorney-client privilege. It would prevent individuals or hamper individuals from speaking to their lawyers, the corporate lawyers, in confidentiality with the confidence that it wouldn't disclose.

We've talked about this culture of waiver. This has, as we must know by now, resulted from implicit and indeed occasionally explicit, at least by government agencies over the last decade --

PROF. CAPRA: Can I interrupt for a second, how you started out here? You are saying that it would chill the conversation of a corporate agent with their own lawyer?

MR. GOLDMAN: No. It would chill the conversation of individuals with the corporate lawyers.

PROF. CAPRA: OK. Sorry. Go ahead.

MR. GOLDMAN: This would further nourish that culture in which corporate identities feel, as they generally do, that they must waive attorney-client privilege, otherwise face harsh punishment, perhaps indictment.

It's unfair, because, although it benefits the government and some corporations, it is to the great detriment of the employees, the individuals, and indeed the public, as well as the principles that underlie not only the attorney-client privilege but the Fifth

Amendment as well. Partisan rule-making I submit should not be done. A rule, if done at all, should be done by legislation.

In order to understand this, one cannot consider this in a vacuum.

PROF. CAPRA: It is being done by legislation.

JUDGE SMITH: Under the Rules Enabling Act, it can only be done by legislation. We are only proposing something.

MR. GOLDMAN: I understand that. Instead of a rule that will have a partial benefit for some litigants as opposed to others, some parties as opposed to others, that is something that should not be done in a rules context but should be done through legislation by another body.

PROF. CAPRA: Virtually every rule has positive impact on some and negative impact on orders.

MR. GOLDMAN: I understand that. But this is, I think, an extreme. I understand how it is done. Let me explain the background and how we get into this. The rule itself, a

sterile rule, has had a certain appeal, I admit. But what really is happening and what background we must consider is very different.

Courts don't usually find out, frankly, what happens in terms of these corporate investigations. The goal, no doubt, is to keep the case away from the courts for a corporation not to be indicted. Judge Kaplan recently in the KPMG case got an inside look at what happened in that situation, and obviously was outraged.

Now, this culture of waiver, by the way, continues. The McNulty memorandum is somewhat of a cosmetic improvement but it reiterates the basic rule that waiver will help you, and it reiterates the years of I say "coercion" after thinking of it carefully, which has nourished this culture and led to it.

Corporations' response to virtually every investigation is to cooperate with the government and to waive privilege. Of course, an indictment, as shown by Arthur Andersen, even if no conviction results, could be a capital death penalty.

Every employee, of course, of a corporation can criminally bind that corporation, no matter how low she is. And of course the justice department has very, very great discretion, as does any prosecutor, in determining whether to charge.

JUSTICE HURWITZ: Mr. Goldman, can I ask you sort of an empirical question about this. It seems to me we currently labor under the circumstance where individual agents, if you will, of the corporation, individuals who work for the corporation, can be, I use this term advisedly, sold out by the corporation for the corporate interest. Do you fear that adoption of (c) will make that more or less common?

MR. GOLDMAN: I think it will make it more. To put it as the gentleman before me said, the purpose of this rule is to have more waivers, to ease waivers. It's for the benefit of some corporations, corporations which frankly have a lot to hide, as opposed to other corporations. It's for their benefit. We have this culture today where the corporations who get the best benefit from the government are the

ones who are the worst.

PROF. CAPRA: Maybe it is simplistic to say that the purpose of the rule is to have more waivers. Maybe the purpose of the rule is at the margin to have more waivers, but actually, as Professor Broun was talking about, protect those who are already waiving.

MR. GOLDMAN: It is to protect those, and certainly one wonders whether those people should be protected. Admittedly, it will protect those who are already waiving, some of them. Some of them don't need it. That's a course which I will get to.

But it would also encourage waivers. I start off with the presumption -- and if one disagrees with me, I'm wrong -- that the attorney-client privilege is important, it should be preserved, it should not be eroded. If one says the attorney-client privilege is really not worth much and should be easily skipped, eliminated, my argument is worthless.

JUSTICE HURWITZ: To return to my first question, empirically, because you're the expert, how often are corporate agents

prosecuted on the basis of statements they made to corporate counsel where the privilege is later waived? Is that a common thing?

MR. GOLDMAN: I would think so. I think there are two things that happen. They either quit the company, don't give statements, or give statements that are used against them. It is every criminal defense lawyer's fear that the client is called in by the company, special counsel sometimes, corporate counsel, under penalty of firing, you, employee, must tell us what happened.

If the employee says something that is untrue, obviously that's not good for anybody. If the employee admits some liability, the company then is potentially, and often is encouraged, to submit a report, submit his statements to the government, which uses it against him.

JUSTICE HURWITZ: In my limited experience with this, I thought it was typically done when you are acting as special counsel, when you call in that employee, you say, by the way, this may not be a privileged conversation,

I want you to be careful here.

MR. GOLDMAN: My experience, frankly, if I have a choice, I tell the employee give up your job. Most lawyers are not going to let an employee, in anything significant certainly, go before corporate counsel and admit criminal wrongdoing.

JUDGE TRAGER: How would selective waiver make it any worse for the employee?

MR. GOLDMAN: It makes it worse because it encourages waiver. See, there are two prongs. We have two kinds of novelties in the law on this.

JUDGE TRAGER: Are you saying all-or-nothing is better for the employee than partial?

MR. GOLDMAN: Frankly, from my standpoint, I'd rather not encourage companies to come and waive, and therefore the employee is better off. The employee isn't terribly worried about civil liability down the road.

You have two anomalies here. The employee who was called in has essentially no attorney-client privilege of confidentiality. Whether that should be in an ideal sense or not

is something else. In terms of search and seizure, we talk about the individual's standing and only the individual has it. Here, the individual whose privacy, if we want to consider this a privacy right, is lost, has no standing.

MR. TENPAS: It is not a privacy right, right? It is not a privacy right.

MR. GOLDMAN: I'm sorry?

MR. TENPAS: It's not a privacy right.

MR. GOLDMAN: It's not a privacy right. I am just using that by analogy. But when you talk to your attorney in confidence, confidentiality is privacy.

The second thing that an individual does not have, he has, with very rare exceptions -- the KPMG case, where there is a government partnership, so to speak, with the corporation -- the individual has no Fifth Amendment light.

Although, the issues that underlie the attorney-client privilege, the issues that underlie the Fifth Amendment privilege, both remain here. The Fifth Amendment privilege generally is someone shouldn't be forced the

incriminate himself. Here, the individual is required to incriminate himself or otherwise lose his job, assuming there's wrongdoing.

PROF. CAPRA: What you're missing, of course, is state action, right?

MR. GOLDMAN: No, no. Because there is no state action, he has no legal Fifth Amendment right. But the Fifth Amendment, I hate to use the word "penumbra," the theory of the principle underlying it is you should not be forced to give information against yourself which incriminates you. Those are both underlying.

MR. TENPAS: Do you just discount completely the possibility that the company legitimately has an interest in saying we think we potentially have criminal wrongdoing here, we're not the state, we don't feel like we ought to have to pay salary and benefits to folks who won't help us figure out what happened? Do you treat it as if that is not any part of the dynamic between the corporation and the individual when they have that conversation?

MR. TAYLOR: I'm just not sure what

any of this has to do with this rule. The way companies conduct their internal affairs, particularly in connection with an investigation of this sort, that's the way it's done. How they go about disciplining employees is also unaffected by this rule, it seems to me.

The question is whether this rule, or this proposed rule, will have a material effect, a beneficial effect, or protective effect, as Ken Broun said, that's desirable in enabling entities who want to make a selective disclosure.

I don't agree, although I practice in the same area that you do, that it will encourage waivers any more than they are already being encouraged. I share your view that you can't encourage waivers without punishing nonwaivers. But I don't see how this rule will encourage companies to waive with any more damaging effect that has already been done.

MR. GOLDMAN: I respectfully disagree, Mr. Taylor. Encourage. I would put it the other way. One of the brakes, and I personally see that, one of the real brakes that a

corporation has is when the corporation says, we know what's in our interest in a criminal sense: To go to the government and to say to the government, this is what happened, here is the report, here is what A, B, C, and D said. We also know if that gets out, we are facing public embarrassment, we are facing the potential shareholders suit. That, I think is a serious brake on this.

If we agree that this historically coerced over the last ten years waiver is a bad thing, I think it does encourage it. Or does not discourage it, to put it another way.

JUDGE SMITH: Wrap it up in about two minutes or less.

MR. GOLDMAN: I will try to. Let me in the last two minutes say some things that I have not yet said.

Again, the public, and no one has spoken to this, the public at large, is certainly also suffering. We have a theory of law which is there should be citizen attorney generals, citizens should bring RICO suits, and things of that sort. We are preventing the

public, not only jurors or triers of fact from having information that might help them, but we are preventing those individuals from bringing suits.

On the one hand, we are talking about victims' rights. I know you dealt with it last week. We are talking about victims' rights, and they are expanding generally. Here, the victims are being kept in the dark. People who are defrauded perhaps by the company may never know this, even though the U.S. government or the state government has privy to this.

So I submit there are many reasons against this. As well as depriving individuals of evidence or jurors or triers of fact of evidence, it deprives people of information which, if given, they might choose to bring lawsuits, they might choose not to deal with the corporation. I submit that is wrong.

PROF. CAPRA: The best way to disseminate the most information to plaintiffs would be just to do away with the privilege entirely and they would have all this information, wouldn't they.

MR. GOLDMAN: I'm sorry?

PROF. CAPRA: Do away with the privilege entirely. Then there would be all this information out there for plaintiffs to deal with.

MR. GOLDMAN: Look, when you deal with a company that has committed wrongdoing or individuals in the companies have, obviously they don't want to. Thank you.

PROF. BROUN: I don't understand the two points that you are making, which seem to me to be conflicting. One is the enactment of the selective waiver provision will discourage communications, will discourage the protection of the attorney-client privilege. That's argument one. Argument two is that the selective waiver provision deprives the public of this information which you want to protect.

It seems to me that they cut against each other. One is an erosion of the privilege that you're concerned about, and the other is a greater dispersal of the information. Aren't those inconsistent arguments?

MR. GOLDMAN: They are two separate

areas. One deals with the attorney-client privilege. Simply put, if there is selective waiver, there will be more waiver, there will be more incentive to a corporation to waive and give up the statements by individual employees.

Two, if there is a selective waiver provision for those companies that do give it up, none of that information will get to the public. They are two different interests so to speak, both of which are harmed.

I am more concerned with the individuals who are essentially coerced into making statements. I'm surprised we haven't heard it from the negligence lawyers, the plaintiffs bar. Those are the people who should be more concerned with the fact that that information is kept from the public, that information is kept from them.

JUDGE SMITH: Thank you, Mr. Goldman.

MR. GOLDMAN: Thank you.

JUDGE SMITH: Next I have Defense Research Institute. I have four names here: Mr. Freedenberg, Mr. Gerber, Mr. Shalhoub, and Mr. Sneath. Are you giving a joint presentation

or what?

MR. FREEDENBERG: We are sharing the small amount of time allotted. We'll all be very brief.

JUDGE SMITH: Let me ask you to go ahead for about 10 minutes.

MR. FREEDENBERG: My name is John Freedenberg. I'm a private practicing attorney with the firm of Goldberg Segalla, in their Buffalo, New York office. I am also the vice chair of the Defense Research Institute's product liability committee nationally, and my colleagues are also active in DRI.

We have all been asked by DRI to attend today but not to express necessarily anything on behalf of other members, just to express our own views, our own opinions based on our own personal experience.

My personal experience I believe is somewhat different than many attorneys. I have the privilege of serving as national counsel to a couple of manufacturers of household products in their fire litigation. One of my clients is a Fortune 5 company, the other is a closely held

corporation.

I'd like to share very briefly a personal anecdote illustrating the use of the attorney-client privilege in my practice. In my work as a defense attorney, I go out to scenes and I crawl around in the fire scene with my experts. I do it from Brownsville, Texas, to St. Paul, Minnesota, to all points in between. I've attended dozens of those. I've also attended hundreds of post-scene inspection investigations, where the product is actually taken into a laboratory, torn apart, and analyzed for evidentiary purposes in preparation for further litigation, if that's to come.

How this bears on the discussion today is I learn a lot about my client's products and I then interact with in-house people, in-house engineers. I listen to experts at the scene. Sometimes they are experts that are working on behalf of my client, sometimes they are working on behalf of other people interested in the outcome.

As I listen to these people and make my own observations and listen to their

observations, I then go back and talk to engineers who work for the company to share those observations with them and ask them questions. I'm asked to speak candidly to these men and women, and they are asked to speak candidly back to me.

In the course of my work over the past couple of years, there have been two concrete instances where these candid exchanges have helped, I believe, lead to important modifications of those products. These have been enhancements in the safety of the product. And I believe that these changes and enhancements in the safety of products will also enhance the quality of life of the customers who use them.

Some may ask, would these changes have been made without your involvement or without your exchange with these in-house engineers? Perhaps they would have, but I believe they have been faster because of the candidness with which we were able to interact with one another. I believe these have been positive changes. I believe they clearly, because of the culture

afforded by an attorney-client privilege that is strictly enforced, have been helpful in these instances.

For these reasons and for many others, I support any strengthening of attorney-client privilege as well as work product protections, and I applaud the adoption of the proposed rule generally.

With respect to provision (c), I will leave it to others. I share the observations made by Mr. Van Itallie a few moments ago. I understand that there is a struggle here in the community to get around each of the sides of that argument. I know there are arguments to be made by both sides.

But I generally believe that provision (c) is troubling. I agree with those who fear that the codification of selective waiver may increase the number of waiver demands made to companies like my clients.

I'm going to leave my further comments to my colleagues on both that and the uniform application of the rules to federal and state courts, which I also welcome. Thank you.

JUDGE SMITH: Mr. Gerber now.

MR. GERBER: Good morning. My name is Steve Gerber. I'm the partner in charge of the Adorno & Yoss New Jersey office. I'm a member of the DRI, but I'm speaking here in my individual capacity. I also note that the committee has had a long colloquy with a number of witnesses this morning and in the record below about the costs, benefits, risks, and ultimate issues involving 502(c). I'd just like to add one small voice to the discussion.

I well understand that there is an incentive in today's climate that promotes waivers. I share the concern expressed by earlier witnesses today that while there are important protections that could be available in certain limited circumstances to corporations by adopting a selective waiver provision, it is my view that that will take it far down the slippery slope and will in fact lead to and encourage more waivers, whether it is in a regulatory pharmaceutical context or in an employment context.

It is my belief, based on my

experience in employment litigation on the defense side, that the attorney-client privilege is very important when regular folks come to corporations in an executive capacity to ask about a certain fact pattern. I do believe that incrementally adopting a selective waiver provision will take us down the road of more and more waivers, and I believe ultimately that will be deleterious to corporate self-policing.

Thank you.

JUDGE SMITH: Thank you. Mr. Shalhoub.

MR. SHALHOUB: Good morning. My name is Mike Shalhoub. I'm a partner in Heidell, Pittoni, Murphy & Bach, with offices here in New York and in Connecticut. I'm an active member of some of the organizations that will be appearing before you today, and I'm currently one of the national directors of the board of DRI, which you may or may not know is the largest corporation of civil defense attorneys in the country, with some 23,000 members.

The views I express here this morning, though, are my own and not on behalf of DRI or

my law firm, and my comments are specifically going to be directed towards the uniform waiver rule and its applicability in federal and state courts.

My personal position and sort of a philosophical thing is that if there is to be such a waiver rule, it ought to be uniform in the federal and the state courts, for the reasons outlined in Professor Capra's March 2006 memorandum with regard to this rule.

The federalism issue has been discussed at length in prior testimony and submissions, and I'm not going to repeat that other than to say that I support the position that has been outlined by Mr. Cortese, who will be speaking this afternoon, and the position outlined by the Lawyers for Civil Justice.

If there is a constitutional way to get at uniformity, I would respectfully suggest that this committee should take it and make representations in that regard. I believe that the materials outline a method that some constitutional lawyers believe is an appropriate way to get at it, and I would hope that you all

consider doing that. Thank you very much.

JUSTICE HURWITZ: Could I understand your suggestion. Your suggestion that the committee should go farther than we have now and dictate to state courts the effect of what their selective rule ought to be with respect to state court proceedings?

PROF. CAPRA: Any. State orders, the whole bit.

JUSTICE HURWITZ: That's right. That's your position?

MR. SHALHOUB: I would go back to the original proposed rule that, as I understand it anyway, would have imposed a uniform rule on the federal and the state courts with respect to the waiver issues that are addressed in this, yes.

JUDGE SMITH: All right. Mr. Sneath.

MR. SNEATH: Good morning, members of the committee. Thank you for allowing me to be here. I'm also a board member of DRI, and I'll adopt the disclaimers made by the other gentleman.

I'm here to talk on a very limited topic from my own personal perspective, which is

the perspective of patent and trademark litigation. I do that in Pittsburgh, Pennsylvania. Pittsburgh sits in the Western District court of Pennsylvania, and we are one of four jurisdictions in the country in a now have local patent rules, federal local patent rules.

You've all probably heard of the Eastern District of Texas and its now being a patent hotbed. The Western District of Pennsylvania passed similar local rules. The import of my comments therefore are that in Pittsburgh we now have a rocket docket for patents.

Immediately upon filing a patent case in the Western District, parties are faced with document production. Even before the status conference, rule 26 kicks in. Parties are mandated to begin production of documents very early on, and that pace of document production expands very rapidly over the first two or three months.

More importantly, however, there is also in our district a default protective order

that the minute a lawsuit is filed in a patent case in the Western District of California, the parties are subject to a default protective order which governs all production of documents and information and depositions in the case.

What's important here is that the proposed rule discusses the concept in 502(d) of having an agreement by the parties put into a court order and therefore making it binding not only on the parties, but on all other parties in both federal and state litigation.

There is a potential anomaly here in jurisdictions like ours that have this default protective order, and I think maybe it is a wave of the future for courts to adopt these kinds of orders, particularly in IP litigation. The potential anomaly is the parties are not agreeing to anything other than when they file a case they are immediately subject to this order.

I would urge that there be some consideration either in the rule or in the notes that where the courts impose a default order like this, I and we, the parties in those agreements, would want those protections to

extend as you have proposed them, even though the parties have not made an agreement.

MR. HANGEY: Doesn't rule 502(d) as proposed do exactly that?

PROF. CAPRA: No.

MR. SNEATH: No, it does not.

PROF. CAPRA: The rule as issued for public comment was dependent on agreement.

MR. SNEATH: It depends on the agreement being incorporated in.

PROF. CAPRA: To fill you in, the committee has discussed that matter. It is an important issue, so important that it is subject to discussion. I'm sorry.

MR. SNEATH: That's good. I assumed I wasn't the first to think about it. I'm just a small guy from Pittsburgh.

The point is the parties are free in this scenario to modify the agreement. But to do it and to get a court order, the parties may very often submit competing provisions to the court that have little, nuanced differences where they say the plaintiff wants this, the party claiming infringement wants this, the

party defending wants this.

If you submit those competing proposals to the court and the court adopts it as an order, then it is unclear to me whether or not under your proposed rule that's an agreement being incorporated in. My personal experience is that parties want these protections, particularly in patent matters, where these are highly sensitive, highly important things, and want that protection to extend.

PROF. CAPRA: Do you ever have situations where one party wants an order and another party doesn't want an order at all?

MR. SNEATH: I haven't seen it. Although, I have seen in your notes that potentially one party who was not producing many documents may not want to give anything up when they know the other party is going to produce the documents. I haven't had that experience yet.

More often than not, in Pennsylvania we all seem to abide by the ethical rule that if you find an inadvertent production, you immediately notify the other party. That

happened in a recent case with me. It's happened a couple of times. We've notified each other. Pittsburgh is known as a pretty congenial bar, so it works out well.

My concern is that if we don't expand that rule to include all court orders, you are going to have these anomaly situations where you then are litigating down the road on did the parties really agree here.

PROF. CAPRA: Let me ask another question. Your scenario where the parties disagree on particular parts of an order, what might those disagreements be about?

MR. SNEATH: It may not even be about the relevant provisions on waiver. In our protective order, there is an inadvertent waiver provision. We have a provision that says that if either party wishes to designate a document as confidential or privileged, it's a claw back provision, there is no waiver. So the parties may not even be disagreeing about that provision. They may all agree but disagree about something else.

I would urge that we have either

something in the notes or in the rule that demands that all orders that are entered be binding on third parties in federal and state.

MR. TENPAS: Does the Western District of Pennsylvania's standing order have any language that purports to define the enforceability scope? The rule, for example, has particular language about it binds people whether they are party to it or not.

MR. SNEATH: No. This is new. The Pittsburgh rules were modeled in part after Northern California. It's eastern District of Texas, Northern Georgia, Northern California, and Western PA, and they are all slightly different. The protective order drafted in Western PA, many people around the country are calling to get it or are using it.

It is a very comprehensive order. It has an inadvertent waiver provision in it, but it does not go beyond that to define what happens or how you determine any of the standards that you all have contemplated in your discussions. But they may amend it. When I go back, I'm going to be talking to the committee

about the developments here and what may occur down the road.

JUSTICE HURWITZ: As I understand what you were just saying, the form order in the Western District just binds the parties to the litigation?

MR. SNEATH: It's unclear. It doesn't say one way or the other. It appears to bind just the parties.

JUSTICE HURWITZ: Of course, there is probably no substantive law on that that would allow the court to bind third parties.

MR. SNEATH: No, none that I know.

JUSTICE HURWITZ: Now I understand your concern.

MR. SNEATH: I do think in the IP arena, this is wave of the future, because the parties all want it. So I think it ought to be contemplated.

JUDGE TRAGER: These documents, you don't actually docket them, you just exchange them, right?

MR. SNEATH: That's correct. There is no filing of the documents.

JUDGE TRAGER: So in the real world, how would a third party ever get them?

MR. SNEATH: They certainly could subpoena them in another action, I suppose. Under the scenarios you all have envisioned, if somebody produces one -- word gets out and you find yourself -- people that are in patent litigation tend to find themselves in repeat patent litigation, for one reason or another. That's the concern, that in other cases this will not be that same protection afforded.

JUSTICE HURWITZ: But the order today, at least on its face does not give you that protection?

MR. SNEATH: It does not. But I'm going to be talking to the committee when I go back.

JUSTICE HURWITZ: They are still producing the documents?

MR. SNEATH: They are still producing the documents. The parties could try to modify it, but I don't know that the courts would feel that they have the authority to do that. I would suspect they do not.

JUDGE SMITH: Thank you, Mr. Sneath.

We will hear one more witness, and then we'll take a break.

Mr. Oot.

MS. KERSHAW: Good morning, thank you. My name is Ann Kershaw. With previous communication with Mr. Sneath, I believe, the committee agreed for Patrick and I, Mr. Oot, to adjust the schedule so we could give you this presentation this morning.

JUDGE SMITH: You're doing this jointly then?

MS. KERSHAW: Yes, we are. We are back-to-back in our ten minutes.

JUDGE SMITH: You have a total of 10 minutes then. That's fine.

MS. KERSHAW: As I mentioned, my name is Ann Kershaw. I am an attorney. I have a litigation management consulting firm. We represent and work primarily with in-house counsel for big companies, also in big cases, to realize efficiencies and improved litigation processes using technology, new ideas, and engaging in rules amending processes such as

this.

I have with me today Mr. Patrick Oot, who is the director of electronic discovery and senior litigation counsel at Verizon. Mr. Oot is here today to explain to you some of the real costs of privilege review in a real case. Then, I will spend some time talking to you about what that scenario of his privilege review might have looked like in a world where we did have a rule like Federal Rule of Evidence 502.

MR. OOT: As Ann said, my name is Patrick Oot. I'm director of electronic discovery and senior counsel. I report to the chief litigation officer at Verizon, and I work on our major federal matters. Last year I worked on about 20 of them. It's strictly managing the electronic discovery process and working on our best practices internally.

What I hope to do today is present to you some statistics in a very short presentation of a case that we worked on in 2005 and just how expensive privilege review process it.

As you see, the first slide of the presentation here shows our law firm assisted

three-tier review process for privilege and relevance.

For the first tier, we use contract attorneys. Other companies use actual associates for the first tier review.

Second tier, a staff attorney will review the work of the contract attorneys.

Finally, outside counsel will make a final judgment call on the document before it is either produced or goes to a privilege log.

In sum, for the process here, one of our main goals is protection of privilege. Obviously, relevancy assessment is also a component of this review. However, the relevancy standard is judged by a much more reasonable standard, whereas with privilege we get one bite at the apple. So if we make a wrong determination, it's perilous to us.

To start, I'm going to talk about a case in 2005. It was a recent Department of Justice second request. It was actually our acquisition of MCI. Documents were collected from 83 employees in 10 states. It was about 1.3 terabytes of data and 2.4 million documents.

All of these documents had to receive some sort of human review for both relevancy and privilege.

How did we manage the case? We hired two law firms to manage the review. The first law firm was conducting the privilege review. We bifurcated the data based upon key word search terms. We used outside counsel attorneys names that we pulled from Time Tracker, terminology like "privileged" and "confidential," about 5,000 terms in total to separate the data between the two firms.

The first firm received approximately 1.02 million documents. Those were the potentially privileged documents. The other firm was conducting relevance review and also privilege review for anything that was a key word term miss.

So this process, as you can see, 115 attorneys. And these are just contractors we are talking about now, we are not talking about associates or staff attorneys. These are just people that are working for our contract attorney agency. So a total of 225 attorneys on

preliminary review, which is a bit of a daunting cast, I'll tell you. It took us 4 months, 7-day work week, 16-hour days, all of these pertinent people working simultaneously. All of these people working continuously.

JUSTICE HURWITZ: If this rule were adapted, and one of the purposes of the rule is to save the kind of costs you were talking about, you would stop doing a relevancy review?

MR. OOT: There are search-and-retrieval tools out there that we can use to assess relevance. The distinction here is privilege --

JUSTICE HURWITZ: My question is how much of this is expended on relevance review and how much on privilege. Can we tell? It appears to be pretty equal, 110 to 115. That's why I was asking.

MR. TAYLOR: But in scope, not relevance.

MR. OOT: Scope and relevance are the same thing, I guess.

MR. TAYLOR: Yes and no.

MR. OOT: The issue here, the

distinction, I think is the privilege review is the real cost here. If someone said to me, if you gave me a strategy where I could remove all of the privileged documents from a production and merely provide all the nonprivileged documents regardless of relevancy, I could save the amount of money that we are about to see right now, I would definitely do that.

JUSTICE HURWITZ: That was my question. If the privilege were protected, would you conduct relevance review?

MR. OOT: It would be a case-by-case basis, but definitely it would be something we would consider. But We can't consider that now.

The first tier review, which we were talking about just a moment ago, for just privilege, key word hits indicating privilege, the contractors were $2.2 million. That's just the first tier review for that particular matter.

Another interesting component is the law firm billable hours which go directly to the privileged determination issue, that was $5.4 million. So the actual cost of privilege here

is $7.7 million for this one matter for one year.

MS. KERSHAW: Remember, this is just one firm reviewing the documents that out of the total population had responded to some sort of key word review. There was law firm number 2, as Patrick is going to talk about, who were reviewing all the rest ostensibly for relevance but catching documents that had slipped through the key word process.

MR. TAYLOR: Relative to the size of the transaction, what is the percentage of this legal fee to the --

MS. KERSHAW: We are not at the end yet. There's a little more.

MR. OOT: I could give you law firm billable for what the acquisition cost was. Is that your question?

MR. TAYLOR: Yes. Acquisition costs in the billions?

MR. OOT: Yes, exactly.

MR. HANGEY: But it doesn't always work that way.

MR. OOT: Correct.

MR. HANGEY: You have transactions with 20 million, Verizon does, where there are plenty of documents where the costs are in the single-digit millions.

MR. OOT: Correct. We have just plain old litigation that isn't of this nature that doesn't have acquisition cost factored into it.

MS. KERSHAW: This is a Department of Justice subpoena, so it might have a little different treatment than civil litigation.

JUDGE SMITH: You have about three more minutes.

MS. KERSHAW: I did trade my ten minutes in slot 22 for this slot.

MR. OOT: I'll move through these quickly. To break it down, the overall cost for protecting privilege here is around $13 million.

The question that's been circulating in our group is, just as you were pointing out earlier, is there a strategy that we can use to protect privilege and not be so concerned about the relevancy component of the documents? Right now, the way the law is written, if a privileged document goes to the other side, it's gone for

good.

I'll turn it over to Ms. Kershaw.

MS. KERSHAW: Thank you.

$13½ million, think about that next time you pay your phone bill. Why does Verizon have to spend that kind of money on privilege review? And I'm about to say things that all of you know for sure. It's because of risks.

Their outside counsel will tell them that will they must take every precaution, as shown by that three-tiered review and $13½ million, every precaution to avoid a mistake of a privileged document being inadvertently disclosed because in many, or some, jurisdictions that inadvertent disclosure is a waiver and perhaps a subject matter waiver as to the entire topic of the document.

In addition, claw back agreements, while perhaps effective -- when I say claw back agreements, I'm also talking about a court order -- might be effective within a particular case, there is no guarantee that it's effective outside of that case, particularly in state court. I don't know if Patrick had an

opportunity to mention it, but his company, like every company, they have lots and lots of cases in state court.

Just as a backdrop to what we're talking about, I'd ask the committee to consider that none of these advantages and positives of this rule really provide a company like Verizon with any true benefit unless it also applies in state court proceedings.

Of course, 502(a) would take care of problem number 1, subject matter waiver. 502(b), as you know, holds that an inadvertent disclosure is not a waiver. Most importantly I feel is the effect of 502(d) and (e).

MR. TAYLOR: May I, Ms. Kershaw? I'm sorry, Mr. Chairman.

JUDGE SMITH: Yes.

MR. TAYLOR: Are you positing a situation in which no precautions are taken?

MS. KERSHAW: Not at all. Reasonable precautions, which I believe is the language in the rule, as opposed to every possible precaution that money can buy.

MR. TAYLOR: But if you are going to

take all the costs of privilege review out, then no precautions are being taken.

MS. KERSHAW: No. I'll show you next the kinds of precautions that in today's world you can take using technology and other advantages that certain document review tools will provide if you use them with a strategy and with intelligence and also with the cooperation of your adversary and the court.

I'm going to skip quickly through this summary down of the three sections that we're talking about. Again, I emphasize we've got to have it applicable in both state and federal proceedings. We're not, you might have noticed, talking about 502(c) in our presentation.

Talking about reasonable precautions and cost saving strategies. Thinking about a world where 502 allows us to have reasonable precautions and allows us to negotiate with our adversary or the court for an appropriate order that protects us if we make a mistake in our agreement about how we're going to do this with reasonable precautions, presents a risk that we otherwise may not have had.

One option would be, instead of what we call a brute force review with the lawyers reading every possible document, to interview Verizon's in-house attorneys, find out the domain names or the URLs of the law firms they work with. They all have one, and it's in the email. If you could do that, ten as to the email you could electronically and very quickly and for virtually no cost remove all of the emails sent to and from a law firm and put it in a separate bucket.

What does that do for you? Let me just say that there is no question that there is going to be email that doesn't have a law firm domain name in it that is privileged and that would end up being produced. There is also no question that there are documents with law firm domain names that are not privileged that would be pulled aside and put in the bucket.

But I would submit to you that if you're taking a reasonable approach to this, the chances of something really very important in email not having a law firm domain name on it is probably pretty small. And if I have an

appropriate agreement with my adversary or court order, if and when that were to happen, I'd know that it's not going to be a mistake that's going to ring around the whole United States, that it's going to be confined to my case and the document will be returned to me.

If I have taken these documents, these emails, with law firm domain names and put them in a separate bucket, I now have a lot of options. What's really important from my perspective, and I think Patrick's perspective as well, is the ability to have choice here. Every case is different. Every situation is different. If we can have options, then we can manage these processes in ways that can save money and do it faster.

One option might be to agree with my adversary that I'm just going to take all that stuff and hold it aside, I'll produce very quickly everything else. I have my claw back agreement.

Now, adversary, after you've had a chance to look at this stuff and figure out what you really want and what you're really after,

tell me, and now I'll go to that bucket that I held aside. And now, because I know what you're really looking for, I can use key word searches and other methods to sort and sift and review only the top or whatever you think you might really want.

Another option would be to take that bucket I've set aside, and now I know, because I've talked to the lawyers at Verizon, I know what are the active matters that we really care about and what are the older matters that are privileged but they were settled.

I can't tell you how many times I have gone into a law firm in this country and seen people doing privilege review over documents that nobody really cares about that much anymore. Wouldn't it be nice if we had the option to separate that out from the active matters and do a privilege review on the active matters, again holding aside the other unless and until the day comes when my adversary says there is a need to go there.

another option, of course, would be a quick peek.

MR. TENPAS: To some degree you seem to be positing a world where you're putting into the bucket stuff that might not be privileged at all. I understand the reverse situation and interest in overproducing, so to speak, and not having that harm you. But do you read the rule about reasonable precautions as something that is going to allow you not to produce materials that are not privileged?

MS. KERSHAW: No.

MR. TENPAS: That is sort of your option 1, for example. You've put in a bucket every email to any law firm you've ever dealt with. As you indicate, although it goes to a law firm, it may still not be privileged.

MS. KERSHAW: That's right. No, I'm not saying you would never produce. I'm just saying you will hold it back for a second-tier production after we've all figured out exactly really what we need to go for.

It used to be in the old days we took all the boxes from the warehouse end, because we didn't and couldn't get into those boxes and find out what was in them in time. Now we have

electronic search tools that allow us to get out these materials if we know what it is we are looking for and we have an intelligent approach.

I'm about to show you another option. Let me just explain. What you're looking at here is what we call an interface. If you were doing a document review electronically and we had put a bunch of emails in a database, you would go to a secure website and you would log in.

These are listings of the documents. These particular documents come from Enron's production to the California Energy Commission. It was a pool of some 500,000.

I'd like to add, because I spent several hours looking around these documents, if you want to know what it feels like to live in a world without privilege, attorney-client privilege, and as a lawyer how shocking it was, go Google on Enron.

On the websites there are all these Enron documents. You can search the Brobeck firm, as I did. It's shocking how much privileged material is up on those websites that

was produced in that situation. It's, frankly, a little scary.

But I did the search, and guess what I found. This is showing you how you look through. You just put in the words "Brobeck" and "electronic documents." I found a document, it is a little hard to see, but I'm going to highlight some pieces.

Clearly you can see up there the Brobeck domain name, URL. It says, "Review of electronic documents. We can review the pace dictated by the litigation," and it goes on. I'll show you the whole document. It's hard to see. Basically, this is an internal lawyer communication at Enron where they are discussing how they should manage the document review and whether they should do it in-house and what exactly they should give to the outside law firm, etc.

This particular searching tool, here it has a feature that says when you find something, you can ask it to find everything similar. So I can take that document that I found, submit it to this "show similar"

function, and it will show me, as it does here, in this case seven. Often it's a much wider net. All these documents, I've looked at them, they're all about the same thing.

Now, wouldn't it be nice if I could show my adversary or the court this particular application and this function and obtain agreement that when I do "show similar" and I grab another 50 documents all on the same privilege topics, that I could tag all those and not have a lawyer read every single word? Wouldn't that save us lots of time? And wouldn't that be a reasonable precaution?

I think if you spent any time looking at how this works, you'd agree that not only is it reasonable, it is probably more effective than people reading every document. It's very hard for a hundred different lawyers reading 500,000 documents sitting at different desks to identify the fact that there are 50 of them all on the same topic that I stumbled across first.

Here is the related document. Again, frankly, I find it shocking. They are talking about meetings and decisions about what they are

going to produce. I'm happy to show this offline to anyone who is interested, but I expect that my time is moving along here.

In closing, the rule would provide limitations and protections that allow us to negotiate reasonable, less expensive, and less time-consuming review processes. We think it is a good rule. We think it also allows courts to help us out in the case where we've got a plaintiff who doesn't care, doesn't have the same burden in discovery and review that we do.

We can propose reasonable processes and show the courts ways that we might go about doing these things that would save an awful lot of time and money. We're talking a lot of time, months versus weeks. It's really startling, the time you can save, and the money. This is our closing slide, 13½ versus 502.

Thank you.

PROF. BROUN: Have you gotten a ballpark estimate on how much of that $13.5 million would be saved?

MS. KERSHAW: I would argue it's the cost for the privilege review that they siphoned

off into key words. Do you agree?

MR. OOT: That's one way to look at it. Alternatively, I think it goes back to the relevancy standard. If we didn't have to determine relevancy, we wouldn't have to determine privilege. So I would think that the number could be at least half or much larger than that.

MR. TENPAS: I don't understand that. Reasonable precaution, you still have to do something. Presumably you have spent 13 million on your privilege review. It's not zero.

PROF. CAPRA: Maybe the issue is to describe the scenario you undertake with domain name search. Just as an estimate, how much would that have cost in the Verizon matter?

MS. KERSHAW: Gosh, if you would hold it aside?

PROF. CAPRA: You do what you said, do the bucket thing.

MS. KERSHAW: That takes 20 minutes. That's easy. That's nothing. You can find that stuff and move it over. Then the question is how much of that do you want to review if I have

an agreement with my adversary.

MR. HANGEY: Why would I give you that agreement?

MS. KERSHAW: Because you might have the same problem.

MR. HANGEY: So you could all litigate a lot faster if we just didn't have that.

MS. KERSHAW: No. Right up front, of course, we have to produce.

MR. HANGEY: Not a foolish idea, by the way.

PROF. CAPRA: At least what is saved is you don't have to review all of the stuff that is not in the bucket.

MS. KERSHAW: Right. You can save all that time -- privilege review holds up production tremendously -- if I can do this and I can have comfort that the some that are going to slip through are either not going to be that important or I'm going to get them back and it's not going to be waiver for the whole country.

MR. HANGEY: But the good stuff is the stuff where you copy your attorney and other people sufficient to waive the privilege. As a

trial lawyer, I can tell you that most of the great documents I've ever come across fit that description.

MS. KERSHAW: I can take care of that. I can go to that same bucket and, let me see now, let me find all of those emails that have a law firm domain and somebody outside the privilege circumstance. We can do that. We just have to talk about it.

MR. HANGEY: That brings us back to Mr. Taylor's question: What's that going to cost? What's the real savings against your $13.6 million?

MR. OOT: Oftentimes, we find ourselves in company-to-company litigation just as she was describing, where both of the players are sort of equal on the math. I've done some initial analysis in the past, and the figure is in the millions that we would save in billables using technical strategy.

This is something that we have been looking at internally for some time. Obviously, the hurdles that we have to overcome, like Federal Rule 502, are very important prior to

using these strategies.

MR. TAYLOR: I take it that an additional advantage of this is that it would move the litigation more quickly, that is, that you could do rolling productions --

MS. KERSHAW: Absolutely.

MR. TAYLOR: -- much easier. You wouldn't have to do all the privilege review and all the privilege log before you start producing some things that you might not otherwise.

MS. KERSHAW: Absolutely.

MR. HANGLEY: I got a little lost on what you're doing on the other side of the equation, the relevancy. Are you just disclosing everything so that you're moving that component of the cost over to the other side?

MS. KERSHAW: Under the new way or the old way?

MR. HANGLEY: The new way.

MR. OOT: Under the new way, relevancy, at least internally to our company, is much less important than privilege. We would overdisclose on pretty much any matter just to move things along faster.

JUDGE SMITH: You're going to have some limits on relevancy. The court is not going to let you throw every document in the shop.

MR. OOT: Correct. We would negotiate key word search terms with opposing counsel. There are a variety of different methods you can use to limit the scope of that relevancy.

MR. TAYLOR: You're responding to a document request.

MR. OOT: Correct.

MR. TAYLOR: That's the terms of the search. The document request dictates the terms of the search. Whether you call it scope or relevancy, you've got to be sure that you search all possible locations for documents called for by the terms of the search.

MR. OOT: Sure.

MR. TAYLOR: You're not going to turn over every document in Verizon's file.

MR. OOT: That would come out during the meet and confer. Everything we do is very custodian-based. The initial disclosures are charts, and they would help us select who they

are interested in talking to, whether it be in deposition or whose documents they are really looking for.

JUDGE SMITH: Thank you.

PROF. CAPRA: Thank you very much.

JUDGE SMITH: We are going to take a ten-minute break. Then we will return with Mr. Neale.

(Recess)

JUDGE SMITH: Let's resume with Mr. Neale. And let me mention that we have been joined via telephone by Judge Robert Hinkle from Florida, who was unable to be here because of an emergency. Glad to have Judge Hinkle. Feel free to participate.

JUDGE HINKLE: Good morning.

JUDGE SMITH: I hope you have a lot of good questions ready.

Mr. Neale.

MR. NEALE: Good morning. My name is Paul Neale. I'm the executive vice president of Doar Litigation Consulting. Thank you for this time today.

As one of the only, if not the only,

nonlawyers testifying before the committee today, I have a unique perspective which will provide you with some practical and empirical insight to consider. My testimony incorporates the dual roles I play within my company.

First, as an executive, I interact with and seek advice from our general counsel on a daily basis on matters relating to the operations of our company and our management, of potential and pending legal actions.

Second, acting as a consultant within my company, I advise corporations and their counsel on assessing and mitigating litigation risk and on the best practices associated with building a cost-effective defensible discovery plan in response to regulatory actions, civil litigation, and white collar criminal matters. In this role, I have consulted on many of the seminal cases that go to the heart of the discussions on 502.

For example, I was the testifying expert before Judge Sand in the United States v. Rodriguez matter on the issue of the government's inadvertent disclosure of

privileged work product. I'm also currently leading the team of consultants advising the plaintiffs in the widely reported Hobson v. City of Baltimore matter before the Judge Grimm in Maryland, who has incorporated nonwaiver and claw back provisions in his orders and has spoken extensively about selective waiver.

At the outside, like to say that I'm highly cognizant of the issues in the proposed rule, and I commend your efforts in this regard. I'll limit my testimony to sections 502(b) and 502(c).

Starting with 502(b), related to inadvertent disclosure, in today's complex litigation climate, given the sheer volume of information that needs to be addressed and the method for doing so, the inadvertent production of privileged material is virtually inevitable. The result has been a protracted legal wrangling over what constitutes a waiver, among ever more sophisticated litigants focusing on the methodology to determine privilege and how the information was produced.

I believe the proposed rule can be

made stronger with a few changes to the language. First, I'm concerned that the rule as it currently stands only offers protection for privileged documents that are inadvertently produced in the context of federal proceedings. The inadvertent production of privileged documents in matters initiated at the state level is not protected.

In my experience, litigates are often dealing with both state and federal matters at the same time. In fact, the types of matters that are most affected by a rule change meant to reduce the burden and cost of privilege review are those that relate to the types of issues that involve government inquiries at both the state and federal levels and parallel or derivative suits in state and federal courts.

Corporations cannot streamline their privilege review processes unless the rules consistently apply to both federal and state jurisdictions. Given that one of the main motivations for the proposed rules is to reduce the burden of time, cost, and effort of document screening for privilege, I strongly urge the

extension of this rule to state jurisdictions.

JUSTICE HURWITZ: I know you've prefaced your remarks by saying you're the only nonlawyer testifying in front of us. But if a state wished to do away with the attorney-client privilege, as I take it would be its constitutional privilege to do, would you then impose a privilege on the state even though it is substantive law didn't have one?

MR. NEALE: I'm sorry. Could you repeat that.

JUSTICE HURWITZ: Part of my difficulty with imposing on this on initial state proceedings is that there is no federal definition of attorney-client privilege. We are dealing here with common law privileges. States are free not to have an attorney-client privilege or to limit it in any way they see fit.

I'm just saying I have a difficulty with the notion that we are going to impose a rule of waiver of privilege on states when we don't have the able to impose a privilege rule on the states.

MR. NEALE: I recognize that the issue of state applicability at least in my view applies more greatly to 502(c) that I will talk about in a little bit, and is probably is not as significant issue at the state level. Any protection of inadvertently produced information, in my view, is a good thing. But to the extent that there are state laws that automatically waive privilege based on inadvertent production, I would say that this needs to be applied at that level as well.

I also think that the committee should clarify what constitutes reasonable precautions to prevent disclosure. Needless to say, what constitutes reasonableness and what actions are considered adequate precautions are highly subjective and have been and will continue to be the focal point of legal battles about privilege waiver.

Again, given the goal of reducing the burdens associated with the traditional document-by-document privilege screening process, the use of technology, like the inference system, which Ms. Kershaw and Mr. Oot

just discussed, to address the huge proliferation of discoverable materials should be specifically considered by the committee.

The committee should be aware of and consider how litigants are dealing with document-intensive litigation and what technologies and method they are using and may use in the future to facilitate a more stream-lined privilege review.

When a party uses statistical, analytical, and/or linguistic tools in lieu of traditional review methods, would that be considered as taking reasonable precautions? Studies have shown that these analytical software applications are at least as accurate as, if not more than, traditional human review methods. Nevertheless, they too could certainly result in the inadvertent production of privileged information.

However, these technologies do allow enormous reductions in time cost and effort over traditional review, and there is no doubt that the use of such technologies being a key component of managing litigation and is only

going to increase in the future.

PROF. CAPRA: Any time you start talking about technology, you risk the concern that once you start writing something in a rule or committee note, it is outmoded essentially before it becomes law. Assuming that, you wouldn't want to get too specific in what you say is a reasonable precaution, right?

MR. NEALE: Right, exactly.

PROF. CAPRA: So what general language? "Statistical, analytical, and linguistic tools"? What would you suggest?

MR. NEALE: My ultimate recommendation is that "reasonable precautions" be changed to "reasonable methods" and that as a note the use of technology as part of the methodology for the review and production of information be indicated specifically.

PROF. CAPRA: Why wouldn't that be a precaution? I don't mean to quibble, but why wouldn't what you just said be a precaution as well as a method? What's the difference between the two?

MR. NEALE: I think that the overall

review for privilege is more of a methodology, and it's a little less subjective if you use the word "method."

PROF. BROUN: Would you mention anything specifically with regard to technology? For example, you used "analytical." What else?

PROF. CAPRA: "Statistical, analytical, and linguistic tools."

MR. NEALE: In most large productions today, technology plays a very significant part in the production anyway. The concern that I am expressing here is that the courts can interpret the reliance on technology, and in fact a third party applying that technology or the rules that come out of that system, to be a waiver if it was not considered a reasonable precaution.

PROF. BROUN: I understand that. What I'm getting at, and I think Dan is as well, is the language that might be useful. The words I think you suggested were "statistical, analytical, and linguistic methods, methodology"?

MR. NEALE: "Tools."

PROF. CAPRA: Thank you.

MR. NEALE: I also have great concern about the "should have known" language in 502(b). I would like to share with the committee my experience on matters relevant to this issue.

In my consulting engagements, we typically deal with very large, complex productions of electronically stored information. Once a privilege and relevancy review is completed and productions are made, it is often the case that the documents that were produced are not reviewed again by the producing party for several months, if at all, particularly in government proceedings, where you typically sit back and hope the government doesn't come knocking again.

Therefore, it is oftentimes the case that several months or even years pass or it is not until the receiving party identifies a privileged document that was produced that the producing party knows of the inadvertent production.

The key issue is here is should they have known and what criteria should be used to

determine the standard. To illustrate, I quickly refer to the Rigas matter where we were retained by the defense. Shortly after the government's production to the defense, we discovered that the government had produced material that was obviously privileged. We notified our clients, who in turn notified the government and the court.

We and our clients felt that the government had waived their privilege due to the circumstances surrounding the production. There was a protracted briefing period, an evidentiary hearing, which took months and at a significant cost to both sides, after which Judge Sand did conclude that the government had taken reasonable precautions to prevent the disclosure and had acted promptly.

In this case, the standard of when the government should have known was not discussed, so the point of intimation by the defense was judged to be the time at which the holder of privilege knew about the inadvertent disclosure.

In conclusion, I ask that the committee consider clarifying removing the

"should have known" language.

JUSTICE HURWITZ: Would you remove it entirely or would you replace it with "was reasonably placed on notice"?

MR. NEALE: I'd remove it entirely.

JUSTICE HURWITZ: In the circumstance where, as in your case, the recipient of the privileged information sent a letter to the other side saying I've got the following 55 documents, all of which appear to be privileged, would you then hold as a matter of law that the other side knew at that point?

MR. NEALE: That was the point.

JUSTICE HURWITZ: You really are talking about reasonably should have known, aren't you, under that circumstance as opposed to know?

MR. NEALE: No. I'm actually stating at the point at which the producing party was notified is the point at which they should be acting promptly from that point forward.

PROF. CAPRA: On those facts, it's the same, isn't it? That's when they reasonably should have known and also when they knew?

MR. NEALE: You could argue that either a sufficient period of time elapsed or some other steps should have been taken that would have allowed them to otherwise know that they had produced the information. That is the subjective.

JUSTICE HURWITZ: My concern about the word "know" is I don't want to end up in litigation later where somebody says, I just got a letter from plaintiff's counsel with a list of 75 documents, I didn't know they were privileged.

My question is, shouldn't we then say either when you knew or were placed on notice, were placed on some duty of inquiry, or some words like that? All of us have been involved in lots of litigation --

MR. TAYLOR: Whichever comes first.

JUSTICE HURWITZ: Whichever comes first, where you've gotten a long letter saying I've got 75 documents here and I think X of them might be privileged, and the other side does nothing about it.

MR. NEALE: At that point, that would

require you to act promptly.

MR. TENPAS: One of the hypotheticals raised at one point was the situation where a party who was receiving discovery, counsel went through it, found some documents that appeared to be privileged, returned them. They keep going. A couple of weeks later, they find some more, return them.

Part of the argument for sort of the reasonably should have known was the person who had experienced this was making the argument at a certain point they just sent a letter essentially saying it appears that your production was so sloppy that it utterly fails, and we are reasonably putting you on notice that we regard anything else we find as having been deliberately produced.

Is that a common kind of experience, in part, that "reasonably should have known" was designed to deal with that situation, to allow who is on the receiving end to sort of fire back and say, we consider it so bad that you have now waived and we're not going to keep returning things to you as we discover them?

MR. NEALE: I think that goes to the point of reasonable methods or precautions. If the production was so bad that you produced so much privileged information, then something was wrong in the methods or you did not take the proper precaution to protect it.

Once you're notified that a production was made, that's the point at which you know. If time lapses between then and your assertion of privilege that related to additional documents, I would say that that period of time indicates that you may have waived that privilege.

With regard to 502(c), I respectfully request that the committee withdraw the proposed section. Consistent with my opinion on 502(b), I believe that the absence of state applicability raises serious concerns.

In my consulting experience, I've worked with clients in the investment banking, mutual fund, pharmaceutical, and insurance industries who are frequently the subject of state-led regulatory inquiries. The specter of discovery in derivative suits is a key

consideration for those companies and drives their decision-making during the regulatory actions.

I would like to offer what I think is a very good example of this. My firm is currently involved in the white collar defense of individuals accused of bid-rigging activities in criminal proceedings at the state level which are derivative of state investigations into the insurance industry.

During the state investigations, insurance companies, as well as insured companies as third parties, produced massive amounts of information to states attorneys general, who in turn then produced them wholesale to the criminal defendants without any further review or notice to the producing parties from the initial inquiries.

Last week I just happened to be at a surety conference in San Francisco which was attended by corporate counsel for many of the insurance companies whose information was ultimate produced in that criminal action. I spoke to lawyers from three of the companies,

and none of them was aware that the information they produced as a result of subpoenas from state regulators was produced in the criminal case.

My point is that not only were protective documents not protected from waiver, but companies were not even given a chance to consider this issue.

JUSTICE HURWITZ: I understand that as an argument -- which I don't agree with, but at least I understand it intellectually -- for broadening 502(c). But why does it make you 502(c)?

MR. NEALE: The lack of state applicability is one of two reasons I oppose it. Without state applicability, I oppose it all together. For issues of attorney-client privilege, I oppose it outright.

JUSTICE HURWITZ: If it were applicable to the states, God forbid, would you support it?

MR. NEALE: I would still not support it, but I would like it better than in the form it is now.

MR. TENPAS: There may be a constitutional impediment to our being able to do anything in a federal rule about the consequences of a disclosure in a state proceeding where that is later attempted to be used in another state proceeding.

Why is it, if we are constitutionally impaired or Congress would be constitutionally impaired from addressing that problem at all, that you say the better solution is nothing at all? Theoretically, you could solve 70 percent or 80 percent of the problem, or maybe it's only 20 percent, but why not do that?

MR. NEALE: Again, I'm thinking mostly in the context of matters which are being investigated where suits are pending at both levels, so that the process of defending or making a production within the context of a regulatory inquiry which is being led at both the federal and state levels doesn't allow you any relief in considering your selective waiver options if you need to actually employ different processes for producing information at different levels. So my view is given the complexity of

the matters, that doesn't offer much relief.

MR. TENPAS: I guess I don't understand the logic of the argument. You have no option now.

MR. NEALE: The option now is not to waive privilege.

MR. TENPAS: You would continue to retain that option not to waive at all. This gives you at least another tool. It may not be the tool, the perfect tool, but why you prefer no tool or a bad tool to no tool is not clear to me.

MR. NEALE: Getting to the second point, as an executive within a company that has their own general counsel, I just generally oppose any rule that makes it easier for companies and gives them some type of benefit for waiving privilege. The two are related, and maybe one should have come before the other.

JUDGE SMITH: Can you wrap it up, Mr. Neale.

MR. NEALE: On that point, I just feel that it would cause the erosion of the attorney-client privilege. I think it is critical for

employees to be able deal openly with general counsel. I have seen also in matters that there is a heightened likelihood of executives destroying information when they feel that they may be implicated in a particular action for alleged wrong doing. I think the selective waiver would actually heighten that even further and cause more suppressive behavior.

PROF. CAPRA: We wouldn't want to encourage people to violate the federal criminal laws, that's for sure, through a rule of evidence.

MR. NEALE: Thank you.

JUDGE SMITH: Thank you, Mr. Neale.

Mr. Sellinger.

MR. SELLINGER: My name is Philip Sellinger. I'm with Greenberg Traurig. I manage the New Jersey office. I'm speaking in my individual capacity today.

One of the purposes of the proposed rule is to reduce litigation expense specifically with respect to privilege review for attorney-client and work product privilege. I speak on sole question of urging that the

application of the proposed federal rule be applied to the states as well.

Let me give you two scenarios that arise in my practice and the practice of my law firm. The first is parallel multidistrict litigation. There may be a single federal multidistrict litigation with several or dozens of parallel state court litigations simultaneous. Somebody who is representing the defendant in one of these cases, producing documents that apply can have an effect in any of those dozens of cases that are pending. That's one scenario.

Another scenario is really unknown litigation. One deals with a case of national scope under a class action, for example, under CAFA. I have a case that was filed in state court pre-CAFA, litigated in state court for over a year, a lot of documents were produced, and then that case was voluntarily dismissed.

The case was subsequently refiled in another state post-CAFA, removed to federal court. After another year of litigation, that case is now being voluntarily dismissed. And we

believe will be refiled again in yet a third jurisdiction.

In producing documents, we are worried not only about the known jurisdictions where we are dealing with that litigation but unknown jurisdictions, which essentially means that in defending any case of national scope and producing documents in any case of national scope, as a defense lawyer we need to assume the broadest scope of waiver and have to essentially produce under the assumption that the broadest scope of waiver applies.

JUSTICE HURWITZ: If this rule were adopted in its current form, you would not have to make those assumptions in federal court?

MR. SELLINGER: You would not have to make it in federal court, but you do have the problem of state court.

JUSTICE HURWITZ: Do you have a view about Congress's Article III power to dictate to state courts for future use in state proceedings the consequences of production of documents?

MR. SELLINGER: I'm actually not a constitutional expert. I've read the

submissions of others. I'm relying on them for my understanding that Congress would have to enact legislation to do that for it to be proper. But that is not my expertise. I'm really here to describe the problem.

The problem is that when, as in the real world, you're defending these cases, you can't even research what the applicable law of a jurisdiction is because you're worried about the unknown case that gets filed tomorrow. So I assume in every case the broadest conceivable waiver, and I have to take steps to prevent against the broadest conceivable waiver.

You have seen some of the statistics on the cost of litigation. I can't break down for you those parts of the costs that are related to waiver reviews from those parts of the costs that are related to production for relevance and substantive review. I've never done any empirical studies.

But I've been involved in a lot of litigation. We are spending millions of dollars in many of these, and in many of these I know that those costs could be substantially reduced

if we were not concerned about inadvertent production problems or scope of waiver issues and we could simply make production taking reasonable precautions and assume that any inadvertent production would not be deemed a waiver, and that if there was a scope of waiver issue, it would certainly not extend beyond the particular document produced.

I'm happy to answer any other questions.

JUDGE SMITH: Thank you, Mr. Sellinger.

Mr. Nelson.

MR. NELSON: Good morning. My name is Mike Nelson. I'm with the Philadelphia based law firm of Nelson, Levine, de Luca & Horst. I'd like to address my gratitude to the standing committee and the Advisory Committee on Evidence Rules for proposing Federal Rule 502.

I do see 502 as saving significant amounts of money and time in the protection of inadvertent disclosure of privileged documents. I would support all aspects of 502 except selective waiver.

My practice is in complex insurance litigation with a specialty in class action litigation. As part and parcel of that, I get into regulatory as well, because these two seem to intersect quite a bit. As part of that, I get involved in business practice consulting with clients as to whether or not the business practice that comes under attack is going to be something that's under regulatory scrutiny also or also part of future class action litigation.

Today I'm going to specifically address three topics. I want to talk about inadvertent disclosure. I want to talk about the selective waiver issue. Then I, too, am going to echo the sentiment that despite the state rights arguments, Congress should be asked to make 502 or those aspects of 502 applicable to both state and federal courts. I think I can give you a little bit more practical perspective on that.

With respect to 502 and its applicability to state courts, I certainly understand the state court arguments and the state court rights to determine whether or not

the attorney-client privilege is going to look one way in one state versus another way in another state.

But when you're trying to give counsel to a corporation as to how it should handle its business practices when it's faced with litigation on the same front in many states, it's hard to give advice and it's hard to give a corporation the security blanket it needs when it is determining whether or not there are documents in its production that are arguably attorney-client privileged or documents that could be turned over to state agencies or federal agencies that could be attorney-client privilege.

I think you do have to have a uniform standard. If you don't do that, I think you're going to get inconsistent results.

JUSTICE HURWITZ: Would that require Congress to codify nationally the law of attorney-client privilege?

MR. NELSON: I'm going to use the exact same escape used before: I'm not a constitutional expert. But I believe Congress

has, under the Commerce clause, based on the comments I've read from submissions, the authority to do that. I realize this is going to be a difficult battle, but it is certainly something that is worth taking up and having evaluated by members of Congress anyway.

With respect to 502(b), I'd like to talk about one case that I have. It's a national class action, and it's brought here in one of the district courts in New York. We received a production request in that case. It's going to be a little bit of a different story than you saw up there on the PowerPoint slides.

We gathered approximately 6,000 documents, and that ended up being about 260,000 pages. There were 436 authors on those documents, 860 recipients, 473 ccs. Again, in terms of the scope, not that large. That's 1700 names.

Of those 1700 names, you could turn to the company and say, who of these names are lawyers? The only way they do that is they go to human resources and say, of all these names,

which are these are lawyers? We get back against that the 1700-name list a list of 79 lawyers, and then we go back into the documents and look to see whether or not attorney client-privilege attaches.

The reason I bring that case up is because that is not a big document case anymore. That's a typical document case. That's what's run-of-the-mill, day in and day out. That case took attorneys in my office working with the client approximately 250 hours to go through the document production process in creating the privilege log.

You might ask, as you have been, what's the benefit of 502 if you are not going to necessarily save that much time? I'm going to suggest initially that even if 502 is enacted, it's not going to save that much time, because we still haven't really worked out what is reasonable and we still haven't worked out what is inadvertent.

I know there has been some discuss as to what inadvertent is in some of the cases, and I know there is some reference to this

reasonableness issue. But, again, going back to the cases cited in your own materials, those cases go back to paper cases, not electronic cases.

JUDGE SMITH: Over time, the courts will work with that, if there is a rule, right?

MR. NELSON: Absolutely. But that's why corporations need some guidance and some protection right now, where there is none there in some states. In some states it's the subjective standard where, if you waive once, its a forfeiture of the attorney client privilege and work product protection.

So I think we need to have this rule in place. It needs to be in place not just for the corporations to have some sense of security as to how these things are going to be handled in the future, but the attorneys need to have some guidance on how the courts are going to look at this. And we need to make sure the courts are not bothered with unnecessary discovery disputes when it can be resolved with a rule that the attorneys all come to respect.

I would suggest that reasonable

precautions be looked at not from the perspective of one or two documents that let the cat of the bag but from the process of the whole. I would suggest that be incorporated into the committee's notes, that it look at the methodology used to go through the process. I do think, as courts look at these one or two cats that get out of the bag, it's going to be Monday morning quarterbacking on how did this one document get out.

With respect to selective waiver, I do think selective waiver is going to encourage more of a climate of you have to give these things to the regulatory agencies. I am concerned about that. I am deeply concerned about the erosion of the attorney-client privilege in general in this country, and I don't see selective waiver helping that.

I'd like to point out one point that I haven't heard yet talked about, and that is that government agencies are enlisting private law firms to do a lot of their bidding for them. You can look at the tobacco litigation and the average wholesale price of pharmaceutical cases

to see plaintiff firms getting involved in what has been traditionally government agencies. I am troubled by that as well.

In closing, I'd like to thank you for your time. I strongly encourage the passage of 502, except for (c), and I would ask that you consult with Congress on its applicability to state law. Thank you.

JUDGE SMITH: Thank you, Mr. Nelson.

Mr. Myles.

MR. MYLES: Good morning. My name is Russel Myles. I'm a partner in the Alabama law firm of McDowell, Knight, Roedder & Sledge. I too would like to thank the committing for allowing me to meet with you and speak today on these issues.

I am going to address three items in the proposed rule: First, the application of the waiver standards embodied in proposed Rule 502 to both state and federal rules; second, classification of the notice to proposed Rule 502(a) that subject matter waiver will be limited to those circumstances in which a party is attempting to use previously disclosed

information to mislead the court or otherwise gain an unfair advantage; then, third, elimination of the "should have known" language in proposed Rule 502(b).

This process, of course, started with the request from Congress that this committee create a rule that will not only clarify the rules governing waiver of privilege by disclosure but will also reduce the substantial costs associated with the privilege reviews. The original draft, as we know, contained language that sought to achieve the twin objectives of this mandate in part by making the rule applicable in both the state and federal proceedings.

As I understand it, due largely to concerns related to congressional authority and federalism, the proposed rule was, as we know, redrafted to limit its application in the state courts to those situations in which the initial disclosure occurred during a federal proceeding.

Like others who have been before you today, I would like to see the committee return to its initial position and recommend that

Congress make the waiver standards fully applicable in both state and federal proceedings.

Judge Hurwitz, I know that you asked earlier if the proponent of that position would take that position if the state had no privilege rules. I think the answer to that question, if I may, is that if there is no privilege, there can be no waiver.

I am also not a constitutional lawyer. I have, though, litigated many Federal Arbitration Act issues. As all of you know, many states in this country, perhaps most states, have a prohibition against predispute arbitration agreements. That is usually by state statute. The state says, as Alabama does, that you cannot have an enforceable, binding predispute arbitration agreement.

Of course, the Federal Arbitration Act tells us all that if there is in any way interstate commerce at issue, then, guess what, you can have, pursuant to the Federal Arbitration Act, a binding predispute arbitration agreement.

In Alabama and perhaps in other jurisdictions, we had years and years of litigation about how much interstate commerce was necessary in order to have that binding agreement. With the latest case out of the U.S. Supreme Court, which I think was directed to the Alabama supreme court, telling that great court that they got it wrong, it's a very, very small amount of contact that's required now.

JUSTICE HURWITZ: Except if guns are in school yards?

MR. MYLES: I'm dealing strictly with economic issues. You're right, your Honor.

As many others before me today have said, and I do believe this, the efficiency and the cost savings sought to be gained by proposed Rule 502 will be substantially lost if these standards apply only in federal proceedings.

Over the years, I have, as have my partners, represented a wide array of commercial clients in various types of litigation. One of the major concerns that these clients have is and has been the uncertainty and unpredictability that is inevitable now in

modern litigation. I'll give you one example.

In a recent series of disputes in which a client was being sued in several jurisdictions by similarly situated plaintiffs, some in federal court, some in state court, we were put in the position of having to determine whether or not we could assert an advice of counsel defense in all of these cases.

We determined that we would not assert that defense, which we knew would require a voluntary disclosure of certain privileged communications, because we were concerned that while the line on complete subject matter waiver might be held substantially in the federal court proceedings, we were concerned that that line could not be held in the state court proceedings because of the uncertainty of that issue.

One matter that complicated the issues was substantial communications involving many issues related in varying degrees to the subject matter that we were litigating, not all of which, though, pertained to, in our estimation, the advice of counsel defense. Because we were uncertain how broad the proposed voluntary

disclosure would be interpreted, however that waiver would go, we chose not to assert the defense.

If we had had a simple, uniform standard, such as that as I think is found now in 502(a), that was applicable in both the federal proceedings and the state proceedings, I cannot tell you that we would not have made the same decision, but our position in being able to advise our clients would have been substantially improved, because we would have had great predictability. That, in my experience, has always, as a lawyer who does nothing but litigation, put me in a better position of advising me client with regard to these particular issues.

In that same litigation, our privilege review of nearly 3 million pages of documents was dictated by what we understood would be the most severe ruling if we had an inadvertent disclosure, which meant of course that there were substantially greater efforts and greater resources expended to guard against such disclosure.

Again, obviously I think it goes without saying that a uniform rule that applies in both federal and state court proceedings would go a long way to reducing the preproduction costs associated with those kinds of document demands.

Having said that, I think that if we take into consideration the twin goals of finding some uniformity that can be applied to this type of litigation or these sorts of discovery requests, discovery demands, and the reduction of costs, the committee's objective, as I understand it, therefore is to propose a rule that strikes the proper balance between a requesting party's need for information and the burdens imposed on a producing party. In my opinion, as I've stated, the best way to accomplish these goals is to have a rule that applies in both federal and state court proceedings.

I understand, as we have discussed, that there are federalism concerns that must be addressed. But I believe that the proper thing for this committee to do is to fashion a

recommendation that advocates federal and state court application and leave to Congress the task of determining how best to resolve the federalism issues.

PROF. BROUN: You referred to a case in which you were concerned about waiver of privilege for advice of counsel. You're aware that, at least in the notes, we have not talked about that particular kind of waiver. We have talked about waiver by disclosure and that the rule was not at least intended to apply to advice of counsel. Would you want to amend it to apply to advice of counsel?

MR. NELSON: Here is what I think the rule does, Professor. It would have given me a greater sense of predictability in that situation. You're absolutely right. I'm familiar with the rule, the proposed rule and the notes. We were going to be making, because we considered asserting that defense, a voluntary disclosure. 502(a) would, I believe, kick in at that point.

The "ought in fairness" language, I think this is addressed in the notes, would mean

that there should not be a disclosure beyond what is necessary or essential to understand what's being produced and to avoid misleading the court or your opposing party. I think that would have allowed me to look at the state court issues and better advise my client.

PROF. BROUN: Thank you.

JUDGE SMITH: You need to wrap it up.

MR. NELSON: I have addressed the 502(a) issue and the 502(b) issue in the paper that I have submitted. So I'm finished if you're finished with me.

JUDGE SMITH: Thank you.

MR. NELSON: Thank you.

JUDGE SMITH: Mr. Merten.

PROF. CAPRA: Do we have your statement?

MR. NELSON: It was submitted on Friday afternoon.

PROF. CAPRA: It's on the website.

MR. NELSON: He does have it.

PROF. CAPRA: Thank you.

MR. MERTEN: Good afternoon. Thank you for the opportunity to be here today as

well. I'm a partner in the law firm of Partridge, Snow & Hahn in Providence, Rhode Island. My practice concentrates essentially in complex litigation involving commercial disputes, products, and products liability.

PROF. CAPRA: You have not submitted?

MR. MERTEN: I have not. I'll rectify that afterwards.

A lot of my clients are national clients that have the opportunity to be sued in Massachusetts and Rhode Island. My practice is in the federal and the state courts, both. I'm a member of the LCJ and the FTCCJ which brings me here today.

I have traveled here today because I have become increasingly concerned about the threats that are being posed to the attorney-client privilege, both because of practical and economic and technological issues and because of the zealousness, I frankly say, of prosecutors.

What I would like to do today is focus mostly on the state and federal applicability, which I think is an important issue and one that this committee is wrestling with, and, if I have

time, the 502(c) issues.

I'm coming after a few practicing defense counsel who all have come to you with the same perspective, which is that as a practical matter, when you are a practitioner, you face these issues, protecting privilege and the scope of discovery. You're really driven by the uncertainties.

When you advise a client on how you have to proceed with a waiver review, with a privilege review, you look to the lowest common denominator. You have to do that, because you don't have the certainty that you would have if this rule was adopted and, I would submit, applicable in both the state and the federal courts. If you don't have that certainty, you're not going to have the cost savings and the predictability which is the foundation and the purpose of these rule changes.

I want to start, if I can, with subsections (d) and (e) and then come back to (a) and (b), because I think it is kind of interesting when you look at the interplay of those two.

I think this committee has it exactly right with respect to what you are trying to do with 302(d), which is to empower courts to enter orders that make claw back provisions, quick peek provisions, applicable and enforceable in both the state and federal courts. I think you need that provision if you're going to make these agreements at the start of these cases. You need to make those agreements and you need to make them enforceable in state and federal courts so they bind the parties to both.

One of things that I thought was striking in preparing for this hearing was one of the comments in the notes that the committee has made to this rule. If I could, I'd just like to read it.

"The utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. The parties are unlikely to be able to reduce the cost of preproduction review for privilege and work product if the consequence of disclosure as to

that information can be used by nonparties to the litigation."

That's in your note, and I think it makes absolute sense. What you have done is you've empowered the federal courts to enter orders that protect and promote that agenda by entering orders that apply in both federal and state court.

So I look at this and say, I'm a practitioner, this rule gets adopted, what am I going to do? If you don't make (a) and (b) applicable to state and federal courts, the first thing I'm going to do, if I can, is go into federal court and get an order and ask the judge to make it applicable to state and federal proceedings, and have it cover subject matter waiver and have it cover inadvertent disclosure and claw back provisions, so that I am protected.

PROF. CAPRA: You would be protected by (a) and (b) as well?

MR. MERTEN: Not if it is not applicable to state courts.

PROF. CAPRA: (b) is applicable to

state courts.

JUSTICE HURWITZ: Any disclosure made in federal litigation.

MR. MERTEN: Made in the federal litigation. But it doesn't protect. You still are going to face a waiver if you go to a jurisdiction or a court that has a different waiver rule. It's going to be applicable to federal courts. But it isn't going to be, as I understand it, maybe I'm mistaken --

PROF. CAPRA: The (b) at least applies to state courts.

MR. HANGEY: If the initial disclosure was in the federal court.

PROF. CAPRA: He's talking about going to federal court and getting an order.

JUSTICE HURWITZ: You're mixing apples and oranges. If you were in state court, you wouldn't have the option of going to a federal judge and getting an order in the first place.

MR. HANGEY: Or if you got it, I don't know what good it would do you.

MR. MERTEN: That's the point. I deal with cases all the time where there are parallel

state and national courts and clients are getting skewed all over the place. If you have a comity concern, if you have a federalism concerned, it's getting sucked into 502(d). And it's getting resolved with 502(d) but only serendipitously, only if you could get to the federal court first and only if you can get the order and only if the other side is in agreement with you.

You heard today that there are some cases where both sides are relatively amenable to entering orders where they both have the same concerns. There are other cases where that's not true. Products cases, that's not true. The plaintiffs aren't going to be as amenable to helping you with your disclosure requirements and your cost review.

JUSTICE HURWITZ: We are the Federal Rules of Evidence committee. We're coming up with rules to govern evidence in federal court. You may have an interesting argument to Congress about why it ought to enact a law that deals with state court proceedings and whether they have the power to. But why should this

committee, which deals with Federal Rules of Evidence, be setting rules of evidence for evidence initially produced in state court proceedings?

MR. MERTEN: Because if you go back to the original submission of the report, it makes the rule effective. It's necessary for a practitioner like me, who is advising clients who are facing --

JUSTICE HURWITZ: I understand why it is desirable for you. I'm not sure why it is within the scope of our setting rules of evidence in federal court to achieve a purpose in state court that you think is desirable for you.

MR. MERTEN: I'm not so sure that it necessarily belongs in the Federal Rules of Evidence. Actually, I agree with that. But it does need to be addressed.

Whether it is addressed by this committee by putting it in the federal rule to prompt Congress to consider, to make this rule effective, Congress, you have to do something on the state side, whether you do it in the Federal

Rules of Evidence, which is a little odd, or whether you do it by suggesting the submission of a separate bill to deal with these issues straight up, I think that's appropriate.

MR. TAYLOR: Mr. Merten, would you recommend that if the concept is not made applicable to state court, there be no federal rule of the sort that we have here?

MR. MERTEN: No, because I think it helps on a couple of other levels. It helps to resolve the conflict between the federal courts, and I think that is important as well. But you're not going to get all of the benefits that the committee would like to achieve unless you make it applicable to the state courts as well. And you've already done that to some extent, I would submit, under Rule 502(d) and (e) to the extent that it follows along that.

PROF. BROUN: Can I ask a classifying question? I wanted to make sure of your interpretation of 502 (d). As I read 502(d) as drafted, the federal court could enter an order governing the effect of the disclosure of documents in the federal court. It would not

affect the disclosure of documents in the state courts. That is, the disclosure would still have to take place in the federal courts, but the order could affect what meaning that disclosure had. Is that your interpretation?

MR. MERTEN: I think that's right. It would only apply where the disclosure was in the first instance in the federal court. But I don't know that that's necessarily a good thing.

PROF. BROUN: I just wanted to make sure we have the same interpretation.

MR. MERTEN: I think that's right.

PROF. CAPRA: What do you mean raising with the courts?

MR. MERTEN: A lot of these litigations there are state class actions going on, federal class actions going on. In products liability, people pick their jurisdiction. In commercial cases it's a race to the courthouse, because you could either be the plaintiff or the defendant.

So you can have a race to the courthouse problem if the federal rule is better and you get there first and you get your

disagreement and you make your disclosures if you're worried about a case that has a lot of document production and a lot of electronic discovery.

The other part of it is, as a practitioner, looking at the rule, you're going to have people going to get those orders every time in federal court, for whatever they're worth. You are either going to generate motions that you could resolve by the rule or you're going to generate fights because the plaintiff isn't simpatico with you on the need for this rule.

MR. TENPAS: On the race to the courthouse, imagine you have a dispute and you can imagine it being resolved either in state court or federal court. I guess you're imagining a world where, if you win the race to the federal court, you're going to be able to get the state proceeding stayed to some degree.

MR. MERTEN: I'm coming from a state where the federal court goes five times faster than the state courts do. So it's not an issue for me.

MR. TENPAS: Say it could be in either place, so people file in both locations, one for sort of injunctive relief to stop this from happening, and another person for declaratory judgment that they can do what they are doing or whatever the dispute may be.

So you go into federal court and you get your sort of protective order. Do you envision that that somehow would then protect you if the state court judge says, well, I don't care what's been ordered over there, I'm ordering that in this state proceeding these documents be produced?

MR. MERTEN: If 502 was adopted as it is presently written, you would have a supremacy issue.

MR. TENPAS: Or, if they were produced, they were produced as discovery in our state proceeding and I am finding that they are therefore usable here.

MR. MERTEN: That's why you would go to the federal court in the first instance, to get the order which is public as to the state courts.

JUSTICE HURWITZ: Only with respect to documents produced in federal court. There is nothing in 502(d) as it now reads that would stop a state court judge from saying, if you produce these documents in my court, it's a waiver.

MR. MERTEN: That's true. But I deal with products cases where there are cases in various jurisdictions and various courts. Sometimes they throw in the store to defeat federal diversity jurisdiction. And you get stuck in state court in some jurisdictions and you get in federal courts.

But the subject matter of the pharmaceutical cases, the subject matter of the disclosure, when they are going for an NDA application or whatever, is the same sort of documents. As written, if you go to federal court, you get the order and you're protected.

JUSTICE HURWITZ: Only with respect to the documents produced in federal court.

PROF. CAPRA: Then you produce them.

MR. MERTEN: Then you produce them.

JUSTICE HURWITZ: My point is it is

not a waiver by virtue of that production, nor does it protect you from a state court judge saying, you may think this is a privileged document but I don't, and it's been subpoenaed in this state litigation and you're to produce it.

PROF. CAPRA: You mean on the fundamental issue of whether it is privileged or not.

JUSTICE HURWITZ: Right.

PROF. CAPRA: As opposed to a waiver.

MR. MERTEN: I agree with that.

JUSTICE HURWITZ: Secondly, if you produce it in state court inadvertently or on purpose, there may still be a waiver issue.

MR. HANGEY: I'm not understanding that part.

PROF. CAPRA: That last part.

MR. HANGEY: If you produce it because you have already produced it, I don't think that is going to be a waiver.

JUSTICE HURWITZ: No, no, I agree. Assume there are two separate proceedings going on. You make a document production in federal

court and you have a 502(d) order. You are protected with respect to anything you have done in federal court. You show up at the state document production and you dump the same set of documents on the other side. Notwithstanding the federal order, your production of those documents in state court may have consequences.

MR. HANGEY: That doesn't sound right to me.

PROF. CAPRA: What consequences?

JUSTICE HURWITZ: If you produce a document inadvertent in a state court proceeding that is privileged, the consequence of that production in the state court proceeding is not governed by the rule, as I understand it. That's the question that Ken asked.

PROF. BROUN: That's my understanding.

MR. TAYLOR: All the rule says is that if the federal court holds there is no waiver, you can't go into the state court and argue that there has been a waiver.

PROF. CAPRA: That's right.

MR. HANGEY: Nor can you do it by a two-step.

PROF. CAPRA: Do you want to join in here?

MR. MERTEN: What it does do is it protects you from inadvertent disclosure and subject matter waiver at least to the extent that you can incorporate that. That's all I meant to say.

JUSTICE HURWITZ: We agree.

MR. MERTEN: Briefly, the other issue I'd like to touch on and add my voice to is the 502(c) issue. I became part of this issue and looked at these rules and have looked at other issues, because I'm concerned that there is in fact a culture of waiver.

I've practiced in Rhode Island for 23 years. For the first 20 years of my career, dealing with the same types of cases, I never dealt with regulators and prosecutors presuming that there would be a waiver. But I have faced that in cases in the last few years. So there is a change in attitude.

Somebody on this panel asked earlier, why would selective waiver hurt? I'll jump right to that, because I imagine my time is

about up.

I see three ways that it would hurt. The first one is that to do that now, in the climate that we have now, when there is pending legislation in the Senate, to do that now really impacts a debate at a critical moment, and it supports the idea that there should be a presumption in favor of waiver. It helps make that waiver easier.

The second point is it makes it much more difficult for corporations to say no if they want to. Even under the McNulty memo, it still is the case that they give credit for cooperating. And there is really no legitimate distinction in my mind between offering credit and punishing.

PROF. CAPRA: What would you say to a criminal defendant who is faced with the same choice? What would you say to an individual criminal defendant who is faced with the same choice? You can plead and confess, or we can go to trial, they'll charge you with a whole bunch of stuff and you can end up with a much worse situation?

MR. MERTEN: It's a different choice.

PROF. CAPRA: Reward and penalty. It's the same choice. Am I wrong about this? Criminal defendants face this choice every day.

MS. MEYERS: It's the same issue with acceptance of responsibility. It's a benefit.

PROF. CAPRA: That's what I meant, acceptance of responsibility.

MS. MEYERS: It's a benefit if you accept responsibility; it's not punishment if you don't get it.

PROF. CAPRA: But you end up with more time in jail for not doing it.

MS. MEYERS: Exactly. It's like a penalty to the client.

PROF. CAPRA: It's a benefit/penalty decision we apply in every criminal case.

MR. TAYLOR: They are different conversations.

MR. MERTEN: That would be my answer.

PROF. CAPRA: That would those different considerations be?

MR. HANGEY: One guy committed a crime and the other guy talked to an attorney. Maybe

they mean the same thing; I hope not.

PROF. CAPRA: One guy is forced to confess and the other people are forced to give up the privilege.

MR. MERTEN: There has been a longstanding societal determination that there is a value to a society as a whole.

PROF. CAPRA: For cooperation?

MR. MERTEN: No. For the attorney-client privilege to exist and be effective.

PROF. CAPRA: There is also the Fifth Amendment right that is being given up, wouldn't you agree?

MS. MEYERS: Yes. What he is talking about is that the courts have held that it is not a violation of the Fifth Amendment to reward acceptance of responsibility. Now, to my clients that makes no sense, because you get more time if you don't confess. That looks like punishment to them, to most of us.

MR. MERTEN: I understand.

MS. MEYERS: But it's the same theory of it's just a reward, so it's not coercive because it's a reward.

PROF. CAPRA: It happens every day.

MR. MERTEN: I didn't argue that case, but I would suggest that it has been decided wrongly. I would also suggest that there is a difference here, because what you're doing is you're eroding the privilege. I think that makes a difference.

JUSTICE HURWITZ: In the other circumstance, you're --

PROF. CAPRA: Eroding the self-incrimination privilege which is in the Constitution. I'm sorry.

JUDGE TRAGER: I know it is very hypothetical, but if the issue of selective waiver had come up in your first 20 years of practice, as you described it, when the seeking of waivers wasn't common, would you still be opposed to the notion of selective waiver?

MR. MERTEN: I have to confess, I'm not sure I would have been as educated on the issue when it first came up. Knowing what I know now, if you put me back then, I would be, because I think it does undermine the strength of the privilege.

The third point that I would make on that is the corporate officers and directors are becoming aware of this issue. I'll leave you with this. One of my partners was involved in a case that had enforcement, regulatory, and civil components. He is interviewing his clients. One of the clients asked him, am I talking to you as the corporation's lawyer, is this going to directly to the state?

When that's in the back of the minds of clients, the trust that's necessary and the disclosure that's necessary between an attorney and his client simply won't happen.

JUSTICE HURWITZ: In the absence of the selective waiver rule that we have proposed, what would your answer be to a client who asked you that question? Wouldn't you have to tell them that you're the corporation's lawyer and not his and that what he says to you may not necessarily be privileged?

MR. MERTEN: I absolutely would that say that, and I have said that. But we're talking about coming in the office. We're talking about the initial disclosure. Yes,

that's the rule and that's always the rule. But if you don't have the conversation to begin with because somebody is worried about it, that changes the paradigm.

I think the kind of thing we are talking about, with requests for waiver and selective waiver, which is only going to enhance that, is what is changing the paradigm, changing the way people look at the privilege.

MR. TENPAS: Maybe another way of getting at Judge Trager's question, if you could have, for example, Senator Specter's bill tomorrow, which is maybe a way of thinking about being back in the world you described 20 years ago, would you then want selective waiver?

MR. MERTEN: I can't answer that, because I can't separate the two. I think Senator Specter's bill would be a great step forward. Whether that ends the problem, I think it would. But the problem I see is it changed the paradigm in terms of people asking the questions. So I don't know that I could separate it in my mind like that and answer that kind of hypothetical question.

PROF. CAPRA: We just can't envision a world without corporate waiver.

MR. MERTEN: At least right now, I think that's true.

JUDGE SMITH: Thank you, Mr. Merten.

Mr. Carr.

MR. CARR: Good morning. My name is Dabney Carr. I'm a lawyer at Troutman Sanders in Richmond, Virginia. As the other speakers have done, I want to thank the committee for allowing me the opportunity to testify today. I find myself being the fourth private outside counsel in a row testifying, so I have been revising my remarks as I hear people go before me saying many of the things that I had planned to say.

I intend only to address the issue of state and federal applicability and the issue of the should have known standard in 502(b).

I want to start by talking about the costs of preproduction privilege review. In my experience, similar to what you heard earlier from Ann Kershaw and Mr. Oot from Verizon, that it is one of the most significant costs in

litigation.

I noticed in the questioning that there was some confusion amongst at the panel about separating out the relevance review portions from the privilege review portions of a document review. My answer to that would be that the privilege review portion alone tends to be a very significant cost.

The relevance review tends to be generally less expensive, because it can be done a lot by nonlawyers; there is less judgment involved in whether to produce a document or not; a lot of it can be done by technology.

Looking at the privilege portion of it standing alone, that tends to be a greater cost than anticipated, a significant cost in the overall litigation. You budget for it at the beginning. Almost always you go beyond your budget. It takes longer than you ever thought it would take.

My point is that the clarity of the rules that the committee has set out to achieve, and uniformity of the rules among both the state and federal courts, while it wouldn't solve all

the problems, it would certainly help.

Technology in the area, in my experience, comes with pluses and minuses. The minuses being that in the era we are in today, in which many things are stored electronically, much more is kept and much more is retrievable. So you find that the volume of the documents you have to deal with is larger than in the paper document era, and that would be the minus.

The plus to the technology is a lot of the things being described earlier, that you can use things like key word searches to reduce the volume of what you need to look at.

The way the process, as I have been through it, usually goes us you first identify locations. As I think Mr. Taylor said before, you identify custodians of documents that may be relevant to the litigation. Then you go to those people and you gather amongst them everything that could possibly be relevant. You use technology to cut down the pile of things that you then have to go through with more expensive and intensive efforts.

I think that the rule will achieve

some more predictability. As I was sitting here today, I read again the Hobson case. That discussed in particular the standard in the Fourth Circuit, where I practice, as being an unknown as to what it was, that it may well be a strict liability standard. And in addition to being a strict liability standard for inadvertent disclosure, it may well be one where subject matter waiver for anything that had been inadvertently disclosed would follow necessarily.

So by adopting the rule, even if it justifies it in only the federal courts, you will gain some greater predictability.

I think the rule, if adopted, will also allow for the creation of some best practices. When all the courts are reading from the same script and applying the same rule, it makes it easier for the development of the law, and the practitioners out there are using a lot of the same consultants, to try to come up with what are the best reasonable precautions or reasonable measures or reasonable methods that are out there.

And those become more accepted. As I think Professor Capra pointed out, you can't write technology into the rule. But you do gain some benefit in that people will start to develop methods that will become uniform across different jurisdictions.

I'd like to make a couple of comments on the technology presentation. The process that was put up on the screen was very familiar to me. In the large document cases I have been involved in, it's the same process. A couple of things were unfamiliar.

The numbers were very familiar and the amounts of lawyers involved and the time that is spent on that kind of work. You have a lot of associates working a lot of long hours. It just is hard to, when looking at streams of documents, to get through it very quickly. Some of the rates are higher than I'm used to seeing in Virginia. Other than that, a lot of things looked very familiar to me.

MR. TENPAS: What level of associate do you use? Is that first year work? Is that fifth year work?

MR. CARR: It's a combination of things. Usually, first and second year and third year associates. If you have more experienced people available, you cap the rate at what would have been charged by the less experienced lawyer. That's what happens.

In the end, you end up throwing every body you can find at it, because you get into this process where you're not able to complete it when you thought you could. You're familiar with what our practice is. It's done very quickly.

MR. TENPAS: The market regards this as a job that requires the kind of level of legal expertise and legal judgment that you would expect a first or second year to have. You may not have enough first and second year bodies, but that's sort of what the market will bear for your billing practices?

MR. CARR: Yes, because clients will pay it. What happens is that you go through and problems get run up the flagpole to more senior people. Those problems tend to repeat. You start out with a set of rules that you apply,

then it grows as you're going through it literally, and you learn the different problems that will arise again and again. First and second and third year lawyers can usually apply those rules pretty competently.

I want to talk a little bit about the state and federal applicability and Justice Hurwitz's comments. I'm going to take the same out on whether Congress can do it. I'm not a scholar in that area.

I do want to reflect a little bit on something I heard Professor Capra said very early in the day, I think with only the second witness, that under your research you had found that all but five or six states had the inadvertent disclosure rule that appears in 502(b). If that is the case, then the federalism concern seems to me to diminish.

JUSTICE HURWITZ: The practical concerns are also diminished. If all the states have those rules already, then why does Congress have to tell them what rules they have to have?

MR. CARR: Yes. I want to talk from the standpoint of a practitioner out in the

field. I don't know what Professor Capra knows about it being uniform cross the states. Perhaps that can show up in the notes somewhere so that we would all know it. But what you want to have is a rule that you know that's the rule and that's the way that you can advise your client that it would be applied.

The question that arose in my mind as I was hearing the colloquy earlier today, is it the same for subject matter issue, 502(a)? An answer to that I don't have.

It seems to me when you asked just a few witnesses ago whether it would be desirable for this committee to have a rule of that type, my response to that would be that as I understand what the committee is trying to do, it has certain goals that it has set that it wants to try to meet in this rule.

If it wants to meet those goals, then it should make it applicable to both the state and the federal courts. If you don't make it applicable to the state and federal courts, you have the problem that has been discussed by the three people earlier, where you have to design

your privilege review to meet the least common denominator.

JUSTICE HURWITZ: I understand your concern. Frankly, because I favor the rule, I would favor my state adopting it. What I'm not so clear about is what the business of the federal evidence committee is to tell me state what evidence rules it ought to have. It's a philosophical issue rather than a disagreement about the utility of the rule.

MR. CARR: A philosophical way to comment on that is that in the world we are moving to living in, referring to the globalization concept here, where you're moving to a world where everything moves too quickly, litigation is in multiple forums and information can be spread so quickly that the plans start to shift where the uniformity becomes more important and perhaps federalism and comity become less important. Whether or not it should be done by this committee or not, I think this committee has to face the issue and really can't avoid it.

My preference would be for it to be in

the rule, because then I think it puts the level of importance of the issue front and center.

PROF. CAPRA: If you're in a state litigation, I think the last place you would look for what determines it would be the Federal Rule of Evidence.

MR. CARR: Absolutely.

PROF. CAPRA: That's why I was thinking that that's not the appropriate place to put it. At least that's how I have been trying to think about it.

MR. CARR: It would be very odd for me to be looking to a federal rule of evidence which is in a state litigation, you're absolutely right. I think the ultimate resolution of the issue, as some people have said, should be left to Congress. But perhaps the best way to do it would be in a separate legislation rather than in the rule itself. It's just the impact of the recommendation.

MR. TENPAS: In terms of how important it is to pick up the state piece of it, do you have any way of characterizing or generalizing about whether the most expensive discovery cases

tend to be in federal court and less expensive tend to be in state? Because that bears on whether a federal rule only is going to solve 80 percent of the problem or 10 percent of the problem here.

MR. CARR: The only example of where it is limited to courts that I can think of is patent litigation, which is all federal. All other litigation has the great possibility, if it's big enough -- you're only talking about the big cases.

MR. TENPAS: Right.

MR. CARR: -- of being in both state and federal court. You have been getting a lot of examples going through here. Mass tort litigation, being an example, is always some in state court, some in federal court.

I would expect that post recurring commercial disputes, customer class action kind of litigation, which I personally don't practice, would come up under both state and federal regimes. Customer Protection Act litigation is one of the hot areas. That's always state statutes. So you're going to be in

state court a lot.

Picking up again on what Professor Capra was saying, I think this is an area that is pretty mature, the law of waiver, so it is appropriate to be talking about a law that would be uniform across both state and federal courts.

JUDGE SMITH: You need to wrap it up.

MR. CARR: Yes, sir. I want to talk about the should have known standard very quickly. I believe "should have known" doesn't need to be removed from the rule itself. I believe that the notes can lend clarity. Justice Hurwitz, you said earlier, what about "reasonably placed on notice"? That sounded pretty good to what I had in mind that it should have.

My concern is that if there simply isn't much clarity in the rule, in the notes, a judge coming to this fresh who does not have the background that you all have, looking at the phrase "should have known," could give a whole range of meaning to what that could be. The concern would be that you could have cases out there deciding that "should have known" means

that you should have known it at the time you produced it.

JUDGE SMITH: There is a body of law that uses that phrase. There is a commonly understood meaning.

MR. CARR: You're talking specifically in this context?

JUDGE SMITH: Generally, there is a lot of law about what "should have known" means. I'm sure the courts would build on that.

MR. CARR: I agree with that. What I am trying to express is that in this context of when should you have known that you inadvertently disclosed a document, in my experience I don't know it until somebody, the other side, tells me. That's what my concern would be.

Thank you very much.

PROF. CAPRA: I just have one question. If you should have known it at the time you produced it, which is your concern, wouldn't you almost by definition fail the reasonable precaution standard, whatever that would be?

MR. CARR: My concern would be, because I see those as being separate, that you first have to have reasonable precautions before you even reach the should have known.

PROF. CAPRA: My point is somebody who really should have known it at the time they produced it was not being very careful in the production, which is the first step.

MR. CARR: I believe that a judge could find that even though you had reasonable precautions at the time, you still should have known. That would be a concern. Maybe it is at the margins, as you say. It may be the rare case.

Thank you, sir.

JUDGE SMITH: Mr. Barry. Mr. Barry is not here.

Let's go ahead and break for lunch. We'll be back at 10 minutes to 1:00, 12:50.

(Luncheon recess)

AFTERNOON SESSION

(1:05 p.m.)

JUDGE SMITH: Let's reconvene. Is Mr. Barry here yet?

The next two witnesses are from Federation of Defense and Corporate Counsel. Are you coordinating?

PROF. CAPRA: Separate.

JUDGE SMITH: Mr. Kohane.

MR. KOHANE: Good afternoon, I'm Dan Kohane, in case you're wondering where you are on the list. We apparently lost some people at lunch. I'm hoping, having sat through the morning session, that you have that post-lunch quiet time now.

I am not a constitutional scholar, we'll deal with that right a way. I'm a trial lawyer, and I represent as president the Federation of Defense and Corporate Counsel. The FDCC is a 1300-member organization made up primarily of attorneys who defend the interests of individuals and companies in civil litigation not only in the United States but all over the world. That's just to give you an idea of what

my membership looks like.

We thank you for the opportunity to speak this afternoon. We are generally in favor of what the committee has proposed, with the exception of the 502(c) issues, which we will discuss in a moment.

Let me say that our passion is the preservation of the attorney-client privilege. It is very important to us. Any legislation, any rule, any promotion of that privilege is something that we support wholeheartedly. We think for the most part this rule is designed to do that, and as a result we are supportive of, as I said, most of the rule.

We also think it is important to have clarity and consistency to the extent it's possible, and we understand it isn't always possible, between state and federal rules and state and federal outcomes. Although we recognize that as hard as we try to do that and as hard as this committee is trying to do that, there are nuances that make it difficult. But any way that the rule can be strengthened to assure or to lean towards uniformity and

consistency, we support.

An attempt to protect documents from disclosure, for example, in one forum should be treated the same in any other jurisdiction. We are in favor of the extension of this rule to the state courts. Whether there is Article III power to do that, I can't speak. I leave that to the constitutional scholars who can speak more clearly and articulately on that issue. But we do recommend the extension of this rule to the state courts, to the states to the extent possible.

We believe as well that the inadvertent disclosure of privileged information should not operate to waive the privileges protected by federal and state rules. Our clients, our constituency, is involved in multidistrict and complex litigation. You've heard from members of Defense Research Institute and all members of the federation who talk about their involvement in class action litigation and products liability litigation all over the country.

We know in this day and age that there

is a likelihood that no matter how hard one tries to protect against the inadvertent disclosure of materials, protect it by attorney-client privilege, work product privilege, or other litigation privileges, there are times when there are inadvertent disclosures.

We support the rules changes which would maintain the privileges which attach to those documents inadvertently disclosed, so long as the person, the company, that discloses that documentation has engaged in methods and means reasonably designed to protect against inadvertent disclosure and, once that party is aware or made aware of the inadvertent disclosure, that prompt action is taken to retrieve the documents.

We have heard from more than one member of our organization of horror stories associated with inadvertent disclosure and the concerns that the materials produced will now be used against that company in some other litigation in another jurisdiction. Fair attempts should be made on the part of the person disclosing to try to prevent inadvertent

disclosure. We are not suggesting that there is no means or methods that should be used.

I know there was a concern raised by panel members when the PowerPoint presentation was up this morning about using no method of screening. Certainly we don't support that. Reasonable methods should be used. Obviously, if there is a mistake or an error, there should be an opportunity to correct it without waiving the privilege.

We do not subscribe on the selective waiver issue. We do not subscribe to the view that permitting selective waiver is a good thing. We recognize that there are others who may have a different position, but our view is that we must do what we can to protect the privilege.

Ms. Meyers raised the question about criminals who may give up their privilege against self-incrimination in exchange for a lighter sentence. That's not the issue here. I see the similarities, but it isn't the issue here.

Here we are dealing with something

that has been protected for generations, as the privilege is against self-incrimination. The difference here is that we have something that until recently has been protected without question. Only recently were government investigations such as to be a real push and press to have companies give up something that is sacred to them.

We don't believe that any rule should encourage or even suggest the correctness of a practice which would allow for government and others to press for a sacrifice of that privilege in exchange for kindness in an investigation. Our view is we should discourage at all costs the sacrifice of that privilege, and we recommend that the selective waiver provisions not be adopted.

PROF. CAPRA: I'm sorry. I guess I didn't get that distinction between what Ms. Meyers discussed and the situation that your client or corporations are in. Is it that because the government hasn't fiddled with the privilege until recently whereas we've done that with the Fifth Amendment privilege for a long

time? That's the distinction? I didn't quite get the distinction.

MR. KOHANE: Obviously, if we could find a way to take back the years of sacrifice of the Fifth Amendment privilege, we would support that.

PROF. CAPRA: You want to go back to the state of nature, as it were?

MR. KOHANE: Yes. The state of nature with respect to this privilege is one for protection. I'm not a criminal defense attorney, and I haven't dealt with the sacrifices that have to be made by those who do. But this nature I know something about, because I have been involved in this one for 25 years. We want to protect that privilege and we urge you to leave that provision out of the rule.

Unless you have any other questions, I will be happy that lunch has done its job. I thank you for the time and the opportunity to present. Thank you for your good work.

JUDGE SMITH: Thank you, Mr. Kohane.

I'll let you pronounce your name for us. I'm not even going to try.

MR. TAGLIAGAMBE: I've heard that before. Good afternoon. My name is Anthony Tagliagambe. I'm a partner at the firm of London & Fischer. I'm a panel member of the Federation for Defense and Corporate Counsel that Mr. Kohane is our president of.

At the outset, as a litigator, someone engaged in trial work, I want to applaud the people on this committee for making the types of efforts you have undertaken to try and bring clarity in dealing with important issues that affect companies throughout the country engaged in the process of manufacturing, which I'm involved with representing, and other aspects.

In coming to this hearing, I spoke to some of the clients that I represent in the oil industry who face environmental litigation and manufacturers who have exposure in 50 states. The dialogue is what you have heard throughout this morning's proceedings, and that is to bring clarity and uniformity. One of the important points I would like to reinforce is the need to have application to state and federal rules. I'll leave it to greater minds than mine to deal

with the mechanism of doing that.

The idea of predictability in litigation is so important. To have a corporation face the same rules, whether it is in state or federal court, I think is such a fundamentally fair concept to pursue.

One of the things that we were probably most impressed by this morning was the presentation on behalf of Verizon. We saw a staggering number, $13 million, involved in the process of dealing with resolution of attorney-client privilege. Whether that is a number that is fully attributable to that resolution or it's a lesser number, the bottom line is that litigation is a very costly endeavor.

It is often said that there are no winners in litigation, because even if you prevail you've incurred enormous litigation expenses. So from the client's perspective, to try to have a uniform approach would be most welcome.

I want to briefly comment on 502(d). I think this committee's proposal is terrific. I think it promotes the idea of providing

safeguards so that the parties can engage in this process and obtain a court order that protects confidentiality and has that applicable to third parties. In particular, my concern would be the offshoot litigation that you would have in state court, whether it's in a products liability case or a toxic tort. So I think the committee has done a great job in that regard.

I would adopt the comments of Mr. Kohane with respect to 502(c). Again, I thank this committee for the time and effort it's put into a very important area of litigation practice. Thank you.

JUDGE SMITH: Thank you.

Mr. Lederer.

A VOICE: I think Mr. Lederer notified the committee that he was not going to be coming today.

JUDGE SMITH: Thank you. Mr. Wolf?

MR. WOLF: Thank you. Good afternoon. My name is Rick Wolf. Thank you for having me here today. Just briefly, until August of last year I was senior officer and compliance officer for a Fortune 100 Company, responsible for

ethics and compliance program. Also included in that was records management and production of information in litigation for regulation and regulatory matters, and managed litigation before that, and was in private practice doing litigation. So I kind of touched all angles on the problems that are raised by a couple of these rules. I hope to hit on a couple of points today that may sound a little different from what you have heard to this stage.

A couple of points on inadvertent waiver, claw backs, and lastly on the selective waiver topic. On the inadvertent waiver, the term "reasonable precautions" is really where my focus comes in in understanding what that actually means for a corporation.

I agree with the comments that were made earlier about not being too prescriptive and making specific reference to technologies or ways to cull through information in advance. Because the technology is changing so rapidly, by the time this rule is in effect, which would be sometime I imagine in 2008, the technology is probably going to be completely different from

what you are dealing with now, with concept searches and other techniques.

What hasn't happened or hasn't changed and probably won't change is the volume of information that is coming into organizations and the pace with which it is accumulating, with no disposition of the information at all. In the last three or four years it has tripled, and probably will quadruple by next year, the volume.

The question I would ask is whether the attorney review model that you saw earlier, the $7 million, is really one that is sustainable if you consider all the information that is coming into organizations and how going forward it is even going to be possible to conduct your review, particularly with the constricted time period under the new federal rules of procedure that parties have to review information, meet and confer, and ultimately produce it.

What I would suggest the committee consider in lieu of "reasonable precautions" would be more "reasonable steps." For me that

would be steps taken internally for the company to have some semblance of a records management program. All studies indicate that almost 90 percent of companies will readily tell you that they don't have effective practices in place today.

In addition, when you consider the steps being taken to sort privileged information from nonprivileged information, in a Webcast I did with compliance a couple of weeks ago, I conducted a poll of listeners. It was on the Federal Rule of Civil Procedure, so my audience was an educated one of compliance and legal executives of corporations, with a few outside lawyers on the phone as well.

One of the questions we asked in the poll was whether you took any steps to segregate privileged information from nonprivileged information as a regular course of doing business. The response was 20 percent said they do and 80 percent said they do not.

So what you have is a combination of a couple of factors. You have more information coming in to companies than ever before. You

have very little being done to manage information with records management and policy and program. And there is very little being done to segregate information that is privileged from information that's not.

So the question I would ask is what really are we going to be expecting of companies between the time that they learn of a litigation problem to the time that they actually need to produce information in it?

JUSTICE HURWITZ: What language would you use instead of "reasonable precautions" to describe reasonable precautions?

MR. HANGEY: I think that's a loaded question.

JUSTICE HURWITZ: I can't think of better language. That's why I'm asking.

PROF. CAPRA: I don't know how substituting "steps" for "precautions" advances the ball. I haven't been able to figure that out from the written comments submitted. If you want to spend a minute on that, that would be great.

MR. WOLF: I appreciate that. It may

be just a matter of semantics, because when all is said and done, whether any reasonable precautions were taken or reasonable steps were taken is what the analysis would be. It may need to be something that is fleshed out in the comments ultimately.

PROF. BROUN: What you seem to be saying, though, is that most corporations now don't take the kinds of steps that you would consider to be reasonable in order to separate privilege from nonprivileged information, is that right?

MR. WOLF: That is correct.

PROF. BROUN: As I understand it, you would hope that the rule would change corporate conduct in order to have them develop that. Is that the point that you're making?

MR. WOLF: Yes. In fact, if you ask the follow-up questions to companies that tell you they don't have effective policies, the follow-up question is, Would you like one? The answer overwhelmingly is yes. The question really is what are they doing to take steps in that direction, and they are.

PROF. CAPRA: You wouldn't want to have a rule, even in the comment, which says that you need to have a records management program as an indication of it, because, as you say, most people don't have it. That would be a disaster for a rule, wouldn't it?

PROF. BROUN: Just to follow up, there would be a period of time in which almost no precautions would be sufficient for 80 percent of the companies, right?

PROF. CAPRA: Yes.

MR. WOLF: I'm actually not the person to be asking those questions. But, really, what does that language mean? Ultimately, companies that learn of a lawsuit or learn of events that will lead to a lawsuit and then have to actually produce information in the suit and are dealing with hundreds of millions of emails in a relatively complex litigation, what's being expected of them? What I'm offering is some kind of practice or procedure that companies should at least be adhering to to move themselves in the right direction.

MR. TENPAS: Sounds like you want

something in the note that would suggest for those 20 percent of companies that are managing information as it is created, that would sort of be a sufficient but not necessary way for satisfying that you have taken reasonable steps, precautions, whatever it might be. Or at least that could be one factor in assessing whether those prelitigation management practices could be a factor in the analysis.

MR. WOLF: I think it could be. I wouldn't be suggesting this now if it wasn't feasible. I'll give you an example. In litigation, we heard earlier about searches being done on law firms' URLs. Those kinds of communications today in most all organizations is commingled with other email. It's just part of the overall email traffic in the organization.

It is not new technology or advanced thinking to have those kinds of communications take place outside the general population of email traffic that companies have. And within the general population of email traffic, there will be privileged communications. To the

extent that they are produced inadvertently, then you have a rule.

At least there are steps being taken, when there is litigation or communications with outside counsel, that those take place outside the general email traffic. So it is feasible. It is something that I have done and put into practice in fact for ten years now.

PROF. CAPRA: You wouldn't argue that this records management is the only way?

MR. WOLF: Absolutely not.

PROF. BROUN: I was just going to raise with you, what if we left "reasonable precautions" in the rule but added in the note language that would refer to by "reasonable precautions" we mean statistical, analytical, and linguistics tools to separate privilege from nonprivileged documents?

PROF. CAPRA: That would include that, not be only that?

PROF. BROUN: Would include, yes.

MR. WOLF: Frankly, I'm in favor of adding language that touches on technology. But technology is not the solution. It really is

more fundamental than that. This is behavior in organizations and the way people communicate, and that's what goes to the core of a compliance program in a company, which I would like to touch on in the 502(c) part of my discussion.

There is very little education even within law departments about when communications should or shouldn't be transmitted via email. Once it is transmitted, the email, it could end up in the hands of ten different parties outside the respective group of participants.

That has little to do with technology. It is more a matter of having people trained, having monitoring of processes, and just putting better systems in place. Not systems with a capital S, but small s, just in terms of the way companies operate.

It is very well documented that records management programs are effective when executed properly. It is just that companies are just getting to it now because they have to.

JUDGE SMITH: All that you are telling us was also true back in the old paper regime, right?

MR. WOLF: Absolutely.

JUDGE SMITH: You have a manila folder that has a case file in it and it's got some phone slips of notes of a call from the lawyer or it's got a letter or two from the attorney that's stuck in there with all the other stuff, and it hasn't been segregated. How is that any different from your email example?

MR. WOLF: It is absolutely no different. What I'm suggesting to you is that otherwise lax practices are seeing the light of day, and it is being exacerbated by the new requirements around electronically stored information and production in litigation.

If you just look at email volume alone, from 2002 to 2006, we're talking about almost quadrupling, and somewhere in the neighborhood of 80 billion emails a day crossing businesses. It's not changing. Unless anybody is seeing a different approach in sight, my expectation is that email and the use of the Internet will continue to be the way to compete globally.

So the way things were done on paper,

yes, those practices may not have been effective, but it's being exacerbated by the volume information you can create via email today. People just don't pick up the phone anymore. They use email for almost everything.

JUDGE KLEIN: Isn't the reality that reasonable precautions, the judgment of what's reasonable, is necessarily going to be relative and contextual to the precise situation? Did You have five days to respond or 50 days to respond? What measures did you have in place?

PROF. CAPRA: Were there a billion emails or 5 billion emails. Was it a complex case or not a complex case?

MR. WOLF: That is actually something I was thinking of when I was listening to the testimony this morning. Reasonable precautions as to when the litigation is filed and before you produce or reasonable precautions about the way that you manage information generally? That would be, I suppose, in a sense, a distinction to consider.

But if nothing is done, which I would argue is where we are today, then what is

expected of organizations under the rule so that they are not deemed to be producing information intentionally or recklessly?

JUDGE KLEIN: In effect, taking into account time, place, and context?

MR. WOLF: Yes, precisely. For that reason, it shouldn't be prescriptive, and a standard of reasonableness is appropriate. What I am trying to do is give you a little bit of window dressing on what's taking place and what the expectations may or may not be of parties under this rule.

If I may turn to 502(d) and (e) and the claw backs.

JUDGE SMITH: Quickly, if you would, please.

MR. WOLF: Yes. I think those rules are great for expediency, but I don't see them saving any costs, frankly. If you don't review the information for privilege when you produce it, you will at some point in time have to review for privilege using these same tools and techniques. So I'm not sure that there is a tremendous savings in cost, but I imagine there

will be some savings. Certainly it would move proceedings forward faster.

On 502(c), lastly, I suggested that inclusion of the word "proper" in the rule to qualify the conduct of the government to ensure there isn't coercive tactics used for waiver, requests for waiver. But I overall believe that there is a fixation on privilege waiver and a lack of focus on what companies are doing in the compliance area.

If you read the Thompson memo and the Holder memo and the federal sentencing guidelines, there is a tremendous amount of focus on what companies should be doing to institute compliance programs and to self-govern and ultimately self-report if a problem were to arise.

I believe that there is a quick leap to requests for waiver as a show of good faith, because there is not a tremendous understanding of compliance programs in those meetings, principally because the participants are prosecutors and defense lawyers and maybe the general counsel but not the compliance officer.

The reason I mention that is because I have attended meetings with Fortune 100 companies' compliance officers where they are spending millions of dollars every year building these great programs but they are not necessarily getting any attention in these matters. So I would support the selective waiver rule. Indeed, every corporate counsel I've spoken with said that it's a rule they would like to see in place, recognizing that there are some problems associated with the government's conduct.

I know that when I conducted an investigation in connection with a large accounting scandal several years ago and cooperated with the SEC and the grand jury, I had to wear out a track to the front door accepting due process for every civil litigation that was filed as a result of that cooperation, and it would have been helpful to have a cap on that activity.

PROF. CAPRA: You say the corporate counsel you have communicated with are in favor of selective waiver?

MR. WOLF: Yes.

PROF. CAPRA: You didn't talk to anybody in this room earlier in the day?

MR. WOLF: Yes, I did. I am very familiar with the folks in this room. But I did speak to others. If you had asked me a year or two ago whether we favor it, everybody would have said yes.

I think in the last couple of years since the Thompson memo and the Enron debacle and investigations that have taken place, there seems to be a leap for requests for waiver. My argument would be the reason there is a leap to that conclusion is there is not a lot of execution and other things companies are doing to detect and protect against fraud.

PROF. CAPRA: So the records management issue, you can pitch that to the government, is what you are coming to?

MR. WOLF: Actually, records management I would say is more an issue to do with 502(b). 502(c), and there is evidence of what companies are doing to detect fraud, to remediate activity --

PROF. CAPRA: I see. I'm sorry.

MR. WOLF: -- to single out wrongdoers and to change or improve processes and improve the escalation process within an organization so that it's known to the board.

I would also add that there may be a loophole in the rule as written that you would be able to report to the government and get protection. But what happens when you report to the audit committee or to your outside directors, which presumably they would learn about this as well as part of this discussion? I'm wondering if that would open up the door for a waiver argument by third parties even if the government discussions were protected.

JUSTICE HURWITZ: Can I ask one more question? It is prompted by what Professor Broun asked before. He was talking about language that might say reasonable linguistic, stylistic, and some other phrase. What I take from your testimony is we ought to say something like "reasonable measures, technological and otherwise," or something in a more broad fashion, because you're worried about the

prescriptive nature of those kinds of terms.

MR. WOLF: Maybe I'm thinking more in temporal terms than anything else. I'm suggesting that if reasonable precautions is deemed whatever you do after you get notice of a lawsuit, then I would have a very low expectation of that being applied in practice. If the language instead was meant to be what do you do as a general business practice and what do you do after litigation is filed, that's the full picture for me.

Thank you.

JUDGE SMITH: Thank you.

Ms. Hackett.

MS. HACKETT: Good afternoon. Thank you for the opportunity to present comments to you today. I know that your time is extremely valuable and that you have likely heard a number of the same themes represented over and over today, so I have tried to draft some comments that may has had something new to the mix so as not to waste your time.

My name is Susan Hackett. I'm a senior vice president and general counsel at the

Association of Corporate Counsel in Washington, D.C. ACC is the bar association for in-house lawyers, with over 21,000 individual members. While the predominance of our members work in the United States, we now have members in over 60 countries. ACC members work in over 9,000 different companies, small and large, domestic and international, public and private, and in every conceivable industry and practice specialty.

ACC members are not only responsible for the execution of legal affairs and compliance within their entities, but also for the management of the relationships those companies have with their outside counsel. So if you'd like to discuss a little more about how attorney-client privilege issues are perceived by and impact corporate practitioners and their clients, I'm hopefully here to provide some of that perspective.

JUDGE SMITH: Mr. Wolf hasn't talked to any of your members?

MS. HACKETT: Mr. Wolf was a chapter president in our organization and definitely

talked with many of our members. I don't disagree with Rick's comments in principle. I agree within the last few years there have been changes in the environment. But, as I will get to in a few minutes, if this was five years ago, I'd be here supporting 502(c). So I think in that sense we do agree.

ACC did submit written formal comments to the committee dated February 9th, and we also submitted comments back in June of 2006. My testimony today is intended to complement submissions and not repeat them. But I certainly don't mean to suggest that they are superseded or we don't wish you to consider them.

In the short time I have today with you, I'd like to delve a little bit deeper into some the human elements of late that would be hard to capture on paper and that have led us to the position we have taken, for whatever that may be worth to your process.

As you probably know, ACC supports 502(a), (b), (d), and (e). We object to 502(c).

There are some at the table and many

in the larger bar community who are surprised and even perturbed that the in-house bar associations and the members that it represents wouldn't be four- square behind the selective waiver protections offered by 502(c). They don't understand why we wouldn't want to guarantee our members and their clients the comforts of enforceable confidentiality agreements that would preclude further disclosure of company conversations in subsequent third-party litigation.

Indeed, I keep asking within my membership for perspectives from this allegedly large segment of the in-house bar I keep hearing about. Somewhere out there hiding somewhere, I guess, are supposedly large groups of in-house lawyers who want 502(c) to pass. But I've yet to find them, and I have been looking for them.

JUDGE SMITH: I don't want to interrupt your train of thought, but I notice here that you do say in your statement, "We do believe there are circumstances in which selective waiver provisions may be appropriate, but these are found in far more limited and

nuanced situations than in the proposed rule." What would a rule say that would address those limited circumstances? How could you have some selective waiver but not --

MS. HACKETT: I don't believe that selective waiver through the federal rules could address those situations. I simply wanted to articulate in the comments that we provided that we are not suggesting that selective waiver is never an applicable concept.

We are simply suggesting that in the government proceedings context, selective waiver at this point in time is the cart before the horse, if you will. We need to take care of the underlying problems that we have in the prosecutorial enforcement community before we are able to deal with selective waiver in the government proceedings aspects.

I think some of the solutions that we have been looking for in some of these other contexts, for instance, in regulatory contexts or in the fraud context, would more appropriately be addressed, for instance, with Congress on the regulatory front or perhaps with

the PCAOB on the audit front, and so on.

So I'm not suggesting that this group necessarily is responsible for addressing those situations, although if someone comes up with a clever way to do it, I'm all ears. I'm not trying to preclude that. But that was not my suggestion, that there are other things you should be writing. Simply, selective waiver is not always wrong, it's just not in this context that we can support it.

There are certainly some corporate lawyers and law departments that do support selective waiver for their own reasons. While I respect their views, they do not constitute anything approaching a critical mass of the in-house bar. Additionally, there are some, and even if not many, white collar defense counsel who support selective waiver because they have made their careers in the negotiation of such waivers.

So certainly there is a sentiment that enforceable confidentiality agreements are preferable to unenforceable ones, but not at the price of overarching concerns about the unabated

erosion of the company's ability to protect its attorney-client confidences from government disclosure.

let me try to explain the position we've taken and why our leaders and members have repeatedly confirmed the perspective we have adopted and conveyed to you in our written documents.

ACC was founded in 1982. I've been at the association since 1989. We've been focused on corporate compliance and preventive law issues and on improving and protecting in-house practice since our inception. For us, the focus on corporate counsel's gatekeeping responsibilities and the goal of improving corporate responsibility and ethical conduct is not a new fashion, a passing vogue, or an unfamiliar concept that we are still trying to get our hands around. To put it into the popular parlance, we were country before country was cool.

Our members may not always be able to control or prevent problems from arising within the corporate context, but I can't even begin to

tell you how much worse the corporate compliance landscape and record would be if not for the legions of in-house lawyers who have labored with the singular vision to ensure their company's legal heating and stronger internal compliance cultures.

As someone who's been around thousands of corporate counsel and their public and private conversations about the ins and outs of their daily practices for almost two decades, I can certify to you that, first, corporate counsel have always known that their client is the entity and not the company's executives.

Second, they are also faced with the practical reality that in order to act, the company operates through boards, executives, managers, and employees who embody the entity. And so long as all of these folks are behaving properly and following authorized and legal directions, the counseling relationships lawyers have with the entity is properly personified by those employees who are acting as the client.

Therefore, third, without the trust and cooperation of corporate leaders who

proactively call upon and integrate lawyers into the daily function of the company, without the faith of the line employee who calls the in-house counsel because he's seen something that just doesn't smell right happening in his division and he wants to report it to someone whom he trusts, in-house counsel could not do their jobs and the company as an entity would not be well served.

The attorney-client privilege is key to producing a relationship of trust and comfort between corporate lawyers and the boards, management, and employees they represent. It reinforces their individual and team decisions to call upon legal counselors who they know aren't agents of the government and who can and should be asked to join the meetings of management and give straight-up, confidential guidance, so that even the most sensitive topics can be discussed in an open fashion without discrimination and so that competent decisions can be made.

In-house lawyers are uniquely positioned, and we want them to be responsible

for providing guidance that only those responsible for the company's compliance and maintenance of the company's reputational standings can offer.

Employees don't wish to worry that hard questions asked and entrepreneurial ideas discussed will become future evidence that the company is corrupt for even considering a project or for the discussion of its ramification. Executives don't wish to worry that advice solicited by the compliance program they are looking into will later become a blueprint of evidence about the company's insufficiencies if failures occur, some of which in large organizations are unfortunately inevitable when thousands of people are responsible for getting everything right every day.

JUSTICE HURWITZ: Can I ask a question?

MS. HACKETT: Please.

JUSTICE HURWITZ: You argue, and I think quite eloquently, for a vigorous attorney-client privilege, and waivers are occurring now.

MS. HACKETT: Yes.

JUSTICE HURWITZ: Apparently with some regularity, listening to people who are in front of us today.

MS. HACKETT: Yes.

JUSTICE HURWITZ: Is it your fear that waivers will occur more often if we adopt (c)?

MS. HACKETT: Yes, I believe so. I think one of the concerns that we have is that companies currently are in a situation where they have no reasonable means to resist the government's request for a waiver demand. And that, coupled with --

PROF. CAPRA: This is under current practice?

MS. HACKETT: Under current practice.

JUSTICE HURWITZ: If they have no reasonable means to resist now, doesn't (c) make the situation better rather than worse in the sense that if you are going to have to succumb anyway, you should get some protection out of your succumbing?

MS. HACKETT: I would agree with that, except I think we have to address the issue of

the underlying problem. If we pass (c), what we are doing is suggesting that the underlying problem isn't a problem at all. We have done nothing but facilitate yet another way, that we are stamping our approval on --

PROF. CAPRA: Let's just say that it is a recognition of the underlying problem and an attempt of the evidence rules to provide a palliative. In other words, you couldn't write an evidence rule which says the Department of Justice --

JUSTICE HURWITZ: Don't forget the SEC.

PROF. CAPRA: -- and, yes, the SEC will no longer inculcate or perpetuate a culture of waiver. That would not be an evidence rule. But you could in an evidence rule provide a palliative. That is Justice Hurwitz's question.

JUSTICE HURWITZ: Better phrased.

MS. HACKETT: Hopefully, my answer will at least start to address it then.

I do agree that there is a concern out there that those who are painted into that corner have no other remedy and that this is a

comfort to them. I don't object.

But having said that, I think that if we are to support this kind of a remedy, then we have automatically bought into the presumption that the culture of waiver that exists is correct and is inevitable. I think that as a result we are not saying we could not support 502(c), we are saying we can't support 502(c) until we have addressed the underlying problem.

PROF. CAPRA: Couldn't you switch it? In other words, you could support 502(c) and also then still make the argument? It's not like a concession. You haven't given up. It's just one step.

MS. HACKETT: One of the things our comments say is quite clearly if the Specter legislation, for instance, passes in the next six months or however long, knowing that your process would at best take a couple of years probably before --

PROF. CAPRA: I understand your point. But why does it have to be sequenced that way. Why can't it be sequenced 502(c) and then you can work on getting Senator Specter to do

something?

MS. HACKETT: I think it goes back to the issue of putting an inherent endorsement upon the culture of waiver. By addressing the symptoms as opposed to trying to deal with the underlying cure, I think we have decided if we support that, we are saying it's OK for the symptoms to exist. That's the reasoning behind our discussion.

MS. MEYERS: Aren't you saying that 502(c), if it passes, kind of enshrines that there is something special and good about giving the information to the government that's deserving of protection, kind of puts the court's imprimatur and approval by saying not only do we think it's good enough that you cooperate with the government, we'll let you do it and let you and the government hide that information from everybody else?

MS. HACKETT: Thank you. Excellent statement. It is far more succinct than I was able to provide. I agree that is exactly what we are concerned about, that having put an imprimatur on this, we are not able to go back

and address the underlying problem more effectively later.

PROF. BROUN: Just to try to get your position even more clearly, if the Specter bill were to pass before this goes up, do you believe that your organization would support 502(c) in the form that it presently exists, or would you still have some questions about it?

MS. HACKETT: We had articulated some concerns about the federal-state issues, for instance. But I know those are already being discussed and will hopefully be handled and have been handled in terms of commentary far more succinctly and with greater skill than I could.

But by and large, yes, I think what you have proposed is generally good. It's a timing problem more than it is an issue of concern that we are in different places on how the proposal should be written.

JUDGE SMITH: Your position is very nicely articulated and certainly sensible as a logical position. The hard thing for some members of the committee still to understand is why, from the point of view of corporations and

their attorneys, do they not wish to be given a choice of either to produce and have limited waiver or not to produce at all? Why is that not an attractive choice, a choice that did not exist before implementation of the rule, should it be implemented?

MS. HACKETT: I think you're assuming that choice would exist with 502(c). I think it makes it even less likely that there will be a choice. If the current environment, to our mind and our experience, is that companies really do not have an option to do anything other than waive under the current environment, then it is not a choice that they are making in that context, nor is there any such thing as a voluntary waiver for purposes of discussion of self-reporting and a decision by the company to wish to avail itself of the 502(c) protections.

PROF. CAPRA: Yet your examples of situations in which selective waiver might work are all dependent on situations in which the party has no choice. You speak of the regulatory ones and the auditing ones. The linchpin of why you want selective waiver there

is because the company has no choice.

MS. HACKETT: Because selective waiver is at that point an improvement. At that point, for a company that has by statute no ability to prevent a regulator from, on an hour-by-hour basis, reviewing what it is that -- a lot of these folks are on site within certain organizations then the legislation, for instance, in the context of that regulatory community would provide a selective waiver, so anything produced is a step up.

PROF. CAPRA: If you had an anti-Specter statute that said you must waive at the government's discretion, then you would want selective waiver?

MR. TAYLOR: Then it is not a waiver.

PROF. CAPRA: Neither are the waivers she is talking about in these other situations.

MR. TAYLOR: What strikes me is that it is very difficult to assess where the problem is more acute. I understand that the corporate counsel resists the invitation to have a selective waiver rule because in practical effect it eliminates the ability to say to the

government we can't give you a selective waiver.

At the same time, I think in the experience of many practitioners there are occasions, I don't know how many but certainly I'm familiar with some, in which a client wants to make a selective waiver and it is concerned about the implications of doing that both in the proceeding that is at issue or maybe to a regulatory agency or maybe just generally, and wants to be assured that the consequence of that is not something mysterious.

I don't know what the data is or how you would ever discover that, but do you have a sense that the baby has to go out with the bath water, so to speak, that in order to preserve the position against the culture of waiver there shouldn't be any rules about the consequence of selective waiver?

MS. HACKETT: I believe that you are correct that there are some instances where corporations, for instance, in a situation where there is a clear identification of a rogue employee or employees who are the culprits and the corporation feels just as victimized as

everyone else by that employee's action, they would very much appreciate a situation where they could come to the government and say, we would like to provide everything to you that you need in order to complete this quickly and efficiently, we believe that we've got it all laid out here, and if we can give it to you in the context of a selective waiver so that there won't be repercussions from third-party suits because of our admissions or other kinds of information on subject matter waiver, that might come through the process. That would be ideal.

But those companies don't have the confidence that even an agreement that is crafted will be respected under the current system.

So I agree with you that there are instances. But according to what we have found empirically, there are many more instances of the waiver process that take place far sooner than the company may have its hands around those kinds of facts.

What has been most disturbing to most of our members is that the privilege waiver

process in the environment of prosecutorial enforcement in some jurisdictions has been so much oriented toward the first allegation arising, there is not yet any investigation done or there has only been very preliminary investigation, no one has their hands around this matter, there is an initial meeting between the government and the company, and the demand is made at that point that the company is going to turn over everything. Right? At that point in the process I don't think you can call that waiver, truly a voluntary waiver.

MR. TAYLOR: I agree with you.

MS. HACKETT: So I agree with you that there is a baby and bath water problem here in that you now have a situation where if you are going to argue against those prosecutorial processes and that means that we can't support this alternative at this point in time, that means that those people who are in that situation of wishing to constitute that in a more voluntary manner, that selective waiver, they won't have that option, and it's unfortunate.

MR. TAYLOR: Judge, I won't prolong this, too much. What about the regulated entity who is meeting with the Food and Drug Administration or other entities, unlike the Securities and Exchange Commission and Department of Justice, and the regulator says, well, did your lawyers look at this, the whole issue of whether research is subject to the attorney-client privilege or not, without even going to the tobacco cases? And you want to say to the regulator, yes, we'd love to tell you that our audience did look at this and they have blessed it, and so forth, but we're afraid to do that, because if we do, then we'll open up a can of worms, and we don't know where it takes us.

I find myself torn, because I don't appreciate the demands for waiver either, and I don't think those waivers are voluntary or very good for public policy. But I see the sort of wholesale resistance to the notion to be not sufficiently sensitive to the variety of situations in which companies may want to have conversations with agencies which involve the disclosures of materials that would otherwise be

privileged but are afraid to do so because of the waiver issues.

I'm not suggesting which way I come out on this, but I don't hear anybody from the company side saying what I'm saying. Maybe I'm just wrong.

MS. HACKETT: Maybe I'm not understanding your concern. I had thought in our comments that our effort to try to say that we would look to address some of those regulatory contexts separately was part of the way we were looking to handle this.

If it's not in the context of a government proceeding, which I understood to not necessarily cover the kinds of things we are talking about, if you're Pharma and you have an ongoing relationship with the Food and Drug Administration, and there is a constant conversation about what you're doing and whether there are problems outside of the context of formal investigations, allegations, and potential charges, I didn't think that was covered by the federal rules. Maybe I'm not understanding your question.

MR. TAYLOR: I think it is. I wouldn't want to argue that an approval process at FDA is not a proceeding for purposes of advising the client under these terms, but I don't know that we can take it any further than this.

MR. TENPAS: If we were to get to the world you imagine, through the Specter bill or otherwise, so that you then we had a world where the only waivers were voluntary, the world five years ago, at a time when you would have been supportive of this, what is the public policy argument for benefiting companies with a selective waiver rule?

At this point, if you accept your description of culture of waiver, part of the public policy argument is there is some broader benefit to the department, the SEC, other agencies, in shortening these investigations, and such. If you are not in that world so that the only waivers are going to be rare and in those narrow circumstances where the company sees itself as sort of peculiarly benefited by doing that, why should that be public policy?

Why should companies get the benefit of that rule in that world? It sounds like it will be a small number of cases, and it's not clear to me what broader public good is served. Corporations are advantaged and other groups are hurt.

MS. HACKETT: I think the broader public good is actually very consistent with the public good you articulated. What happens in the environment if there's magically a reversal back to, say, 2002, is that you have companies that are incented by the opportunity to have a selected waiver, to self-report in a manner that includes information they would otherwise be loathe to put into the public discussion.

Remember, no one in this debate is suggesting that corporations shouldn't make full disclosure of the facts and should not fully cooperator. Our concern has been that the majority of companies that do believe they are fully cooperating and are providing everything factually don't get any credit for that, because there is this holy grail of privilege that deems until it is waived, the company hasn't done

enough.

But there are some circumstances, as you yourself have articulated I think in prior speeches I have heard you give, where the privileged information may truly be one of the linchpin pieces in either providing the investigation the tool or the information that it needs to get to the next step.

So what you have done is provide the incentive for the company that self-reports already in that perfect world to be able to feel the confidence that what they are sharing with the government investigator won't take them into a realm of undue exposure, especially given the state of subject matter waiver that exists out there for other possible third-party suits that may come in the future.

JUDGE SMITH: Thank you, Ms. Hackett.

MS. HACKETT: Thank you.

JUDGE SMITH: Mr. D'Angelo.

Mr. Parker then.

MR. PARKER: Good afternoon. I'm Bruce Parker. I'm here today in my capacity as president of the International Association of

Defense Counsel. The IADC is probably, if I remember this correctly, the oldest operating association of civil defense lawyers in the country, having gotten its start in 1920.

Although predominantly a United States membership organization, peer-reviewed membership, part of the thoughts that are going through my mind today as I've listened to the comments are the commentary we receive from our European members who don't enjoy the attorney-client privilege, and that perhaps has colored some of the comments that I may have time to get into later on about 502(c).

I want to direct most of my attention today to 502(a) and (b). I'll try to be brief. Our written comments are written from the perspective of trial lawyers on the defense side in civil litigation, of attempting to go through an otherwise laudable rule to figure out where we trial lawyers, plaintiff and defendants, are going to be fighting about this rule, should it be enacted, and hopefully try to minimize some of those fights down the road.

The first one, if we start on 502(a),

as our papers talk about, is a plea, quite frankly, to please put in the word "voluntary" in 502(a). The comments make it abundantly clear, and I think common sense makes it clear, that 502(a) is talking about a voluntary disclosure of information. The comments make that clear. But the rule doesn't use that word at all.

I can assure you, although we can sit here today in this room today and say it is common sense that "inadvertent" is addressing 502(b), so obviously 502(a) ought to be voluntary, we trial lawyers will be fighting about this if this rule should come into effect.

PROF. CAPRA: Inadvertent disclosures are voluntary, aren't they?

MR. PARKER: No.

PROF. CAPRA: Yes, they are voluntary. They are acts of free will. No court is forcing it.

MR. PARKER: Well, OK.

PROF. CAPRA: Am I right?

MR. PARKER: If you mean they are not subject to subpoena, that is correct.

PROF. CAPRA: They are voluntary. It's an act that you make when you press a button or you send the thing. It's a voluntary act. It's maybe not a knowing act, it might not be an intentional act, but it is unquestionably a voluntary act. You are looking for a different word than "voluntary." Because if it is involuntary, it is not a waiver anyway. If you have another word. Maybe "intentional"?

MR. PARKER: "Intentional" would address the issue you raised, which I quite frankly hadn't thought of, Professor Capra. If "intentional" were to go in there, that would satisfy us as well.

The second thing is the ought in fairness component of Rule 502(a). I understand in the comments that we talk about or the committee talks about that that phrase is drawn from Rule 106. It is the same principle one talks about in the comments.

This is my concern. Anyone who has tried cases in federal court and has 106, what we call the rule of optional completeness in some courts, it's a very minimal standard. When

you are in front of a judge, when your adversary reads something or uses something which you then want to complete, in my 28 years I have never had to make a proffer, go through and make a showing of misleading or selectivity.

My concern, our concern, I'm not here on my own behalf today, is that we key the scope of a waiver in 502(a) to the "ought in fairness" language coming out of a rule where there is a rather minimal standard, raising concerns for us that it will be deemed to be a rather minimal standard for a litigant to reach in order to show that in fairness this information ought to be produced.

What we would propose -- this is not in our papers, and I apologize for that. Frankly, it just occurred to me on the trip up from Baltimore today. As I was reading through the memo that Professor Capra and Ken Broun, forgive me if I have pronounced it incorrectly, sent back in March '06, there is on page 31 of that memo a proposed language change to this comment.

For reasons that I have not been able

to discern, there is a very good sentence that didn't make it into the current comments that begins, "Under the rule, a subject matter waiver is not found merely because privileged information or work product is prevented selectively. A subject matter waiver is found only where the disclosure or use of privileged information or work product is selective and misleading and a further disclosure is required to protect the adversary from the misleading presentation of the evidence."

I think that is an excellent sentence, and I would encourage the committee to insert that back into the comments.

Moving on to 502(b). Earlier this morning I heard one of the members of the panel mention that in lieu of "should have known," which is the first phrase we want to draw your attention to, perhaps a better phrase was "reasonably put on notice." I like that phrase. I wish I had thought of that before we came up here. I think that better signals what we are hopefully talking about than saying to litigants, all right, now we're going to fight

about whether or not how soon after or perhaps in the context of producing this information should I have known.

There is a question asked, isn't there a body of case law out there using this term "should have known"? The one that came to me most as a personal injury products lawyer is a discovery rule of when a litigant should have known about their cause of action arising. That led me to think, boy, I've practiced in a lot of states, and I can tell you the discovery rule is so different in so many states that I would be hard-pressed to tell you what the case law is now on what "should have known" is. In some states you have to show actual knowledge to start the state statute from running, and in other states it is very much less burden.

Second point. It is perhaps, I hope, more of a question. As I read through section 502(b), inadvertent disclosure, and as you track through the rule and you contemplated that there has been a disclosure, inadvertent, Professor Capra, under circumstances where everyone would agree that reasonable precautions had been

taken, yet a privileged document was produced, sometime thereafter circumstances, whether it is reasonably put on notice or should have known, create facts that would lead a trial judge to conclude that under those circumstances there has been a waiver.

I read through the comments, I read through the earlier memos, and I'm not sure I know at this point, when you go back to 502(b), what is the scope of the waiver under that circumstance. Are we talking about a waiver of the type that is defined in 502(a), or is there general subject matter waiver? I hope not. That's not the spirit of this rule. But I am not able to track through the rule clearly.

If you find yourself in situations where there has been inadvertent disclosure, there has been reasonable precaution taken and temporally at some point thereafter that producing party hasn't done something once put on notice that there has been disclosure, that would lead a trial judge to say that under the circumstances we deem this to be a waiver?

PROF. CAPRA: That is taken care of

you by your fix to (a), right, by adding the word "intentional"? Because these aren't intentional disclosures by definition.

MR. PARKER: That's correct, Professor Capra. I would agree with you.

PROF. CAPRA: I have a question about your "ought in fairness" language. Is your position that that language is not sufficiently protective in the case law?

MR. PARKER: By reference to 106, that's exactly my concern.

PROF. CAPRA: Case law allows just regular completion upon request, is that your view of the case law.

MR. PARKER: It certainly does.

PROF. CAPRA: In practice?

MR. PARKER: In practice in a courtroom, a litigant reads a deposition or reads an exhibit that is in evidence and they want to read a sentence, and you say judge, in fairness let's read the next sentence. I'm sure some judges are different than others, quite obviously they are, and require a proffer to be made that this is misleading, but it's not my

experience that with the press in time to get through a trial, that judges stop you and force you to make that proffer.

MR. HANGEY: It depends on the length of what you want to have read.

MR. PARKER: That's quite true.

Moving on, my last point under 502(b), as we said in our written submission, the case law talks about at least five factors that we have been able to piece out of the case law. To in those jurisdictions that did not previously recognize a general waiver in the context of an inadvertent disclosure, the rule certainly takes care of the reasonableness of precautions, it takes care of the time taken to fix the error, which are two of the factors.

We would urge the committee to incorporate into the notes an urging, a suggestion, that trial judges also look at three other factors that are routinely mentioned in the case law. Those are the scope of discovery. With one of the other presenters, this came up in the context of what would be reasonable precautions. But I think that is a separate

factor that would be helpful to spell out.

The extent of the disclosure. How many documents are you producing is also another factor that the case law teaches in the overriding principle of fairness under all the circuits.

Those five factors we have found in a good number of the cases that look to see under a given set of circumstances whether there has been an inadvertent waiver.

PROF. CAPRA: Aren't these last three really embraced within reasonable precautions?

MR. PARKER: One could make that argument. But the cases talk about those and talk about reasonable precautions as well. I can certainly envision an argument being made that, Judge, that's not what the committee wanted us to be looking at. Reasonable precautions has to do deal with what the other presenter was talking about, what sort of document controls, what sort of software do we have, those sort of issues. It doesn't talk about the compressed time. It doesn't take a lot to put those three factors in it.

PROF. CAPRA: You're suggesting that those be added to the note?

MR. PARKER: Yes, sir.

JUSTICE HURWITZ: One of my concerns is people have been talking about how you need certainly and regularity. My strong sense is that five-part tests give people much less regularity than two-part tests, and five-part tests are even better, because every judge can weigh the five parts differently when he or she gets to it.

MR. PARKER: I guess, your Honor, my concern is that this is not taken out of a vacuum. We have a body of case law that has talked about reasonable precautions, has talked about the scope of discovery, has talked about the time in which you have had discovery. If the comments are limited to one of those, then I think an argument can be made, somewhat persuasively --

JUSTICE HURWITZ: I take your point. One of the concerns I have is we have been hearing that the body of case law isn't sufficiently protective or predictive of people.

So I wonder whether we ought to return to it as the test.

PROF. CAPRA: I agree. I was thinking of this. Maybe one of the things that the committee can address, referencing that case -- actually the committee note does reference that case law, right?

MR. PARKER: It certainly does.

PROF. CAPRA: -- to say that there is a five part test, but, looking at it carefully, it is really a two-part test.

MR. PARKER: As long as we as trial lawyers are able to not hear the argument that the committee has disavowed any reliance upon those other factors that the case law talks about, that would be fine.

My concluding point, I say that with some degree of trepidation, but it comes out of my years of experience, as you know, we have, if you have seen our papers, gone on record also with respect to 502(c), and I do want to raise one issue I haven't heard discussed up to this point.

Several of my members, myself

included, have been participants as lawyers for companies, although it doesn't have to be a company, who are the subjects of congressional investigations. If this committee were to recommend 502(c), that's not our position as to what it should be.

That rule as I read it, certainly isn't broad enough to sweep up what occurs in congressional investigations, which is that Congress doesn't recognize the attorney-client privilege, at least that's what the staff is telling you. Then you sit down and you start talking about how far they are really going to push that until perhaps they need their own lawyer. But that's what the staffers tell you.

Should this committee ultimately recommend 502(c), I would like to see language that protects us in the context of demands that are made by Congress to produce attorney-client privileged material, because they don't claim to recognize it.

MR. TAYLOR: Do you really think that Congress would approve a rule which expands the scope of the Federal Rules of Evidence to

congressional proceedings?

MR. PARKER: The rule doesn't affect the congressional proceedings. If a staffer comes to me and says, short of having a congressional contempt citation and the power of the media and everything else going against you, you're going to produce this privileged information. The privileged information becomes part of the public record at that point.

If you're going to enact 502 (c), and I'm not proposing it because that's not my association's position, if in the judgment of this committee that section is needed, I would like it written broader, to note that if you were in those circumstances and you had to produce privileged information by a body of our government that claims not to recognize the attorney-client privilege, then we'll be protected.

MR. TAYLOR: They have never successfully enforced that claim.

MR. HANGEY: I'm still not understanding what you said.

MR. PARKER: This is the situation.

MR. TAYLOR: Congressional investigators contend that the attorney-client privilege does not apply.

MR. HANGEY: I understand that part. What I am trying to get is the chronology where the disclosure goes as it wanders down the path. Are you saying that the rule ought to provide that things disclosed to Congress in that context, that the waiver with respect to them would not be enforced in either (a) federal court or (b) some other tribunal's proceedings?

MR. PARKER: Yes, sir. I'm saying that when you produce that material, it's made part of the public record. It's been our members' experience that Rule 502(c) as I'm reading it now, "federal public office or agency in the exercise of its regulatory," etc., is not broad enough to include that type of investigation. So if those documents become into the public arena, you will have a difficult time convincing some judges that that material has not been waived.

JUSTICE HURWITZ: So the same Congress that in your contention doesn't believe that

there is an attorney-client privilege is the Congress that we would be asking to approve an exclusionary rule?

MR. TAYLOR: No. All you would have to do is define investigative proceeding as a congressional proceeding.

JUSTICE HURWITZ: But they would still have to approve this rule.

MR. PARKER: Yes, sir, they would.

JUSTICE HURWITZ: Once we have done away with federalism, separation of powers is a small step.

MR. PARKER: I'm a pragmatist. I'd like the rule.

MR. TENPAS: Can the record reflect that was said by the state court judge.

MR. PARKER: Thank you. If there are no questions, those are my comments.

JUDGE SMITH: Thank you, Mr. Parker.

Mr. Cohen.

MR. SULLIVAN: Good afternoon. My name is actually Peter Sullivan. I'm a colleague of Mr. Cohen. He Mr. Cohen couldn't be here today, because he is actually on trial

in Atlantic City.

PROF. CAPRA: The statement is his?

MR. SULLIVAN: The statement is his, and he asked me to come here and amplify.

PROF. CAPRA: The written statement is his?

MR. SULLIVAN: Exactly. And to amplify some of the comments he made in that statement. So if I may.

PROF. CAPRA: I'm sorry. Can we have your name again?

MR. SULLIVAN: Sure. Peter Sullivan.

MR. CAPRA: Thank you.

MR. SULLIVAN: At the outset, we would like to urge the panel to consider, by whatever means necessary, to see if there can be a uniform standard for both federal and state rules. From our perspective, and that's primarily from the mass tort perspective, we deal with multijurisdictional litigation all the time, in which case we have almost the least common denominator in fact with regards the privilege. We often fight privilege arguments over the same documents in many different

jurisdictions, and it tends to have a watering-down effect if you have inconsistent judgments on those issues.

With respect to the actual comments provided in 502(a), I note that with respect to the ought in fairness discussion that we just had, that the rule of completeness, at least in my experience, has been one involving admissibility. What we are talking about here really is discoverability. It seems that it becomes maybe an unnecessary sojourn to think about making the subject matter broader than just a document itself in the discovery period when you don't even know if it is going to be in front of a court.

Second, we would like to see a comment that says that in the situation of an inadvertent waiver of material, only that document alone be part of the waiver and nothing further than that.

With respect to Rule 502(b), we also note the potential litigation over what would constitute reasonable precautions and reasonably prompt remedial measures.

I would like to note with respect to Mr. Wolf's comments before about corporate compliance, it's my experience that when you look at reasonable precautions, you're really talking about the precautions of the law firm in doing the document production and doing the review of the documents themselves.

The only thing I can say about my clients is that they are all different. They have different recordkeeping, they have different ways of maintaining compliance programs. Also, there are different areas of the law which involve different compliance regimes. A breach of contract action will have a much different body of recordkeeping than perhaps a tax case would or a case involving Sarbanes-Oxley.

For that matter, I don't know if the emphasis on corporate conduct is where we need to be. I think any note that is in here should reflect the overarching process from the client to the law firm about what is reasonable, giving wide birth to myriad reasonable precautions. Mr. Cohen suggests that that is not something

wholly inappropriate for the scope of review given the time and the volume of documents that we are talking about.

When we talk about this, we are talking about it in terms of potentially millions of pages of documents that have to be produced on a very, very short time scale. Sometimes it's very difficult for individual human beings to look at each document line by line to determine whether it is not only the name of a lawyer but maybe our counsel said or on advice we're doing the following.

In that case, if you are going to use a technological solution, nothing from a computer is going to be able to tell you there is actually attorney-client privilege in that document. Oftentimes, as was mentioned, the clients pass information among each other, which could still be protected, and it is very difficult to find under technological solutions.

The point here is that there are a number of ways to deal with this. It's not simply a corporation's obligation, but it's the law firm's obligation, and there are a number of

ways that law firms try to handle this. If this reasonable precaution section can be there to account for those and give wide berth versus a narrow berth, we think we would all be benefitted from that.

I'm not going to comment on Rule 502(c), because many folks already have and it is really not my area.

I will talk briefly about 502(d) and (e). With regards to having court orders regarding privileges, it's very helpful to have that, but we have a lot of situations where we have defended a big company, the plaintiff's counsel is representing an individual, and they have nothing to lose by disagreeing with a request for an order of this magnitude. So what you have is a situation where, unless you get agreement, this rule will not help. The suggestion that we have provided is that there be allowance for a court to enter the order even over objection of the party.

That's all I have today. If you have any questions. Thank you.

JUDGE SMITH: Thank you, Mr. Sullivan.

Mr. Cortese.

MR. CORTESE: Your Honors, members of the committee, I'm Alfred Cortese, appearing on my behalf.

PROF. CAPRA: That's C-O-R-T-E-S-E, right?

MR. CORTESE: S-E.

PROF. CAPRA: That's correct, Al.

MR. CORTESE: I want to be very brief. I commend the committee for proposing this rule. It's something, as you all well know, was a very big problem in the electronic discovery amendments proceeding. I think in a sense this effort grew out of that.

I also wanted to express my appreciation for the ability to appear here.

I want to deal with only two issues, the policy issues, basically the application of the rule of law and the statute to both state and federal proceedings. The other point is selective waiver, (c), which I think, from the discussions I have had with many corporate counsel and other opponents of 502(c), has indicated pretty clearly that that is a

principle position, that they feel essentially there should be no incursions, no diminishment of privilege or work product, and that a federal rule of civil procedure should not essentially sanction efficiency over protection of the rule. I think that is where many of the folks come out.

Many of them would like very much to have a rule that protected them for all the reasons that you have pointed out this morning and this afternoon. But the bottom line is that as a matter of principle there should not be a rule that essentially helps the government and overcomes a very important privilege and work product protection.

As to both of those areas, that is, the application of the rule and the statute to federal and state proceedings. 502(c), I think the course of this committee is fairly clear. It came up really in connection with the civil rule committee's consideration of the class action amendments, where the civil rules committee recognized that it really didn't have power in many areas there to promulgate a rule,

but it made a recommendation to Congress as to whether or not a particular statute ought to be adopted by Congress.

I think this committee is in essentially the same position for even better reasons. With respect to federal-state application, there are obviously very important policy questions of federalism and federal-state relations between the courts. But in this situation essentially the Congress is asking for guidance in terms of what rule would best protect the system and what rule would best protect the privilege and work product.

I think that what the committee might do is really what was suggested in Professor Broun's and Professor Kaplan's memorandum: Have a rule 502 that is enacted by Congress as a rule of evidence, but then have a comparable statute that enacts an identical rule that is applicable to the states.

The considerations as to whether or not the rule should apply only to federal proceedings or to both federal and state proceedings ab initio really is a policy matter

that ought to be the judgment of the Congress and the executive.

With respect to selective waiver, I think that there has been so much opposition expressed. A lot of the folks who had started out saying, well, sure, that sounds like a great idea, why not get that protection, have come to the conclusion that these are such strongly held views in the corporate community, particularly the corporate legal community, that as a matter of principle there should not be a rule or legislation with respect to selective waiver.

I wanted to put behind us this question of should it go before or after whatever bill may be passed by Congress. Obviously, what I think this committee could do would be to make a recommendation to Congress in terms of what the rule would say if Congress were to adopt it, and then point out the arguments on both sides as to pro selective waiver and con selective waiver, and essentially leave the decision as to what the choices are to the Congress.

That's really all I would like to say.

Thank you very much.

JUDGE SMITH: Thank you.

Mr. Altman.

MR. ALTMAN: My name is Keith Altman of Finkelstein & Partners. I want to thank the committee to giving me the opportunity to speak before you today. I wanted to give you 60 seconds of my background, because it is a little bit different than most of the people who have spoken here today.

I work for a plaintiffs law firm, and I've been involved in most of the major pharmaceutical litigations in the last ten years, have been the person responsible for building the document depositories. I have helped draft the discovery demands. I'm also the co-chair of the AAJ electronic discovery litigation group, which I helped found, that group.

I come to you from the perspective of the person who was on the receiving end of this information. Most of the people, in fact all of the people I think who spoke today, have talked about their problems with producing these

things. But I've been the person who has had to comply when one of these inadvertent disclosures takes place and who knows what it takes to actually comply with such an inadvertent disclosure.

I'm not really going to comment on whether there should be an inadvertent disclosure or shouldn't be inadvertent disclosure. But I think there are some aspects of the practical nature of dealing with these things that ought to have an impact on how the rules may be viewed, and maybe it is an appropriate place for the comments.

For example, there is an extreme cost on behalf of the receiving party to comply with the request for return of documents. This is essentially the problem of electronic discovery in general. It's the duplicate issue.

When we were dealing in paper world, people didn't make 300 copies of a document to send to their closest associates and their closest friends. They made one copy, because you had to sit and do it manually. But now we think nothing of creating an incredible number

of duplicates. Very much that is responsible for the increasing amount of electronic discovery.

The same thing applies when you get to litigation. As a routine matter, when I receive document production, whether it is 10,000 pages or 10 million pages, and I deal with everything in between, I make a copy of it and I send it to every law firm involved in the case. That can be 20, 50, 100 different law firms. It goes to all the experts. Everybody has access to this information. When a party decides that it's inadvertently produced information, there is now a major problem logistically of how does one go about retrieving those documents from potentially a hundred or more different sites.

And what about the documents attached to that? Do I have to have hard drives sent in from all 100 sites to me so I can remove the documents off the drive and send them back out? Can I do it remotely?

This ties in to the concept of what actually has to take place when a party requests documents. How do they actually have to be

returned in an electronic world? Is it OK to just throw them away? Is it OK to just throw the reference to them away? Is it OK to say we're not going to do anything with it but it's effectively lost and we won't use it? Is that OK? What does it really mean?

Then what is of great concern to me is what liability do I have personally if a company requests documents back and I have them in a hundred different sites and somehow I only get 98 of them back, and 2 of them get out there, and now the information is considered waived and now there is a waiver of information. Do I have liability for not having complied with the request to return those documents? Am I held to a higher standard than the person who produced the information in the first place?

This is a real concern to me.

PROF. CAPRA: Does that recent package of electronic discovery amendments help you in any of this?

MR. ALTMAN: Not at all.

PROF. CAPRA: Doesn't help?

MR. ALTMAN: Not at all. And I'm not

talking theoretically. I'm the one who gets the request: Here is a list of 57 documents, please delete these, find all these documents. It is not an easy task.

JUSTICE HURWITZ: Does 502 make your situation better, worse, or leave it the same? It seems to me it's probably neutral with respect to the difficulties you now face.

MR. ALTMAN: No, I think it's going to be worse actually.

I have fortunate for being last, having the ability of hearing what everybody likes to say. They talked about an effective claw back provision. If you're going to have an effective claw back capability, I believe effective claw backs would be a good thing.

Just to sidestep for one second, there is this whole concern of mine about paranoia. Electronic discovery is creating a level of paranoia amongst the business community that I think is inappropriate. When the technology that has nothing to do with a person's business starts getting in the way of people conducting business, I have a problem with that.

A great example of that. I don't know how many of you have dealt with real-time court reporting, where you hook up to the court reporter in a deposition. There was a patent litigation that came down called the Engate litigation where effectively these guys got a court to say we have a patent on this stuff, and now you had to pay every time you wanted to use that real-time connectivity. What happened was people stopped using it. There you have a concept of where some technology situation got in the way.

That's what we have here. We are having a level of paranoia that I'm all about reducing, which is hard for the defense bar to believe, because I'm the guy on the other side asking for the stuff and doing the probing. But the reality is I'm trying to find a set of standards that everybody can comply with.

So when we are talking about the claw back, I think it is a perfectly wonderful thing to develop an effective strategy of how not to have to review every document for privilege. The problem with that is that producing parties

have been very reluctant to be open and forthright on what they intend to do: It's a black box, we're going to do something, but we're not going to tell you what it is, we're not going to give you any opportunity to intersect with what we do, you just have to take what we say as being the right thing.

A problem when you dealing with technology, for example, what happens if you don't pick all the key words, you miss something, not because you're trying to hide anything but because you didn't think of something or you didn't see the thing the same way that I do?

One of the effective things that has to take place, and this may tie in with the concept of an agreement within the proposed rule, is that there truly needs to an agreement, there needs to be some transparency in the process, so the other side, the receiving side, has the opportunity to react.

MR. HANGEY: You're talking now about the selection of the search terms?

MR. ALTMAN: The search terms, the

methodology. We saw some examples of different ways you can deal with privileged things. I don't think there is any one size fits all. I don't think anything should be in the rules about how to go about doing it.

I think there is a general concept that we should all be smart about it. More importantly, this ties in with the Rule 26 disclosures and the electronic discovery meeting, and we're just starting to see this. It's just starting to happen.

MR. HANGEY: I'm still having a hard time finding in this your answer to Justice Hurwitz's question of how does this get worse if we adopt or if Congress adopts all or partched of the proposed 502.

MR. ALTMAN: Because you have more claw back provisions that are going to lead to more documents being requested back at some point down the road.

PROF. CAPRA: Can't you in a claw back provision negotiate some language about what you are supposed to do when you get these documents?

MR. ALTMAN: I don't know. I don't

know the answer to that. I don't think anybody really knows the answer to that.

MR. HANGEY: We have that in all of these cases now where you have confidentiality agreements, including the multicounsel cases of the type that you are involved in, that says at the end of the case all of the confidential documents are going to be returned and destroyed. In my experience, it works, or at least it hasn't come back to bite any client of mine so far. Is this all that different?

MR. ALTMAN: I think it is. Let me give you an example. Not all that long ago, in a major pharmaceutical litigation I got a list of 100 documents. It took me probably 25 or 30 hours to figure out how to find that stuff, develop a strategy, get the stuff out, get in touch with the people, get the documents back, delete them, delete the references out of the litigation support system that we had.

Then we had the problem of this fact that our attorneys had expended time reviewing those hundred documents already, had spent a lot of their time and developed subjective comments.

That's going to happen. I don't know what that costs.

MR. HANGEY: Mr. Altman, I want to assure you first that I am a hermaphrodite; I work both sides of the street, plaintiffs and defendants. The expenditure of that kind of time in this universe that we are talking about with the onset of electronic discovery doesn't strike this attorney as unreasonably disproportionate to what other people are doing on the other side of the case to gather the documents and disclose them in the first place. That happens. When you break a whole lot of eggs and you have to put a few of them back together again, it's going to take time and money.

MR. ALTMAN: Sure.

MR. TAYLOR: On the other hand, though, why shouldn't the difficulty of retrieving the documents be a factor?

MR. HANGEY: A factor in the waiver or a factor in the cost allocation?

PROF. CAPRA: It can't be a factor in the waiver.

JUSTICE HURWITZ: Let's not talk over each other. Let me give you some perspective on what I was asking. I understand that that is a problem and it may be a problem that something else should deal with. Put aside selective waiver for a second just so we don't get caught up in a whole series of side arguments. I'm having a hard time understanding why (a), (b), (d), and (e) make your problem worse than it is today, because the way you described it, it is a serious problem today.

We don't know what inadvertent waiver is. People will fight with you about it. You've got to decide. But at the end of the day, once a judge or somebody says give it back, you've got all these difficulties. Why would it be more difficult under the new rule?

MR. HANGEY: And will there in fact be more claw backs in a world in which there is a 502(d)?

JUDGE SMITH: We are asking Mr. Altman too many questions.

PROF. CAPRA: And I have another one. So why don't you get going.

MR. ALTMAN: First of all, I think there will be more claw backs, which I think is a good thing. I for one would like to spend much time with the opposing side to sit and dwell on effective strategy. I think that is a good thing. I think technology will certainly evolve, but I think we can take advantage of common sense things now to help minimize the burden.

Let me give you a sample example to tie up this whole thing. I get a bunch of documents and paper. I really have no choice but to sit and review them one by one in box number order. But in the electronic server I can do a search, separate it out into two things. Maybe I have to look at some documents, but nobody said I have to look at them in the order they gave them to me. I can separate what appears to be the wheat from what appears to be the chaff, and then go through the staff.

That is what was suggested earlier. If I go through a strategy for separating documents more likely to be privileged from documents less likely to be privileged and then

I produce the stuff less likely to be privileged, I think you are going to see more situations where ultimately you're going to find more requests for inadvertently produced documents as they get used in litigation. I think that will increase, because people will take advantage of the idea of doing a claw back and say, I will produce this stuff. Things are going to be found.

I have a bit of a problem that in some respects it is really offloading the cost to the other party, when you think about it, because now I have to spend my time reviewing the documents you produced to me and I'm going to produce all your inadvertently produced privileged documents, which are a cost at my end. So you kind of shifted the cost to me, and I don't know that that is necessary.

JUSTICE HURWITZ: There is nothing in this room that requires you to agree to the claw back.

MR. ALTMAN: Agreed. But at the end of the day I'm sitting in a situation where I'm getting millions of pages of documents, dealing

with a lot of electronic stuff. Clearly, in the paper world all this stuff didn't really help that much. You're back to where you were.

But in the electronic world, which is, in the cases I've been in, in 50 to 80, 90 percent of the material, you can really do some good things with that. So I'd hate to throw away the ability to use technology just because of a simple thing. I think there is a work-around for it.

One of the things you were asking about, how does the cost enter into it. Maybe the cost is an element of considering what steps should be taken in this world for the return of the document.

MR. TAYLOR: I'm not sure this rule should address that.

PROF. CAPRA: This is a rule of evidence. It deals with what particular information is admissible.

MR. ALTMAN: You're talking here that the person has to take steps to remedy the situation. What steps?

JUSTICE HURWITZ: Isn't that about the

producer?

PROF. CAPRA: It's about the producer.

MR. ALTMAN: Sure. What I'm saying is if it would cost me $50,000 to comply with your inadvertent production, to literally do every possible thing that could be done to get rid of this stuff, is there maybe a compromise, and you're not willing to pay the $50,000.

JUDGE KLEIN: Aren't you talking about a claw back rather than a rule of evidence? Certainly you could negotiate in any claw back agreement a fee-shifting provision. It would be perfectly fair to say you inadvertently disclosed and you want a claw back, you're going to pay the expenses of clawing back.

MR. ALTMAN: Sure. But is there a middle ground to say that you can as an element of what you need to do. The rule says, I think it is 502(b), that once you become aware of the of the inadvertent disclosure, what reasonable steps you took to remedy the situation.

JUDGE KLEIN: This was I think Professor Capra's point. That is just a rule of evidence, what you can use in court, and the

answer is it can't be used in court. I don't think it requires the receiving party to send it back. A claw back, which also is in effect recognized, might do it. But that's the kind of thing that's really up to the genius of counsel, isn't it, in negotiating those?

MR. ALTMAN: I might have misread the rule then. I thought it says it's not just the fact that you have recognized it but that you have taken steps to remedy the situation.

MR. TAYLOR: That only affects whether it is a waiver or not.

MR. ALTMAN: That's what I'm saying. What steps do you take if there's an extremely high cost to remedy the situation? Take every possible step? For example, if one possibility would be to bring back all the hard drives, do a whole bunch of work, with a really big bill attached to that, is there a way to negotiate with the other side something softer for that?

For example, maybe I can just throw away all the references. Maybe all I have to do is delete out of all my systems the link to the image or the documents so that I can no longer

realistically find it.

PROF. CAPRA: Essentially, to earn a protection against waiver in these circumstances, you would build in under the took reasonably prompt measures something like including efforts to avoid unnecessary expense to the receiving party, something like that?

MR. ALTMAN: Or the producing party. This is not a one-sided thing. I'm just saying it can be very costly, and I think the cost is going to go up to comply with inadvertent production or claw backs.

What I'm trying to say is, what does it mean to take reasonable measures? It is not really defined in an electronic world. Now, does "reasonable measures" mean that as the receiving party not only do I have to get rid of the hard drives but I've got it on backup tapes, I have to go to my backup tapes and get rid of this stuff as well? Is that how far it needs to go to satisfy reasonable measures? That's really what I'm getting at.

It's not really about the money, recovering the cost money. Frankly, at the end

of the day it's a lot of trouble for the receiving party to comply with such a request. It's real easy for the producing party at a deposition to see somebody introduce an exhibit and say, oh, that's privileged, and send me a letter the next day that said, hey, you used this privileged document, go get rid of it, and I do that, and the next week I get another letter with the same thing. This happens. This is the real world. I think with claw backs you're going to see more of it.

Just a couple of last things I want to comment on, because I know everybody is possibly zonked because this has been a really long day. One of the concerns I also have is the abuse of claiming that a document was inadvertently produced, which is something that nobody spoke about.

There is no element in here of timing. For example, is it reasonable on the eve of trial to come back and start crying that certain documents were inadvertently produced? That's a real problem. I've seen situations where you get letters that documents have been

inadvertently produced.

It puts you in a funny position because your poem have already subjectively reviewed these documents and written extensive comments on these documents, and they are clearly not privileged. Yet you run into a situation, how are you going to deal with those abusive type situations, which happen?

PROF. CAPRA: Doesn't the "should have known" language take care of that?

MR. ALTMAN: No, because they are not privileged in the first place. Part of the problem that is not really addressed here is I guess it ties in to what steps does a party have to do to comply with a claim of inadvertent production, what's the duty on the receiving side. Do I have to stop everything?

MR. TAYLOR: This rule doesn't address that.

PROF. CAPRA: If it's not privileged in the first place, this rule has no applicability.

MR. ALTMAN: Right. But if they claim it's privileged.

JUDGE KLEIN: You have a Rule 11.

MR. TAYLOR: This rule does not address the elements of a claw back order or agreement.

PROF. CAPRA: No, it doesn't do that. It also doesn't say what's privileged and what's not. That's independent law. So if somebody is asking for something saying we inadvertently disclosed privileged matters and it's not privileged, federal common law would take care that.

MR. ALTMAN: Sure. But there is a practical aspect of it at some point. We are dealing with a situation in New York where the judge said just give the stuff back, come back in another day, and it completely disrupts a trial that we are going to have in California. So it's going to tie in with this.

Once again, if you're going to do claw backs, claw backs are going to lead to more inadvertently produced documents. The reality is, with one hundred percent assurance, with any kind of a claw back -- this is even without a claw back --

MR. HANGEY: Are you suggesting that 502(b) perhaps ought to have another element and that's the absence of prejudice to the receiving side? We've got these two elements of prompt measures and reasonable precautions. Are you saying that a third piece, to cover your situation of what the judge does to you in New York is going to hurt you in California, are you saying that there ought to be an element of the calculus of the measure of the prejudice to the recipient?

MR. ALTMAN: That probably puts it better than I put it so far. Yes, I think that ultimately, if you take most of the things I've said --

MR. HANGEY: I'm sure Professor Capra has good reasons why we can't do that, but that sounds kind of sensible to me.

PROF. CAPRA: I'm minding my own business. I'll say that it's not in the case law that we tried to codify. But I definitely will think about raising it with the committee.

MR. ALTMAN: What's happened here is kind of funny. I'm also a member of the Sedona

Electronic Discovery Working Group, and we just had our meeting in November. It's not a knock on Sedona, but the primary people that participated have been people on the producing side of the world. They really haven't had too many questions on the producing side. If you did count them up, out of 300 people, there are maybe 7 or 8.

what's interesting, at the end of the conference -- as you can tell, I talk -- I raised a lot of questions and a lot of issues, and the conference realized that they had not really thought much about what is the receiving party's position in all of this. Really, almost everything has been from the producing party's perspective. They had not considered what it mean to the guy who is getting the stuff, what kind of trouble are these rules going to create for them. That's really what I'm throwing out here.

The other thing is that there was some talk before about if you throw all the stuff that may be privileged in a bucket and you don't necessarily produce it. One of the things that

people have not thought much about, it's not about whether you get every document, it's whether you get every concept.

What I mean by that is in any given litigation maybe there are a hundred distinct concepts that count and maybe there are ten million documents. You may cover all hundred of your concepts in one million of the documents even though you didn't get two million you were supposed to get.

So the whole point of this whole thing, and this ties in how to I do searches and things like that, is to craft your methodology so that you are more likely to find most of the relevant information. You're never going to find all of the relevant information. You're never going to fail to produce at least one privileged document. It is going to happen no matter what you possibly do.

With that, if there are any questions, I appreciate your listening.

JUDGE SMITH: I think you got your share of questions. Thank you.

Is there anyone else who had signed

up? Apparently not. This completes this hearing. I want to thank everyone who has participated, and thanks to the committee members. We'll see everybody in April.

(Adjourned)