JUDICIAL CONFERENCE OF THE UNITED STATES

ADVISORY COMMITTEE ON EVIDENCE RULES

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HEARING ON EVIDENCE :
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Friday, January 12, 2007

Scottsdale, Arizona

The hearing in the above-entitled matter convened, pursuant to notice,

BEFORE:

Honorable JERRY E. SMITH, Chair
United States Court of Appeals
Houston, Texas

Honorable ROBERT L. HINKLE
United States District Court
Tallahassee, Florida

Honorable ANDREW D. HURWITZ
Supreme Court of Arizona
Phoenix, Arizona

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Honorable LEE H. ROSENTHAL
Chair, Civil Rules Committee

Professor EDWARD H. COOPER
University of Michigan Law School
Reporter, Civil Rules Committee

Honorable DAVID F. LEVI
Chair, Standing Rules Committee

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Standing Rules Committee

DANIEL C. GIRARD
Civil Rules Committee

Professor DANIEL J. CAPRA, Reporter
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(Prepared from a tape recording) P
R O C E E D I N G S

JUDGE SMITH: ... Advisory Committee on the Federal Rules of Evidence. We're here to obtain comments on proposed Rule 502. (Inaudible) Let me

just ask to go around the table, those who are seated here, so you'll know who are all the participants. Of course, we have participants who are Committee members and others who are not; but, please, as we go around, just identify yourself and why you're here. Let's begin over here. Jeff?

MR. BARR: Jeff Barr from the Administrative Office.

MR. ISHIDA: James Ishida, attorney with the Administrative Office.

PROFESSOR STRUVE: Catherine Struve, Penn Law School and Reporter for the Appellate Rules Committee.

JUDGE KRAVITZ: I'm Mark Kravitz, a District Court Judge in Connecticut and a member of the Standing Committee.

MS. MEYERS: Margie Meyers, a member of the (inaudible).

MR. McCABE: Peter McCabe, Assistant Director of the Administrative Office of the U.S. Courts and Secretary of the Rules Committee.

JUSTICE HURWITZ: Andy Hurwitz. I'm a member of the Arizona Supreme Court and a member of the Evidence Committee.

JUDGE SMITH: I'm Jerry Smith, a Judge on the Circuit Court of Appeals and Chair of the Evidence Rules Committee.

PROFESSOR CAPRA: Dan Capra, Fordham Law School, Reporter for the Evidence Rules Committee.

JUDGE HINKLE: Bob Hinkle, District Judge for the Northern District of Florida in Tallahassee. I'm a member of the Evidence Rules Advisory Committee.

MR. HANGLEY: Bill Hangley, a private practitioner from Philadelphia, and I'm a member of the Advisory Committee on Edvidence.

JUDGE HARTZ: Harris Hartz. I'm on the Tenth Circuit and a member of the Standing Committee.

John, you should introduce yourself.

UNIDENTIFIED SPEAKER: Judge, I'm going to leave in about 10 minutes anyway. (Laughter)

JUDGE HARTZ: Oh, okay.

UNIDENTIFIED SPEAKER: Thank you, anyway.

MR. GIRARD: I'm Dan Girard. I'm a private civil attorney from San Francisco and a member of the Civil Rules Committee.

MR. RABIEJ: John Rabiej. I'm with the Rules Committee Office.

JUDGE ROSENTHAL: I'm Lee Rosenthal. I'm a District Judge from Houston, and I'm Chair of the Civil Rules Committee.

PROFESSOR COOPER: Edward Cooper from Michigan Law School and Reporter for the Civil Rules Committee.

JUDGE SMITH: All right. Thanks to all of you for being here. I think these two hearings, this one and the one in New York on January 29th, will be really helpful to the Committee in reviewing 502 and the suggestions that are made at the hearings and also written comments.

We're going to go down through the witness list, and I'll permit each witness to speak up to 10

minutes. We need to be strict on the time limits, so please judge your remarks accordingly. Then we'll entertain any questions, maybe first from members of the Committee, and then from any others here at the table.

And I'd just ask that all of us try to avoid repetition as much as possible because we do have a long agenda, and we have a lot of people who have travel plans that need to be met. On the other hand, we want the hearing to be thorough and meaningful to everyone here. So, we don't want to be rushed to the extent that we're just going through the motions.

George Paul is here?

MR. PAUL: Yes, Your Honor.

JUDGE SMITH: Fine. Just briefly -- go ahead and sit there.

MR. PAUL: All right.

JUDGE SMITH: And, briefly, please tell us who you are and what your professional affiliation is and whom else you might be representing (inaudible).

MR. PAUL: Thank you, Your Honor. I'm George Paul. I'm a partner at the Lewis and Roca law firm here in Phoenix. I'm here speaking on behalf of myself. I've been a private practitioner for almost 25 years. I've been a business and commercial trial lawyer, litigator. And if I can start my testimony with -- and I'm very honored to be here, and it's obviously (inaudible) welcome to Phoenix. It's great to have this meeting here.

If I can start with just what I've observed in my 24/25-year career, starting out really enjoying the trial cases and having significant trials fairly frequently, I've personally observed, both in my practice and throughout Phoenix, the fact that the amount of information and the cost of discovery has sort of strangled the dispute-resolution process.

I feel that trial lawyers, commercial trial lawyers, are, except in the biggest cases, somewhat of an endangered species. I've tried to make a study of this process, including the ascendancy of electronically stored information, conducted a survey, read the testimony of the Civil Rules Advisory Committee for the e-discovery rules, interviewed many experts, and have done some writing.

And I hope this isn't just extremely self-evident, but I think the new information infrastructure is doing something extraordinary as far as producing information. There is an information explosion. It's really beyond that. It's something -- and in some of my writings I've tried to quantify it.

My co-author of a book I worked on and I have estimated that there's about, well, several thousand to ten thousand times as much information in enterprises today than there was approximately 20 years ago. And the scary thing is that this inflation or this explosion, I think, is happening because of the dynamic, which hasn't stopped. There may be ten times as much information three years

from now. There may be a hundred times more information six years from now.

And I think that it's easy to take such things for granted when you really get into rules and start word-smithing and really trying to figure out what legal doctrines and what jurisdictional bases you're going to be utilizing.

But I think the bottom line is: I think that the whole adversary system as we've known it in our country is at risk because of the volume of information and the cost of discovery, particularly caused by -- getting to our subject today -- privilege reviews. It's very, very difficult to say it's okay to just let something slip by, and this causes phenomenal expense, and it's stressing out the system.

So, what I'd just like to emphasize is I've read that the Committee has, in all likelihood, made a decision not to exercise its full constitutional authority under the Commerce Clause to enact a privilege-waiver rule that would be nationwide. I think the conclusion of the Committee has been we can do that; that would be constitutional, but it would be heavy-handed; and perhaps the state rule-makers and state judges might object to that.

But I'd like to point out that what this Committee is doing by not doing that is really limiting this new rule, whatever it becomes, a statute or whatever its final form. It's limiting its effect probably to what? I don't know if there are any statistics on this. Five percent of the litigation in the United States, three percent of the litigation in the United States, is in the federal system. The vast majority of litigation is in the state courts, the overwhelming majority of litigation.

Morgan Stanley was a state court case, and the state courts are now starting to adopt e-discovery rules. We filed a petition here in Arizona. It's going to be considered by the supreme court.

Whether there are e-discovery rules or not, there is electronically stored information throughout society and throughout the evidence in litigation. And I can certainly understand why this Committee would not want to recommend to Congress to legislate for all the state courts in the United States, especially when there's been a communication that is not really wanted.

But what I would like to do, if possible, is to make sure that Congress understands the true turning point in our profession. I really enjoy being a trial lawyer. I really enjoy the practice of law, and I enjoy the trial part of it, not the paper-pushing part of it or the warehouse-review-documents part of it, and I think that's at risk. I think it could be gone in 5 years. I think it could be gone, easily gone, in 10 years. And that's a risk to the system, not just for George Paul's fun profession.

So, that's the first point. It's really a big deal, and it's easy to kind of take it for granted. This is an explosion of information.

The second brief point is the concept and the substantive rule that's been proposed that there shall be reasonable precautions under Rule 502(b). Unless I'm misreading things, there seems to be no norm or no guidance to courts about what will constitute "reasonable precautions." It seems to be left completely up to each individual judge to adjudicate what were reasonable precautions.

I'd like just to begin, and note for the record, that in the hearings on the e-discovery rules there was a large amount of testimony and a large assumption, I think, by the rule- makers -- and this can be discussed later -- that, yes, there's a huge amount of information, but it's data, and it can be searched with technology. Okay? And so things will be easier. Technology can help be a tool to provide a solution, for example, in searching for privileged materials.

Now, here's the conundrum: If you have 100 million e-mails with attachments -- and there are now cases that exceed a billion e-mails, and archives of the Executive Office of the White House are going to soon exceed a billion e-mails --when you're doing a privilege review, unless you use search and retrieval technology, different types of computer searches that search the data and the metadata, you really have to look at everything. You have to lay eyes on everything, and that is phenomenally expensive. You can do an easy calculation that shows it just becomes prohibitively expensive, and this is what is stressing the system.

So, if possible, I would like to ask you to consider whether it's possible to signify that "reasonable precautions" does not necessarily mean eyes-on review; that you can consider the use of search and retrieval technology, when done reasonably, would be a reasonable precaution or a reasonable -- the other formulation that I think that Lawyers for Civil Justice has wisely--

JUDGE SMITH: Two minutes.

MR. PAUL: Okay. Thank you very much. I think I basically said it: that "reasonable precautions" should include search and retrieval technology.

I very much appreciate the opportunity to speak here, and I thank you.

JUDGE SMITH: Thank you, Mr. Paul.

MR. PAUL: All right.

JUDGE SMITH: Thank you. Thomas Allman?

MR. ALLMAN: Good afternoon, and thank you for the opportunity to be here. My name is Thomas Allman. I'm actually Tom Allman, and I don't know where I get this "Thomas" (inaudible) (Laughter), but I am at Mayer, Brown, Rowe & Maw in Chicago, Illinois, where I retreated after leaving the corporate world where I was for a decade as a general counsel at BASF Corporation. In my capacity at BASF, I was the Chief Compliance Officer, which left me more experience in dealing with federal agencies than I ever thought I would get, and I also had the capacity and responsibility for our litigation.

I come at this process from two points of

view: First, it seems to me that within the corporate world, at least, the protection of the attorney-client privilege and the work- product privilege is something that is of prime importance and should be, wherever possible, a matter of voluntary -- voluntariness. If there's going to be a waiver, it ought to be a voluntary waiver; it ought not to be a compelled waiver.

And the second point of view I come from is the same one that George just expressed, and that is the overwhelming cost of privilege reviews, and something really needs to be done about that in terms of litigation.

So, taking those two concepts together, here's the way I see what you folks are doing: I see 502 as really a compilation of three different sets of rules. I see 502(a) and 502(b) as an attempt to have uniform practice with respect to inadvertent waiver of privilege.

JUDGE SMITH: Excuse me for interrupting you just now. This won't take from your time, but I forgot to point out to everyone the nice (inaudible) book you have. If you turn to page 397, you have the proposed rules.

Excuse me. Go ahead.

MR. ALLMAN: Thank you. So, I see 502(a) and 502(b) as one of a piece, and they are an attempt to bring uniformity to the way in which waiver occurs in the absence of agreements among parties, and I have no problems at all with either 502(a) or (b).

I see 502(c) as an entirely different matter. I see that as a matter of the impact of federal policies which require waiver, and I really don't think that should be in front of this Committee, with all due respect. I think that's a policy decision that really belongs to Congress, and I look at what happened when the banking industry ran in at the last minute at the end of the last Congress and got their own selective-waiver rule. I think you might want to consider withdrawing that and passing that ball to Congress.
And, as I said, my focus is on the voluntary-waiver side.

So, that turns to 502(d) and (e), which are really what I care about.

502(d) and (e) say--I see 502(d) and (e) as completing the job that was begun by the Civil Rules Committee, and I think they have to be complementary and they have to work together. And any changes you make in 502(d) and (e) and anything you do in 502(d) and (e) ought to take into account what the Rules Committee was up to.

I see 502(d) and (e) as saying that in the implementation of a case-management order or some other order entered by a court that embodies the aggrieved parties, that that ought to be respected, even if the parties chose to go to what Judge Rosenthal would call -- called a "nutty idea," the idea that you let your opponent come in and look at your privileged information before you have.

I used to think that was a truly nutty idea, but I must say -- and I dropped a footnote in

my comments to this point --with the overwhelming amount of privileged information, including marginally privileged information, marginally work-product information, I think it is now increasingly sensible for companies to take risks in the interests of getting the job done and moving on with litigation.

So, I support, reluctantly, but I do support the "quick-peek" concept; I certainly support the "claw-back" concept, which the Rules Committee has already embodied now as an option in the Federal Rules. Now--

UNIDENTIFIED SPEAKER: (inaudible)

JUDGE SMITH: Come in.

UNIDENTIFIED SPEAKER: Sorry. Go ahead.

MR. ALLMAN: No, no problem. In my comments, you may have noticed that I picked up the question you raised, Professor Capra, about dropping from 502(d) the sentence requiring the appropriation of party agreements. I was unaware that you had met since then and had kind of unanimously decided that you did want to drop that. At least, that's the way I read your minutes.

And so, I've given a little bit more thought to it. I still strongly believe that you should do nothing to disincentivise -- to lower the incentive for parties to meet and discuss voluntary agreements. You should not do anything to impair that. But there may be another way to get to the same place that I want to be and where you want to be; and that is, if we look at 502(d), Controlling Effect of Court Orders, it says that a Federal Court order that the attorney-client privilege or work product is not waived, et cetera, if the order is incorporated.

If you simply change the word "order" to "decision" in the second line of (d), I think you will meet the objection of the judge who raised this issue with you folks, and then you can drop -- I think you can drop; I have to think this through thoroughly; I hope you'll think it through thoroughly -- but I think you can probably drop the requirement of incorporating the agreement because you pick that up in 502(e). But--

PROFESSOR CAPRA: May I?

MR. ALLMAN: Yes, please.

PROFESSOR CAPRA: But then I don't know that you could categorize an order that kind of memorializes the (inaudible).

MR. ALLMAN: No, I'm saying that it would -- the enforceability against third parties would come out of 502(e).

PROFESSOR CAPRA: It doesn't because it specifically says it doesn't enforce against third parties.

MR. ALLMAN: No, no. I would leave (e) in. In other words, (e) would still require the incorporation of the court order. In other words, only court-ordered -- I see (b), I see 502(b), as giving the third-party effect that you desire. I don't see 502(b) as being confined solely to parties before a court. At least I'm not--that's not the way I read what your intent was.

What I read, when I read the -- well, let me back up. As I understand the objection of the judge who raised the issue, she was concerned that it seemed to give more effect to a decision that the parties reach pursuant to an agreement than to a decision a court made in applying 502(b). That's the way I read it.

PROFESSOR CAPRA: (d)? Sorry. Admitted. All right. (d).

MR. ALLMAN: Well, you get more effect under (d) than you do under (b).

PROFESSOR CAPRA: Okay.

MR. ALLMAN: Okay? I happen to think that makes sense. For all the reasons I just said a minute ago, I think parties would take the time to negotiate an agreement embodied in an order. I think I'm entitled to the predictability that comes about under 502(d). But 502(e) also -- it seems to me to go to the same point, if I read it correctly. So, what I'm saying, that if you really are compelled to worry about the difficulty of getting into collateral effects and (inaudible) and all the incredible doctrines that come about when you have to look at how you give effect to the impact of a federal order, then maybe just a simple change to confine 502(d) to a decision, rather than order, may make that point (inaudible).

But I haven't yet made what I hope you all read in my comments, my really gut point; and it's a subtle one; and I mean no disrespect, but I am concerned that a busy trial judge, given the option to simply order as a matter of law in their order that parties will not be bound in third-party litigation by the inadvertent disclosure of information in front of that judge, I am terribly worried about the temptation of a busy judge to force an accelerated-privilege review on parties who haven't agreed to do it that way.

I don't want "quick peek" to be mandatory in all federal cases, and I think citing Hopson is a dangerous step towards that, and I would join with Professor Marcus' original suggestion that you delete all reference to Hopson. I think Hopson, with all due respect to Judge Grimm -- and I've said this to his face -- I think he has an unnecessary digression in Hopson, and I do not agree with his reading of that famous Ninth Circuit opinion Transamerica.

I think that case has to be confined to its facts, and I would not embody that in a federal rule.

JUDGE SMITH: Thank you, Mr. Allman. Questions?

UNIDENTIFIED SPEAKER: I have one question. I just want to understand: Is your concern that a federal judge will involuntarily impose on parties a non-waiver order and then, as a second step, impose on parties (inaudible). Is that your testimony?

MR. ALLMAN: I'm not sure about the first part of your question, but it is my concern that a busy judge, concerned about their trial schedule and so on, will take steps which could have the unfortunate impact of, No. 1, undermining what the

Federal Rules Civil Committee was trying to do, which was to get parties to meet and talk about it; and, No. 2, unfortunately deprive parties of a choice to enter into these arrangements.

UNIDENTIFIED SPEAKER: Question. Put aside the second (inaudible).

MR. ALLMAN: Yeah.

UNIDENTIFIED SPEAKER: The second (inaudible). Your first one would be solved by going back to the notion (inaudible) parties.

MR. ALLMAN: Correct. I really think it's--

UNIDENTIFIED SPEAKER: I just wanted to understand.

MR. ALLMAN: Yes. Yes. I think it's important to maintain that.

UNIDENTIFIED SPEAKER: All right. That's (inaudible)

UNIDENTIFIED SPEAKER: A question (inaudible)

MR. ALLMAN: Yeah.

UNIDENTIFIED SPEAKER: It doesn't necessarily answer that question. Couldn't a crafty trial judge say: well, let's try and agree, and part of the agreement is an accelerated--I mean the language that would be crafted might prevent that.

MR. ALLMAN: I'm aware of that, and that's why I suggested that the comment should have a sentence in it that says: look, we're not intending that you folks ought to be forcing people into these kinds of agreements. That's really what the Civil Rules Committee did when they changed their language.

JUDGE ROSENTHAL (?): If I may, we did, in fact, put that language in it in part because we were concerned that we couldn't promise protection as to third parties. So, the policy issue then is whether -- if you can promise protection as to third parties, does that then lessen the problem with having a problem with having a court order these kinds of truncated, abbreviated, or absent pre-production reviews?

Your argument is obviously that there are still valid reasons for a litigant to want to take the time and spend the money, if that's its choice, and should be -- that choice should continue to be available.

MR. ALLMAN: There are some kinds of litigation, there are some kinds of issues where privilege is involved where really it is important that they have that opportunity.

JUDGE SMITH: All right. Thank you, Mr. Allman--

UNIDENTIFIED SPEAKER: Excuse me, Mr. Chairperson. I want to understand your point about (c).

MR. ALLMAN: Yeah.

UNIDENTIFIED SPEAKER: You think that collective waiver is an issue that should be considered by the rules process? Anything that comes out with respect to evidence rules has to be enacted by Congress (inaudible). It's not the usual rules process. (inaudible)

MR. ALLMAN: I just have--I just have a suspicion, and, with all due respect to the gentleman from Wisconsin, I really think this is a policy issue that is kind of being pushed off on you folks where it really belongs--I mean there is no right or wrong answer to selective waiver. There are really strong arguments why the federal government or the state government has a right to insist on cooperation, including the work product of the attorneys that have gone to the trouble of investigating the facts and so on. And I've dealt with that.

But it's equally clear that there is a--I can remember interviewing employees and thinking to myself, you know, these folks have a lot of confidence in us and they're told as a privilege and so on; what if we sell them down the river, in essence, by turning over all this work product to the federal government? I'm troubled by that as well. Balancing those decisions I don't think is a judicial issue; I think it's a policy issue of Congress. That's all I--I don't doubt that you have the (inaudible) jurisdiction and should consider it.

JUDGE SMITH: Thank you. Steven Hazen?

MR. HAZEN: Judge Smith and Committee members and other members of the bench in attendance, I'm Steve Hazen. On behalf of the Executive Committee of the State Bar of California Business Law Section of which I'm a member and currently serve as Secretary, I'd like to thank the Committee for this opportunity to testify before it.

Mr. Chairman, I would request that the written statement I submitted be considered part of my presentation. I'm laboring under some restrictions on what I can and cannot say. The State Bar of California is a unitary bar. We are an agency of the Supreme Court of the state, and there are restrictions imposed under (inaudible) as to what can and can't be said. The result is that the testimony that I gave is exactly what it says.

I would like to be able to answer questions that would come up. They may, in fact, involve something that's not within the four corners of the paper--

PROFESSOR CAPRA: Can I ask (inaudible) in terms of attribution, is it the attribution to the Executive Committee of the State Bar Association Business Law Section; State Bar, more broadly, the Business Law Section? What is the specific attribution?

MR. HAZEN: The specific attribution is as stated in the written testimony: that of the Executive Committee of the Business Law Section of the State of California, on whose behalf I appear.

PROFESSOR CAPRA: Thanks.

MR. HAZEN: And I'm obligated to say, as I do in the written materials, that they do not represent the position of the State Bar of California, which is prohibited from appearing here.

I may not have the opportunity to respond, as I said, but if it turns out that you have a question that's not within the four corners, I will respond in my own capacity and then seek the

authorization necessary to respond by February 15th, saying that what Steve Hazen said at the meeting did, in fact, represent our position.

I think there has been, unfortunately, a tendency on the part of people talking about these issues to either complete attorney-client privilege and attorney work product or try to basically sweep them all together by saying, when I say one, I mean the other; or I'm using a short-term title for it. I think that's unfortunate. I think there are clear distinctions which have to be drawn. However, the use of that is somewhat unwieldy. So, for our purposes here, what I'd like to do is say if I reference privilege, I mean the attorney-client privilege; if I reference immunity, I'm referencing the immunity from production of attorney work-product documents.

As some reform, we support the efforts of this Committee in what you're trying to do; and, as one of the predecessors said, significant parts of these provisions enhance the strength of the privileges, of the immunities, of the protections they provide. We're not taking a position on that, but we applaud what you're doing and urge you to do it.

We are taking a position on Section 502(c) and are here to oppose it. We'd recommend elimination of it from the rule as will be proposed by the Advisory Committee. This question does not arise in a vacuum. There's an abundance of case law on the topic of selective waiver, and that's not just decisions, but that's the analysis judges have used in coming to those decisions, analysis and reasoning that has relevance to this particular question.

We urge the Committee to consider at least six standards by which the concept of selective waiver should be measured. One is the overwhelming case law that exists out there. The second is the impact on communications between attorney and client. The third is the impact on expectation of confidentiality. The fourth is the impartiality of the judicial system of itself. The fifth is the confidentiality becoming a commodity or a bargaining chip. And then, of course, there is the federalism issue.

We believe that the proposal set forth in FRE 502(c) needs to be assessed against those standards, and we believe that, when assessed against it, it will fail.

I have a lengthy presentation on each of those standards, and I'm not going to try to touch on them all here. I'm going to assume that each of you had a chance to read it. I do think it's important to recognize that there actually is not a conflict in circuits as has been intimated. There is one court case that has said what amounts to about five lines. Something that people would like to say is view A, and then all the rest of it is view B, or you can subdivide it, but the point is very simple. There is one simple, unfortunately, limited-scope decision balanced against a mountain of decisions, a mountain of analysis, that have not

followed that, have not applied the reasoning of it and come to different conclusions, some of which outright rejecting it. We would also point out that that one decision, of course, came before Upjohn was decided.

I urge you to be cognizant of that fact, and the Tenth Circuit, itself, recently came to the same conclusion, suggesting that the mere fact that this is before this Committee and it will ultimately go on from here does not necessarily mean that the decisions that have been used have been rendered in the past. The analyses have been rendered -- have been used to support them and as part of them, nonetheless, are relevant to this consideration. I hope that will be taken into consideration.

The impact on communications: I'm going to try to steam through this, and it's going to make things relatively truncated. The bottom line is you've all heard it so many times before. It's in Upjohn, and people say it, and it almost sounds good to recite it, but the bottom line is the nature of the communication needs to be carefully protected because you encourage the full and frank communications between the attorney and the client. And that does two things: One is it allows the attorney to provide informed advice; and, secondly, it allows the client to self-monitor their actions, to conform to the requirements of the law. And absent either one of those, you have a problem.

Selective waiver may not fix the problem, but it's going to create a serious one.

The question is very simple. Who is more likely to be fully candid in providing information to his counsel: the employee that knows that the entity has a strong incentive to preserve the information exclusively within the client and a strong incentive not to waive privilege, or one who knows his client may find a (inaudible) position where it has a strong incentive to disclose that information to enforcement/regulatory agencies seeking to exact punishment from someone?

I don't think that's even a close call. And those of us who practice law see this all the time in terms of trying to get the employees, the representatives of the corporate entities, to tell us things that we need to know, facts that we need to have. Selective waiver will undermine that.

Expectation of confidentiality is a core principle of privilege and, by its nature, is destroyed by selective waiver. Confidentiality exists only if it is confidential. There is no "yes" -- this is a binary question. It's like they say you're not partially pregnant. You are, or you aren't. Something is confidential or it is not.

But there's a second part about expectation of confidentiality, and this comes up constantly when you have an internal investigation. The lawyer has to, of course, inform the employee that the privilege exists between the corporation and the lawyer, not between the employee and the lawyer. The relationship exists between the corporation and the lawyer. But, nonetheless, you want them to be open with you. You need to be able to get the

facts. You need to be able to have the information they have, but how do you do that? Well, partly, the employee recognizes that you have a strong incentive to keep it privileged. Now, there's the point that was made earlier about selling your people down the river. That's an ethical issue that I think in-house people have to deal with. It is made worse by selective waiver.

I get to the fourth standard I mentioned, and that's the impartiality of the judicial system. There are just no two ways around it. Selective waiver is a sword and shield simultaneous (inaudible), and that's just the way it is.

JUDGE SMITH: Two minutes.

MR. HAZEN: Two minutes. Well, with that (Laughter), I will just say confidentiality as a commodity is an issue that has been, I think, rejected by all courts. The issues that you have to deal with, the reason that you observe this privilege, is because of the enhancement it brings to the judicial process. Treating something as a commodity undermines that.

I think what I'll do is finish off with something of a flourish from a fellow alum from the University of Chicago Law School, Judge Ab Mikva, and it's from the D.C. Circuit Permian case: "A client cannot be permitted to pick and choose among the opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." And this goes on.

The point is simple: Impartiality of the judicial system requires that all people who appear before the courts are treated the same, not the government in a preferred fashion, not the corporation trying to inculcate favor with the government in a preferred fashion, but all persons who come before the court.

With that, the Executive Committee of Business Law Section of the State Bar of California believes that FRE 502(c) does not preserve the confidentiality of the attorney-client communications. We believe it does not preserve the inherent standard of fairness and equal treatment of all parties on which our system of justice depends. We urge the committee to reject (c), continue on with its efforts. Intentional, unequal disclosure sticks out like a very sore thumb.

And I managed to get through it all.

JUDGE SMITH: Professor Capra?

PROFESSOR CAPRA: In your submission, there's a footnote about the Bank Regulatory Act. Could you (inaudible) that?

MR. HAZEN: Yes. How much detail do you want?

PROFESSOR CAPRA: Well, it seems to me that that's an indication of Congressional intent to implement selective waiver, and since this committee is drafting essentially for Congress's usage--

MR. HAZEN: I think that's--

PROFESSOR CAPRA: --when I saw that--

MR. HAZEN: I think that's a bad

misunderstanding of what Congress did. The bottom line is, in effect, as you know, Professor Capra, I sit as an advisor to the Task Force on the Attorney-Client Privilege with your colleague Professor Green as a Reporter for it, and I was the one who, in fact, prepared the task force's position on that.

And the bottom-line analysis is very simply the regulatory agencies involved in those cases and covered by the Financial Regulatory Relief Act of 2006 all have absolute, God-given access to the information in the first place. They have it. There's nothing that you can do except forfeit your charter. Regulatory authorities that are covered by this act, they have people in the company, in the bank, every single day. They have offices there. They walk in and out of office, they pull documents in and out of files as they wish. They have absolute access to things. Now, in that context, there is no incentive created to get more by granting selective waiver. They have everything.

What they're saying is: we, as a matter of policy, have decided that the financial institutions, the regulated financial institutions, occupy a position in our economy of such significance that we need to have the regulators have absolute, God-given access to everything, and once we do that, once we make that decision, we need to live with the result. And the result is we shouldn't allow that to become the basis by which other people claim that the privilege has been waived.

So, I believe, Professor, that that situation is in fact sui generis. I think it is easily distinguishable from other situations and one which I don't believe is in any sense at all appropriate to say that the Congress has, itself, concluded that selective waiver is a good idea.

JUDGE HINKLE: I have a question. My question's about your two hypothetical business executives and which is going to be more candid with the inquiry. And before I ask the question, let me say I certainly agree that candor in that situation is important. One of the other speakers, whose views are pretty much the same as yours are, said that one of the most powerful ways to secure compliance with regulatory requirements is by having an (inaudible) exchange with general counsel who then may be able to do more about compliance that the regulators, even after the fact, if you're trying to enforce them. So, I'm all for candor and for improving the incentives for candor.

But it seems to me that the two hypothetical people you posited, neither is the one that exists in the real world. If you talk about the one who knows that the (inaudible) may find itself in a position where it has a strong incentive to disclose that information in the course of regulatory agencies seeking to exact punishment and still--or the person would still be protected by selective waiver.

Well, it seems to me all but the last part about selective waiver is the situation now that everybody faces. The idea that the executive could

come in and talk to a lawyer and thinks that there's not going to be a powerful incentive to disclose this information to a regulator is just misguided because without selective waiver--with or without selective waiver--there is a strong incentive for people to make these disclosures now.

And the idea of selective waiver, when it came to us, the idea was we're going to improve the privilege if we provide selective waiver because the disclosure's being made anyway. And so, this protects it more than it's going to be protected otherwise.

MR. HAZEN: If I--

JUDGE HINKLE: What we have to sort out, what's the real situation? Is this going to help protect the privilege or is this going to further undercut the privilege?

MR. HAZEN: If I might, Judge Hinkle, first off, it's important to recognize that you are right that the situation I have described is, in fact, purely hypothetical and not necessarily reflective, but I believe the ends of that continuum are quite realistic. More importantly, that continuum has been shifting, and it will continue to shift until such time as the government comes to the conclusion or is told by Senator Specter that it cannot do what it's doing.

Now, I think the question is: Will corporations actually tell the government such and such that they got from a client, absent the pressure it gets from the government to disclose that information? I don't know. What I do know is that, over a period of years, there has been more and more and more pressure to do so. What I was saying is that--and I've seen this myself--is that when you walk in and talk with an employee, think about it this way: Our paradigm today is between the situation where every single employee of a company has in his back pocket or her back pocket a lawyer who, every time they talk with their superior or someone at equal level, they are--that lawyer is there, and that lawyer is always saying, "Just a minute." That lawyer is always saying, "Wait. Privilege. Don't talk about that." Or we're going to increase or we're going to provide a system whereby these people talk to each other.

All I'm saying, Judge, is that if you grant the selective- waiver concept, what that means is that when the executive is sitting here, he has to think to himself: "Now, this company--I've known this company for a long time. I've been a good, productive officer for a long time, and I have a pretty good sense about what they think is important to them. They will not waive the privilege merely because the Department of Justice comes in here and threatens to do one of two things: One is issue a subpoena and make a press release about it (inaudible), or the other is just go ahead and indict us and embarrass us. What is the company going to do in that case? Well, I've got a pretty good sense about it because we don't have anything to hide. We're going to stand up. We're going to assert our privilege." Or that same one is saying,

"But now on top of that, the company has the ability to go ahead and tell the government all those things and maybe what it is I did, maybe I did wrong. I don't know what I did wrong--what I did was right or wrong, but what I do know is that I need to be sure that my company has that information, so I need to be able to provide that to them. But if I know that what I'm about ready to tell that person, tell the general counsel, in fact, is not in that same dynamic where the company itself is going to be inclined to assert the privileges, he's going to say, 'Wait a minute. Why would I do this?'"

It changes the situation where they're in a selective-waiver environment; the person sitting in this chair is always going to say to himself, "Do I tell you what I tell you because you're part of the company, or do I tell you that because you are the surrogate for the Department of Justice who's actually going to get what I'm telling you?" And in that context, I get a lot less information.

JUSTICE HURWITZ: Just--Mr. Hazen, you don't have to respond. I know this is not in your testimony, but whether or not the concept of selective waiver is a good one or a bad one, as you can see from the (inaudible) issued in committee, this group doesn't necessarily have a settled view on it. It would be useful for folks to talk about it, but also comment on if we are to have selective waiver within the proposal we have drafted has--is the right one or is there some other one that would be better? And, again, it's not encompassed in your testimony, so I don't expect you to respond to it.

One of our dilemmas is we asked to grant a selective waiver (inaudible); we do not know whether Congress will adopt one or not. (inaudible) anything else. Part of our job, I think, consistent with our commission, is to make sure that if they go adopt something, they at least have before them something thoughtful.

So, when folks look at this--and because we've got the relatively (inaudible) as opposed Sections (a), (b), (d), and (e), where folks are saying, "Yeah (inaudible). You make it better this way." All the commentary we get on (c) is either, "This is terrible!" or "I love it!" (Laughter) And so, it would be helpful--and not just you, but other folks who ask this--to say, "If you are going to have it, here's what I'd do different."

MR. HAZEN: I don't know whether these proceedings are being recorded or not. I will say for the record at this point, I'm going to answer your question as Steve Hazen, if I may. And that is the only selective-waiver system that would work is not one that you currently have.

The only selective-waiver system that would work is one that would, in fact, nationalize privilege--the one that would effectively say this applies not just to us, not just to the federal government, but to the states. It applies to everybody. And, coincidentally, it applies to Canada. It also applies to the E.U.

The bottom line is you cannot--you cannot put that toothpaste back in the tube. Once the

information is out, it's out; and the question is the impact of it being out is determined by the lowest common denominator. If it gets out in an environment where it could be released further, that's exactly what will happen to it.

So, in answer to your question, Justice Hurwitz, the best possible selective-waiver provision you could adopt is, well, let's amend the Constitution and get rid of the states completely. Let's nationalize the whole process; and while we're at it, let's go ahead and take over Europe. And I know that sounds facetious, but if you work through the implications of what this does, that is, I think, an immutable conclusion.

JUSTICE HURWITZ: (Inaudible) too much there because you wouldn't even have a privilege rule with--if some country had no attorney-client privilege, why would we even bother with a privilege rule?

UNIDENTIFIED SPEAKER: And in that--in Europe, is that where they are on this?

MR. HAZEN: Well, it's hard to say, to be honest with you. You certainly don't have a uniform system in Europe, although it may try to be, and it's not just Europe; you have to deal with Canada. It really is a much bigger issue for us because Canada actually does have a situation that effectively grants by statute a limited waiver applicable to auditors--not, curiously enough, to the government. In fact, it specifically does not apply to the government. So, if you go this way, you'll be at odds with Canada, but if you adopt--

JUDGE HINKLE: Do you mean--I mean I saw some (inaudible), certainly don't find it matters, but I thought that in the corporate context, they want to recognize the privilege was automatic.

MR. HAZEN: Canada?

JUDGE HINKLE: In Europe.

MR. HAZEN: Oh, well, again, Judge Hinkle, I apologize. I believe that you can't actually lump it all together. They try to make it uniform from jurisdiction to jurisdiction, but it is not. And I submit to you that the difference between France and Germany on this thing is more complex and difficult just between those two, in answering that question, than would make this worthwhile.

JUDGE SMITH: (Inaudible). Patrick Long?

MR. LONG: You won't put me under oath or anything? (Laughter) My name's Pat Long, and I live and work in Southern California. And I am currently the president of D.R.I., which used to be known as Defense Research Institute. I am not here on behalf of D.R.I. because we have 23,000 members, and we didn't poll them to see what their thoughts were on the proposals for 502. So, I am here as an individual, and what I have to say will be very brief. I'll be finished in about 3 minutes. But these are my own thoughts. You know, if D.R.I. had wanted to send their best and brightest, they probably would have sent my colleague John Martin from Dallas, Texas, who is following me through the D.R.I. chairs.

But part of the reason why I'm here--

actually the main reason why I'm here is that I'm Irish Catholic, and I've gone to confession all my life. I have an intense and an exquisite appreciation for the concept of confidentiality and privilege. (Laughter) And I started--before I became a lawyer, I was very familiar with the concept of the clergy-penitent privilege, and I have appreciated that all my life.

I just--and since I've been practicing law--and I do a lot of trial litigation in Southern California--I have not had very many clients who are being investigated by the Department of Justice, but over the years we've had situations where there had been the inadvertent disclosure of things that should not have been disclosed.

And I just think it's important for us as a group, for you as a group in completing your work, to really think about what the concept of privilege is and what confidentiality really means, because as--and I agree with the general thoughts expressed by the previous three speakers. I've read their papers, and they are truly wonderful. I'm not the wordsmith that they are, and I'm not here to discuss that with you. But I just really want you to focus as much as you can on what somebody said a few minutes ago. They said, you know, the toothpaste is out of the tube; you don't put it back in.

And there was a statement in one of the cases that was cited in the papers that have been presented to you; and the statement said, you know, there's no such thing as a partial privilege. There is either a privilege or there is no privilege.

And it is for that reason that I think that whatever you do should be applicable to both the federal court system and the states, so there will be full and complete protection for everybody across the country.

I am generally against subsection (c), selected waiver and whatnot, but the main thrust of my thoughts here today is that it is so precious, it is so fundamental to our system of justice, the concept of confidentiality, and it is the basis of what we do as attorneys. And so, being Irish Catholic helped me to get there.

So, that's really all I have to say today. I thank you very much for having your meeting in Phoenix, which is my home town. I grew up here in the slums of Phoenix. When I was a boy, we didn't call them "slums"; we called it "our neighborhood." And I'm grateful to be back here again with you folks. Thank you very much.

JUDGE SMITH: All right. The next name on the (inaudible)--if I mispronounce the name--is it Verderame or Verderone (phonetic sp.)? Not here?

All right. Carol Cure?

MS. CURE: Good afternoon.

JUDGE SMITH: (Inaudible)

MS. CURE: Hello?

JUDGE SMITH: Please go ahead and--

MS. CURE: Thank you.

JUDGE SMITH: Is it "Cure" or "Cur,"?

MS. CURE: It's "the cure." (Laughter)

Well, I very much appreciate this

opportunity to testify before the Committee and to share my views about proposed Rule 502. My name is Carol Cure, and I am a former member of the House of Delegates of the ABA, the State Bar Board of Governors in Arizona, and a former chair of the Rules Committee of the Tort & Insurance Practice Section of the ABA. So you don't think I'm just a former has-been, I'm also a very current, new, proud grandmother. So, I hope that shows that I know what's important in life and that really good things sometimes take a long time to develop.

I am very much in favor of Rule 502, and I have a very personal reason for being so because, although I was in private practice for about 24 years, I have been division counsel for a large privately held Arizona home builder for the last four for years and all of a sudden am personally responsible for preserving attorney-client privileges and sustaining work-product protection within my company.

And it really has helped me to see all of these things in a brand new light, particularly having been involved in a Department of Justice investigation which was successfully concluded, but cost us a lot of time and a lot of resources and a lot of money.

So, I really want to thank the Committee for tackling this very important issue and the provisions that are intended to mitigate the burdens associated with the very exhaustive document review that's required by the fear that an inadvertent disclosure may lead to the wholesale waiver of the company's attorney-client and work product protections.

I want you to know that the views that I'm expressing here today are my own, although I suspect that they are representative of many others in my position who support the effort for a very clear, reliable standard for disclosure.

The most important principle, in my mind, that I hope the committee will think about very carefully in coming to their final conclusions is the need for certainty and for the rules to have uniform application at the both the state and federal level. And as the court said Upjohn, I think we'll all agree, that an uncertain privilege is no better than no privilege at all.

And so, I strongly support the adoption of proposed Rule 502(b), and I believe that a uniform inadvertent disclosure exception is essential, particularly in this electronic age. As I know the committee is aware and all of you probably know a lot more about this, having studied this issue over the last few years, than I, there are huge volumes of e-mail generated in virtually every company in our country, large and small, today, and the quantity has made the burden of protecting against inadvertent disclosure exponentially more difficult, if not impossible. Recent statistics indicate that there are something like 80 billion e-mails received and sent every day, and the difficulties involved in managing this quantity of electronically stored information are almost unimaginable. Most companies

are only beginning to think about how they can locate and retain what may be needed for legal purposes, and while I know that we're all aware of emerging automated review technologies that are being developed, privilege analysis is generally more subtle than any automated process can easily handle. In addition, there's often little coordination between legal departments and IT departments, and in many companies, these separate department don't even report to the same entities or persons within the company.

The new e-discovery rules obviously have provided an impetus for change, but I suspect that most companies, like mine, are just starting down this road. And in a poll that was taken recently by the Association of Corporate Counsel, less than 10 percent indicated that their companies were prepared for the new e-discovery rules, and over 90 percent said they were still taking steps or beginning to take steps to prepare their organizations for compliance.

So, when you consider the effort involved in attempting to cull relevant e-mails from the millions of other e-mails that are out there in the universe, it really raises the question about the standard that should be used to determine whether the company's conduct was reasonable.

And it's my belief that the standard currently proposed in Rule 502 may well be too high for most companies at this point, and for this reason, I support changing the language to use the phrase "reasonable steps" instead of "reasonable precautions" because I believe this change would allow the court to consider each case on its own facts and to take into account whether the organization has taken the appropriate steps to implement an effective compliance program, such as writing an effective policy, providing training to its employees, providing sufficient resources, monitoring the program, and remediating deficiencies.

I also believe that the inadvertent disclosure provisions of Rule 502(b) should be extended to apply to disclosures to government officers and agencies in regulatory investigations, as well as inadvertent disclosures made in the context of the Federal Arbitration Act. I would like to know, for my company, that any such disclosures will not act as a waiver in any subsequent litigation.

Now, in regard to Rules 502(d) and (e), it's my belief that in order for the parties to truly have certainty and be able to rely on confidentiality agreements, they must be binding not only as to the parties, but third parties in both state and federal court. Otherwise, in my opinion, the rules will have no practical utility and there will be no reduction in the burden of privilege review.

I think it's pretty clear that such a rule can be adopted by Congress pursuant to its Commerce Clause powers, as well as its Article III powers in aid of the federal courts, and I would encourage the

committee to also consider providing that all federal confidentiality orders, including but not limited to those incorporating the agreement of the parties, will protect against waiver.

I do want to speak briefly about the proposed Rule 502(c), which, of course, is very controversial and which may or may not be adopted by the committee. There is much concern in the legal community about the selective waiver provision because of the fear that this provision will encourage government abuses and coerced waiver tactics that will further erode attorney-client privilege and violate fundamental rights.

In my opinion, if this provision is considered, it should be made clear that the decision whether to engage in selective waiver must be completely voluntary, not coerced, that prosecutors should not condition charging decisions in any way on waiver of the privilege, and also that the language would have to be changed to provide that it applies to disclosures at the state level when they're sought to be used in federal proceedings. That approach would ensure that parties could rely on Rule 502 in federal court in both diversity and federal question cases, no matter whether the disclosures were made at the state or federal level, and would prevent state law from overriding federal policy, in line with Professor Capra's third option in his most recent paper.

Also, if this provision is considered further, I think it would have be coordinated with Section 607 of the new regulatory relief bill.

I very much appreciate the committee taking the time to hear my views, and I appreciate all the work that you've done and will continue to do on this issue. And all of us in the corporate community appreciate your efforts and hope that we will be able to come to a good, workable rule. Thank you very much.

JUDGE SMITH: Thank you very much. (inaudible)

PROFESSOR CAPRA: I just have a--

MS. CURE: Oh, yes.

PROFESSOR CAPRA: In the written statement you have, do we have that?

MS. CURE: I have not submitted it. I will submit it.

PROFESSOR CAPRA: Will you submit it?

MS. CURE: Yes, I will.

PROFESSOR CAPRA: Thanks. I appreciate it.

MS. CURE: Certainly. Thank you.

JUDGE SMITH: All right. Patrick Paul? Is Patrick Paul here?

(No response)

Kenneth Mann? No?

(No response)

Thomas Burke?

MR. BURKE: Yes. Good afternoon. I'm Tom Burke. I'm a lawyer in civil private practice here in Phoenix, Arizona. I have been here about 22 years in private practice. My practice is predominantly in tort litigation with a particular emphasis on defense of insurance companies and

private corporations. However, I also have and my firm has a significant plaintiff practice. I like to think that that gives me an appropriate balance and perspective.

I'm not here on behalf of any particular client or organization. I have been very active in a number of defense organizations--D.R.I., one of which Mr. Long is currently the president of, and state and local organizations on behalf of defense attorneys.

I commend the work of the committee. I've read much, but certainly not all. I don't offer my thanks to all of you as a platitude; I view the attorney-client privilege as a very important aspect of our system of laws and justice, just as I'm sure everyone in this room does. I'm sincere when I express my appreciation for the work that was accomplished by many in getting the proposed rule to where it is.

All of that work that many of you have undertaken serves as a disclaimer for me. I do not profess to be an expert on the attorney-client privilege and many of the nuances that have been discussed here and undoubtedly discussed in your meetings and throughout your work. Nonetheless, I have had to deal with it in my practice. I've had to litigate issues, attorney-client privilege waiver, and it is partly those situations that prompted me to become, at least at that time, temporarily expert, later to be flushed out of my brain as I turned to other matters. When I became aware of the work of the committee here, in fact that you were coming to Phoenix, I decided I would come down and share my views to the extent that they offer any help in your continued work.

What I would like to say is that I have three points to address: Number one, I support the deletion of the "should have known" language in Subpart (b). Professor Capra's October memo sets forth that issue, I think, quite clearly, and as one practicing attorney who deals with this from time to time, I support the deletion of the "should have known" language.

Second, I support the position that a production of privileged materials that does not meet the reasonable precaution standard of Subpart (b) be treated as a voluntary production under Subpart (a), not resulting in a subject matter waiver absent the "ought in fairness" standard of Subpart (a).

I didn't prepare a typewritten statement. I have some notes that I'm referring to. And this note is a very simple note. It's the third comment that I was going to offer, and it was, "I support including Subpart (c) and selective waiver." And I sat here and listened to the discussion. This is obviously a hot-button issue. I have given it--

UNIDENTIFIED SPEAKER: (Inaudible)

MR. BURKE: I'm impressed with what I've heard, just here in this room, on Subpart (c). I've had to deal perhaps in different situations that are generating the discussion on selective waiver now, the question of selective waiver. I lean in favor

of it. I recognize that it is a complex issue, and that as Justice Hurwitz pointed out earlier, you either love it or you hate it. And, unfortunately, I don't have proposed language to address the question you raised earlier. I tend to lean in favor of it. However, I do think that it requires, as Ms. Cure just shared with all of you, some specific language that it indeed is voluntary selective waiver and not negotiated in some way.

My position on these three points is based, again, on the importance of the privilege. I think that the work that is coming together and, hopefully, moving forward reinforces the very importance of the attorney-client privilege.

Second, I think my view is a recognition, perhaps unfortunately, that in the complexity of our system of laws, investigations, disputes, litigation, eventually there are some cases where even the sanctity of the privilege is put "into the hopper," so to speak, for a balancing of costs versus risk. The proposed rule that we already have in front of us, with some clarification for the interplay between Subpart (a) and (b) and inclusion, in my estimation, of Subpart (c) with some clarification that it is a voluntary waiver, helps the balancing for the holder of the privilege to do what he, she, or it might want to do.

JUDGE SMITH: Thank you, Mr. Burke.

MR. BURKE: Thank you.

PROFESSOR CAPRA: May I?

JUDGE SMITH: Please.

PROFESSOR CAPRA: Do you have (c) before you?

MR. BURKE: I do have (c).

PROFESSOR CAPRA: I would say put "voluntary" in there (inaudible) because if you say, "In a federal or state proceeding, a voluntary disclosure," then it just does not operate as a waiver (inaudible) involuntary disclosure did operate as a waiver. So, where would you put the language and why would we actually even put it there?

MR. BURKE: Well, I'm not prepared, and I apologize, and I'd be happy to provide by February 15th something setting forth what you're asking about. I think my point--

PROFESSOR CAPRA: I meant it's really not a selective waiver issue. It's--you're back to the--I don't need to clarify it. I got it now.

UNIDENTIFIED SPEAKER: Well, it may be the comment that emphasized that we're not trying to encourage people to make disclosures. I mean that's the point we're hearing comments again and again--

MR. BURKE: And that's--

PROFESSOR CAPRA: (Inaudible)

UNIDENTIFIED SPEAKER: (inaudible) increased the number of (inaudible)

MR. BURKE: That's where I'm at, and if my comment on "voluntary" was suggesting a redrafting of this, it's more what Judge--

UNIDENTIFIED SPEAKER: It looks just a little bit like the six blind men and the elephant because I heard the question and the comment in a

completely different way from either of them, and I thought you were saying that there ought to be something in the rule that speaks out against the negotiation of waivers or to use the word that other witnesses have used, the coercion of selective waivers by government, I think. Is that not what you--

MR. BURKE: That is. Yes.

UNIDENTIFIED SPEAKER: I win. Okay. (Laughter)

And how would we go about nationalizing, apart from the question of whether it would be good policy?

UNIDENTIFIED SPEAKER: And apart from the question of whether it should be in an evidence rule.

PROFESSOR CAPRA: Yeah, yeah.

UNIDENTIFIED SPEAKER: We'll see which is a good (inaudible).

MR. BURKE: And I'm--I apologize. I don't have a suggestion. I mean my perspective is I became aware of your work, and I recognized that I probably wouldn't have traveled elsewhere to meet you folks. You came here, and I decided it was an opportunity for me to come down and share some thoughts and commend you for efforts. I did look into it, and this--the point that you raise is one that I think is important and I apologize that I'm not able to help you in tackling that, but I hope you--I wish you well. (Laughter)

PROFESSOR CAPRA: Thanks.

UNIDENTIFIED SPEAKER: Interesting. (inaudible). So you don't have to--

MR. BURKE: I was just going to straighten up the--

UNIDENTIFIED SPEAKER: I see. It occurred to me after Carol spoke that, if in fact we were to prohibit all but voluntary waivers, then you're with the interesting question about whether those should be protected (inaudible), and folks really didn't have to do it and chose to do perfectly voluntarily, I'm not so sure I would be in favor, as a matter of policy, of them getting their protection against the rest of the world. After all, they voluntarily chose to do it. So, if you're--

UNIDENTIFIED SPEAKER: "Voluntarily" means no standards.

UNIDENTIFIED SPEAKER: That's right. I mean if there were a law that, you know, that said, "You don't have to do this, and nothing bad can happen to you. You could do it. But if you want to curry favor with (inaudible) and waive your documents--

UNIDENTIFIED SPEAKER: Because you feel like it.

UNIDENTIFIED SPEAKER: --because you feel like, then I'm not so sure you should get protection under that circumstance.

PROFESSOR CAPRA: There's no such thing--

UNIDENTIFIED SPEAKER: Ah, yes.

PROFESSOR CAPRA: --as involuntary waiver. It does not exist in the law.

UNIDENTIFIED SPEAKER: That's my point.

(Laughter) That's my point.
UNIDENTIFIED SPEAKER: If it's truly voluntary, if it's truly not coerced at all or should--
MR. HANGLEY (?): The intention is involuntary. (Laughter)
UNIDENTIFIED SPEAKER: That's exactly right.
UNIDENTIFIED SPEAKER: It's a voluntary waiver knowing what the consequences are and we're--
UNIDENTIFIED SPEAKER: If you're--I'm sorry. If there are no negative consequences to not waiving and you're seeking to curry favor from waiving, (inaudible). That's how it should be.
UNIDENTIFIED SPEAKER: Well, if you're seeking to curry favor from waiving, which is presumably in the public interest, that is, it's in the public interest that disclosure is to be made to the government (inaudible), I think you would all probably agree with that, and I think what we're trying to determine here--and it's hard to get (inaudible)--is whether or not it is the public interest to make it easier to do that. That's really what the issue is here.
JUDGE SMITH: Michael O'Connor?
MR. O'CONNOR: Good afternoon, and welcome to sunny Phoenix. (Laughter) I actually grew up in upstate New York, so it's actually--it's more like what I'm used to.
As you indicated, my name is Michael O'Connor. I'm a private practitioner here in Phoenix, Arizona. I have practiced for 22 years now at Jennings, Strouss & Salmon here in Phoenix. And I'm here on my own behalf, not on behalf of my firm or any particular client. My practice is also like Mr. Burke's, primarily a defense practice. I do quite a bit of work both in state court and the federal courts here in the Southwest. Probably 70 percent in state court, probably 20 percent in federal court, and the remaining is in triple A arbitrations, et cetera, private arbitrations.
And I am here to support this committee's work with respect to Rule 502, and in particular from the standpoint of a private practitioner in my spot, if you will, in terms of protecting my clients and also complying with the various rules of evidence and ethics rules in terms of producing to the other side and to the court facts and documents that are necessary in a particular case.
I'm here primarily for two reasons: Number one, I believe that the current work that you have done on Rule 502 will help reduce the current staggering costs of complying with the privilege logs and privilege reviews that currently undergoes in our system. Secondly, I think that Rule 502 will give much needed relief to reducing the risk of inadvertent disclosures and inadvertent waiver, if you will, of attorney-client privilege to the detriment of our clients and also to the detriment of the practitioners.
You know, I've thought of this in the context of some real cases that I've worked on and the practice that I have. Oftentimes, when I am contacted by a new client, essentially I get asked

two questions: Number one, after they identify what the dispute about is about and we clear conflicts, the first question is, "Am I going to win?" The second question is, "How much is it going to cost me?"

And with respect to the first question, of course, I think as most of us would do, we would defer, indicating "Well, I need to find out a little be more and then we can talk about that issue." As to the second question, when you're directly asked, how much is it going to cost to represent you, oftentimes clients are just staggered with respect to the cost of civil litigation in the United States.

In particular, what I thought I would do is talk about a case actually I have pending in the federal court that could be used to illustrate, you know, that example. I'm fortunate enough to represent a company out of Holland with respect to a dispute that they have with respect to the sale of some seeds, and they'd never been sued before in the United States. In a dispute over some seeds that were sold and then grown, actually tomato seeds and the crop failed, and they were sued by a fairly substantial grower. We talked initially with respect to the facts of the case, the legal principles in terms of warranties and representations, et cetera, and then we talked with respect to the cost, the initial cost, because we're in federal court, in terms of complying with my obligations, gathering information under Rule 26, providing and doing a privilege log. And they were absolutely shocked with respect to the steps and the costs that it was going to go through for us to have paralegals look at documents and review things to prepare privilege logs. And even though the dispute was a for a significant amount of money, the amount of money that we had to charge them with respect to the reviews with paralegals and younger lawyers was staggering because I think as Ms. Cure indicated that, you know, privilege review is subtle and therefore you simply can't do it (inaudible). So, it is fairly labor-intensive.

It was important, as I explained to the client, that this money be spent and go forward in large part with respect to the second point that I want to address, and that is, currently under your proposed Rule 502, it does strengthen possibly the practitioner's view, if you will, of protecting the privilege, particularly with respect to inadvertent waiver.

In my particular example, the lot, if you will, that was sold, the amount of seeds that were sold my company was about 20,000 seeds. It was actually a pretty big load, but the lot that it came from was actually 20 million seeds. So, what happened--this was the first litigation that they were involved with, and it was very important from the standpoint that we do a complete review, a complete privilege log with respect to that material in federal court so that in the event that there was some future litigation, whether in state court or other proceedings, that we were going to be as

protected as possible of the privilege, and not risk any type of waiver by some type of inadvertent disclosure.

One of my big concerns was even allowing some of the other side on a quick peek, if you will, is to run the risk of having that determined later on in some other proceeding, be it a state court proceeding or an arbitration, to be (inaudible) a waiver of the privilege, and at that point, on the first case, the smaller one, if you will, I therefore had jeopardized my client's right in a substantial manner.

So, I think therefore--and I commend both the committee and many of the other speakers. I don't--I have not looked at quite a subtlety as you have, but those were my two major points that I wanted to make, for lack of a better term, being someone day in and day out on the front lines trying to explain to clients both the costs and the risks of litigation, and trying to protect the privilege and at the same time comply with my duties to turn over facts and documents to the other side. I think Rule 502 goes a long way in that regard to assist the practitioner. I would also suggest to make it as broad as possible, if you will, in terms of providing as much information to practitioners with respect to identifying whether it's reasonable steps in the notes that we can take in advance so that there's no waiver, or enhance the (inaudible) the possibility of no waiver for inadvertent disclosure.

Thank you very much.

JUDGE SMITH: Thank you. Daniel McAuliffe?

(No response)

Melissa Smith?

(No response)

Edward Hochuli?

(No response)

Douglas Christian?

MR. CHRISTIAN: Yes, sorry. (Laughter) I had one foot out the door already. (Laughter) (inaudible)

I'm Doug Christian. I'm in private practice, licensed in Arizona and Nevada and Colorado, and what I do is defense work. A former member of the Council of the ABA Section (inaudible) and Practice; former president of the Arizona Association of Defense Counsel; current member of ALI, which just means I've never met an adjective that I didn't want to turn into a noun, and that's kind of why I'm here.

Absolutely no one will allow me to attribute what I have to say to them, so I'm here only on my own behalf. And, by the way, I may be the only person to say to you I'm not here to talk to you about Rule 502. (Laughter)

I'm here to talk about the comments for a moment, if I could, please. I enthusiastically support Sections (a) and (b) of Rule 502. It's a better rule than I am a lawyer. And that's part of there reason that I'm here as well. The rule itself, it seems to me, is going to accomplish the task that you all have hoped that it would and crafted it to accomplish. It was facilitate,

expedite, and make less expensive pre-trial procedures.

I want to be--having done this for 30 years or so--I want to be sure that as I learn about the rule, if it's adopted, that I know exactly what it requires of me. Having my moral and ethical compass so far has been pointing magnetically due north, I always comply as well as I can with any requirements. And because I represent a lot of insurance companies in complex litigation, bad faith cases, coverage cases, we do get involved in a lot production of documents.

And I want to talk to you--I embrace (a) and (b)--I want to talk to you in a very limited way about the comments to (b), and my comments will be limited to only Section (b), please. And I have this suspicion in the back of my mind, because you're kind of halfway between my office and home, so I just stopped by on my way home. And I thought, as I was going home, you may have already cleared this up, but if you look at the language in 502(b), and as I look at it and I want to know what I'm supposed to do to be sure that I have complied with the language of that. Keep in mind I also need to be concerned. You--while 502 will talk to me about rules of evidence and waiver, it will not regulate my ethical conduct. The states, presumably, will continue to do that. And I will look to not only Rule 502, but I will look to the Restatement of the Law Governing Lawyers, I will look at applicable ethical rules for the state, I'll look at the ABA model rules, and I'll try to make sure that I know how I'm supposed to comply with Rule 502.

Now, if you'll get out--to see if I remember without having to fumble through it--I did see something in the comments that concerned me about how I know what is going to be expected of me, my professional responsibility, when I'm trying to do my best to comply with a discovery order and understand the implications of 502(b). I--my client has decided that it is going to--I have discussed with my client the fact that we need to produce documents and that waiver of the privilege is an option, and my client has said, "Ain't going to happen," invoking the privilege. "I don't know what you're talking about, but whatever we're entitled to, by golly, go get it for us. We're going to keep that privilege in place." So, the privilege has not been waived. It's my responsibility then to make sure I have done what I can to keep that privilege in place, and Rule 502(b), and I want to just cut to the chase, which is the back end of it. If you look at the language of 502--now, I have--my client has told me I am not allowed to inadvertently disclose documents. I may inadvertently disclose them, but I'm not supposed to intentionally inadvertently disclose them (Laughter) under Rule 502. So, if I look at Rule 502 and I recognize that I have inadvertently disclosed a document and that I actually think I have taken reasonable steps to prevent the disclosure, if you then look at the language of the rule, it says, "and took reasonably prompt measures once the holder knew or should have

known of the disclosure to rectify the error."
Now, I'd like for you to--and this where I get--actually this is why I'm here and this is where I get a little bit hung up, because when I go to the comments--and I don't know how to reference this because off of my printer at home it came out as page 11--I don't know if that means it's your page 11 or not--but it's the paragraph beginning with "The rule opts for the middle ground." And if you look at that, what the comment says is that it will constitute a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. "Reasonable and prompt efforts"--in the conjuctive. You use "reasonably prompt"--you use "reasonable" in the rule--
UNIDENTIFIED SPEAKER: (inaudible)
MR. CHRISTIAN: --as an adjective. You use it in the comments as a requirement. I like the way it is in the rule, but don't confuse me. (Laughter)
The reason I think that it's important is that if you look at the Restatement Section 79, Comment H, you'll see that Restatement also embraces the conjunctive, the "reasonable and prompt," rather than the "reasonably prompt." And so, I don't--you all will decide whether it stays the way it is in the rule and change the comment or vice versa. The Restatement--
UNIDENTIFIED SPEAKER: Do you have a view on that?
MR. CHRISTIAN: Pardon me, sir?
UNIDENTIFIED SPEAKER: Do you have--
UNIDENTIFIED SPEAKER: You want to have the rule say that?
MR. CHRISTIAN: Yeah, I mean my clients would say, make it as--make it an adjective. Make it as easy on us as possible. I would say, as a lawyer, please help me understand what my obligation is. Whatever it is, I want to play by the rule, and that it is helpful if it is consistent with other obligations that are placed upon me. So, as a social architect, I would say if the easiest thing to do is bring this rule in compliance with your comment and Section H--Comment H of Section 79 of the Restatement, that might be easier.
UNIDENTIFIED SPEAKER: To the comment?
MR. CHRISTIAN: Yes.
PROFESSOR CAPRA: And you're--but that factor points to timing. That's not "reasonable and prompt"; it's "reasonably prompt." The factor that we're focusing on is focused on time. It says "reasonable and prompt." You're adding a whole--
UNIDENTIFIED SPEAKER: It could be something you'd think unreasonable but reasonably prompt?
PROFESSOR CAPRA: Well, it could be reasonably prompt.
MR. CHRISTIAN: That's why I say my clients would prefer that it--because it actually is a (inaudible)--you know, you lower the standard by making it a reasonably prompt; you raise it by making it reasonable and prompt.
You do what you want to do. It just seems

to me to be somewhat novel. My clients like it reasonably prompt. It may be easier, for all of us as social architects, if it's consistent with other obligations on the lawyers who are trying to understand it.

UNIDENTIFIED SPEAKER: Yeah.

UNIDENTIFIED SPEAKER: Could you give an example of an "unreasonably prompt"?

PROFESSOR CAPRA: No. "Reasonable and prompt." In other words, a (inaudible)

UNIDENTIFIED SPEAKER: Here's what we're--here's what we're confused about--

PROFESSOR CAPRA: Oh, reasonably prompt? How about your stuff? You know, your systems are all down and, you know--

UNIDENTIFIED SPEAKER: I thought that the other way--"unreasonable."

UNIDENTIFIED SPEAKER: "Unreasonable and prompt."

UNIDENTIFIED SPEAKER: I discovered that I've disclosed a privileged document, and I (inaudible)

UNIDENTIFIED SPEAKER: Yeah. (Laughter)

UNIDENTIFIED SPEAKER: Not without (inaudible) the other side (inaudible).

PROFESSOR CAPRA: That's prompt. (Laughter)

UNIDENTIFIED SPEAKER: When you were referring to the Restatement was that the Restatement of Law Governing Lawyers?

MR. CHRISTIAN: Yes, sir. Third. I only have one other point if I might, please, and that is--and, again, in keeping with the concept that I really just want to understand what's expected of me when I'm doing this in a couple of different states at one time.

And I think the point is that the law, the Restatement, ethics opinions, will eventually follow the rules and law; they will catch up with them and that that may be take some period of time--but if you look, for instance, at ABA Formal Opinion 5-437, which is relatively recent. It was promulgated, I think, in 2002 or 2003. There is a responsibility--this is going to be a gatekeeper issue. There is a responsibility on a lawyer who receives a document, that she or he knows is inadvertently produced, to inform the producing lawyer of the inadvertent production.

Now, I raise that because there are two assumptions: One is that the lawyer recognizes that it's an inadvertent production, and the rule--502(b)--recognizes and only deals with inadvertent productions. So, I ask you whether that 502(b) contemplates that it obviates 5-437. Does it suggest it that the receiving lawyer no longer has any sort of gatekeeper function? Because now it's in the receiving lawyer's best interest or her client's best interest to not say anything.

UNIDENTIFIED SPEAKER: I will need to defer to our esteemed colleagues on the Civil Rules Committee to answer that question.

UNIDENTIFIED SPEAKER: (inaudible) (Laughter)

UNIDENTIFIED SPEAKER: (inaudible) The

answer is (inaudible), what the receiving lawyer's obligations are.

PROFESSOR STRUVE (?): Well, the rules, the Civil Rules, very carefully do not purport to address standards of attorney conduct in the ethics realm. There are certainly provisions in the rules as recently amended that limit what the receiving lawyer can do once put on notice that he has received information that was inadvertently produced. Is that what you're talking about?

UNIDENTIFIED SPEAKER: But they also do not answer the waiver question.

PROFESSOR CAPRA: (Inaudible)

UNIDENTIFIED SPEAKER: (Inaudible)

PROFESSOR CAPRA: The question of--your question is, can you tell your client just "Let's go use it" and 26 will limits that?

UNIDENTIFIED SPEAKER: You can just (inaudible)

UNIDENTIFIED SPEAKER: Right. (Laughter)

UNIDENTIFIED SPEAKER: (inaudible)

JUDGE ROSENTHAL (?): The question you're asking is, what does a receiving lawyer who has not been notified by the other side, but simply comes to realize that she has come into possession, through the inadvertence of opposing counsel, of what is obviously a privileged or protected document or (inaudible) information, what is her obligation? But the rule talks about the obligation of such an individual once notice is given. I think, if you are asking what the rule says about the obligation of the lawyer if no notice is given, but he or she becomes aware of this through other means, that is not specially addressed within the rule, but it is very much, I think, the subject of state and other directives governing attorney obligations.

MR. CHRISTIAN: And my concern is that the receiving lawyer, now under 502(b), has an added incentive, frankly, not to comply with 5-437 by informing the producing lawyer of the inadvertent disclosure because, frankly, under 502(b), the longer the disclosure remains unrecognized, the less likely it is to have been reasonably and promptly asserted. So, you're making a situation where you are going to--you will obviate some of those ethics rules.

UNIDENTIFIED SPEAKER: (Inaudible)

MR. CHRISTIAN: No.

UNIDENTIFIED SPEAKER: If you ignored your ethical obligation (inaudible) "I didn't know that I had this inadvertently produced document," in the passage of time, you (inaudible) the other guy, raised it (inaudible). Would not the passage of time before you disclosed (inaudible)?

MR. CHRISTIAN: Yeah.

UNIDENTIFIED SPEAKER: I think it would.

MR. CHRISTIAN: And I'm only concerned about the codification of the common law and how I as a lawyer or a lot of people out there like me will now view what potentially were only ethics issues, some would say, and now put ethics at odds with a rule of evidence. I think that--by the way, I think that the ethics rule has morphed over the

years, but it's morphed the other way. I think that there are less stringent requirements placed upon the lawyer receiving inadvertently disclosed documents, arguably, than there used to be.

MR. HANGLEY: For a period of time in Pennsylvania, we had an outstanding opinion of the city bar association (inaudible), and a state bar ethics committee opinion telling you that your obligation (inaudible) is not to disclose (inaudible), which made it a little difficult to practice (inaudible). (Laughter)

JUDGE SMITH: Anything else?

MR. CHRISTIAN: I'm done. Thank you. You did a great job on the rule; (a) and (b) are terrific. If anything, for those of us who just simply want to get through the next 30 years of our career without making any ethics mistakes, if you're so inclined, the comments might be a little more useful to the practitioner insofar as what the rule itself actually means. And it's a great rule. Thanks.

JUDGE SMITH: Let me just call again the names of those who didn't answer earlier. Frank Verderame, Patrick Paul, Kenneth Mann, Daniel McAuliffe, Melissa Smith, and Edward Hochuli. Not here.

All right. That concludes the business for today.

Thanks to all of you who have participated in the hearing. And as I indicated earlier, we will have our second and final hearing in New York on January 29th.

(Whereupon, the hearing adjourned.)