FORDHAM UNIVERSITY – SCHOOL OF LAW

Advisory Committee On Evidence Rules: Hearing on Proposal 502

April 24, 2006

Ubiqus/Nation-Wide Reporting & Convention Coverage
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[START TAPE --]

HON. JERRY SMITH: [Unintelligible] attorney-client privilege, [Unintelligible] product. I appreciate all of you being here. I think this is going to be a good opportunity for exchange of views. I am not going to make a lot of introductory remarks, except for a few housekeeping matters. I know that everyone here is busy and some people need to leave early, so we want to get right to the business at hand. Just to explain what we are all about, this is obviously a significant issue that is of concern to the Bar. We think it is important to have this hearing to flesh out all views on this matter. No one here has an agenda. The committee is primarily interested in a rule that works, if there is a rule that works and is better than no rule at all. A good bit of work in putting together a draft of the rule, but the committee will be doing some work this afternoon on reflecting on the comments that have been made and on looking at the draft, too, to see if there are changes that need to be made.

Our procedure for this morning is to hear ten-minute presentations from a number of parties are interested in this matter and ask each of the presenters to limit himself or herself to ten minutes. We will have an opportunity to each of the groups that is going to be here to make comments on each other's presentations. I welcome particularly, specifically from members of the committee, including liaisons, who are free to ask questions after the presenters have given their remarks. The morning will be pretty well filled with the presenters that we have, and then we will be breaking for lunch at an estimate of probably 12:30, and maybe as late as one. Then the committee will reconvene in its formal committee meeting this afternoon. We have a full agenda, but we are primarily concerned today with proposed rule 502. To my left, Professor Dan Capra, the reporter for the [Unintelligible] Rules Committee. The afternoon session has been changed – the location. So can you—

MR. DAN CAPRA: Yes. The afternoon session will be in room 430 of the law school. It is a lot easier to get to than what we had originally booked for the room. There will be signs.

You just go to the elevator and go up to four, and there will be signs to take you to that room. So that is room 430 at the law school. It is the new place for the meeting. And that will be the meeting place for tomorrow's meeting as well.

MALE VOICE 1: I understand that many of you here will not be able to stay through the entire proceeding, and I want any of you to feel free to leave. That is why we have left the door open, just to minimize the disruption of people needing to come and go, but certainly, all of you are welcome to stay for the entirety of these proceedings, and that is why we are having a public meeting to discuss the proposed rule. Members of the committee have complete biographical summaries of each of the presenters, and for that reason, I am not going to take our time by reading a long list of accomplishments of each of these presenters, but we have been able to put together what I think is an outstanding lineup of people to discuss this issue.

The first group will be from judges, and we have two judges this morning to share remarks with us. First is the Honorable John Koeltl, the judge from the United States District Court for the Southern District of New York. Judge Koeltl?

HON. JOHN G KOELTL: Thank you. I appreciate the opportunity to give you some comments on proposed rule of evidence 502. Professor Capra said that I concentrate on confidentiality orders and agreements, and therefore I will begin with provisions C and D of the proposed rule, and then return to some general comments about the rule. Providing for non-waiver of attorney-client privilege and work product protection, both in agreements among the parties, and then in court orders is a fact of life in large litigations today – particularly commercial litigations. Such provisions are commonly found in confidentiality agreements that are submitted to the court that I regularly approve, and so ordered, they occur in cases involving substantial discovery. Indeed, it would be uncommon in large cases not to see such a provision in a confidentiality order. The agreements and orders protect against the waiver of privilege based on the inadvertent production of materials otherwise subject to the privilege. The production of such material is quite possible in these days of massive discovery compounded by the discovery of electronic information. Electronic information

increases greatly the amount of information that is retained and can be produced and also increases the cost and burden of doing the initial search to produce the materials and to assure that privileged materials not produced.

Judges would be naïve to think that all of these reviews of massive materials can be done by the senior lawyers on the case at the most expensive rates with sufficient familiarity with all of the facts to make nuanced attorney-client privilege determinations. Hence, the most recent Fourth Edition of The Manual for Complex Litigation encourages parties to enter into non-waiver agreements and encourages courts to enter orders carrying out such agreements. As the manual explained, in complex litigation involving voluminous documents, privileged materials are occasionally produced inadvertently. The parties may stipulate or in order may provide that such production shall not be considered a waiver of privilege, and that the party receiving such a document shall return it promptly without making a copy, section 11.431 of page 64. The manual specifically refers to a non-waiver provision entered in an order and abridged on Firestone litigation, in Ray Bridgestone Firestone, Inc, 129 [Unintelligible] second, 1207, 1219, Southern District of Indiana, 2001. The manual also notes that some courts have refused to enforce non-waiver agreements entered into among the parties. However, the cases cited by the manual make the reasonable point that while a non-waiver provision entered into among the parties may be binding on the parties, it cannot be binding on non-parties to the agreement. See, for example, in Ray Chrysler Motors Corp Overnight Evaluation Program Litigation: H60, F-Second, 844, 846-47, 8th Circuit, 1988, Chubb Integrated Systems against National Bank: 103, FRD, 52, 67-68, DDC 1984. Even the courts in the District of Columbia Circuit, which takes a very strict view against limiting waiver find that agreements for non-waiver are binding as matters of contract between the parties to the agreement. As the District Court for the District of Columbia explained in the Chubb case, the agreement is for the mutual convenience of the parties, saving the time and cost of pre-inspection screening. That agreement is merely a contract between two parties to refrain from raising the issue of waiver or from otherwise utilizing the information disclosed. The court went on to find that the agreement did not preclude waiver as to a third party. See also: Dowd against Calibrese: 101, FRD, 427, 439-40, DDC, 1984.

In his thorough opinion in Hobson against The Mayor and City Council of Baltimore (232, FRD, 228, District of Maryland, 2005), Magistrate Judge Grimm, who is also on the panel, points out that numerous courts have enforced the agreements. ([Unintelligible] 234-35) At least one court, however, has frowned on broad non-waiver agreements on the ground that they "essentially immunize attorneys from negligent handling of documents and could lead to sloppy attorney review and improper disclosure which could jeopardize clients' cases." (Coke Materials against Shore Slurry CO, Inc. 208, FRD, 109, 118, District of New Jersey, 2002) This view does not give adequate attention to the costs and difficulties of document reviews in these days of very extensive discovery, including electronic discovery. As my colleague Judge Schoenland noted, non-waiver agreements have the salutory effect – at least among the parties to the agreement – of allowing claw back agreements where the parties forgo privilege review in favor of an agreement to return inadvertently produced documents. (See Zubilake v. UBS Warburg, LLC: 216, FRD, 290, Southern District of New York, 2003) Such agreements would also allow the "quick peak" where the parties can make documents available before formal requests so that the documents can be asked for and, if privileged, an objection can be made to production. Each of these types of discovery practices has the potential to reduce the cost otherwise necessary to review materials to assure absolutely that no privileged materials are produced – a process that could be enormously expensive, given the scope of current discovery.

Therefore, the proposed rule, 502-D, in my view strikes the correct balance. It provides, then, an agreement on the effect of disclosure, is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order. The commentary makes clear that this agreement would allow the claw back and quick peak methods of production, but would be binding only on the parties to the agreement. The provision is thus a reasonable provision, but it will provide only partial protection for the parties, because it is not binding on third parties.

Proposed rule 502-C provides for a court order that will protect against non-waiver of the attorney-client privilege or work product protection, and it will be effective against third parties. It makes clear that the order governs its continuing effect on all persons or entities, whether or not

they were parties to the matter before the court. Plainly for all of the reasons that agreements among the parties are important to facilitate discovery in cases involving massive amounts of discovery, such agreements are appropriate subjects for court orders, thereby providing the parties with the protection that inadvertently produced documents will not waive attorney-client and work product protections. Such orders would permit the claw back and quick peak agreements, thereby avoiding unnecessary cost.

The proposed committee notes note that there is a question whether such blanket orders in one case can bind third parties. Magistrate Judge Grimm's decision in Hobson discusses the issue and concludes that courts should satisfy themselves, that full privilege review cannot reasonably be accomplished within the amount of time for the court allowing production. Failure to engage in the inquiry under the current rules risks the possibility that a reviewing court will conclude that there had been a waiver of the privilege, and that the order enforcing the non-waiver was not sufficient. This analysis rests on the strict view that some courts take of waiver of the privilege. Courts have recognized that court orders can require disclosure under circumstances that the production of privileged documents will be found to be sufficiently compulsory that it will not be a waiver. (See Trans-America Computer Co. against International Business Machines, Corp.: 573, F-second, 646, 650-53, 9th Circuit, 1978) In Trans-America, no waiver was found for the inadvertent production of privileged documents after a court order requiring the production of a significant amount of documents on a short time schedule. The order expressly provided for the maintenance of privilege claims, provided only that the party disclaiming waiver had continued to employ procedures reasonably designed to screen out privileged material.

The Court of Appeals looked for guidance to form a proposed federal rule of evidence 502 that provided that there would be no waiver if the disclosure had been compelled erroneously or had been made without opportunity to claim the privilege. The fact that the Trans-America Corp approved the non-waiver order in that case provides some support for the enforceability of non-waiver provisions against third parties. But they also included provisions for the continuing review of documents so that the case can not be

read for approval of a court order that dispenses with any pre-production protections against the inadvertent production of privileged documents. The proposed rule, however, is an independent basis for the court order authorizing non-waiver for inadvertent production. It can be viewed simply as part of the definition of what is covered by the attorney-client and work product protections.

The proposed rule, therefore, is a salutory one, for all of the reasons already explains. It facilitates the prompt production of massive amounts of documents. The rule could require individualized inquiry by the court into whether pre-production review is necessary in individual cases. It could also provide that parties must promptly advise adversary parties of any inadvertently produced documents. Adding these provisions, however, would undercut the predictable protection that the rule attempts to provide.

The parties to the litigation had their own incentives to craft non-waiver provisions appropriate to individual cases. If there are questions with respect to the procedures for the assertion of privilege claims or the timeliness of the assertion of the claims, the parties have an interest in providing more specific provisions in the non-waiver provisions of the agreement. If parties can reasonably avoid the production of privileged documents, the parties have a self interest in doing so. The parties also have a self interest in attempting to assert claims promptly and attempting to retrieve privileged documents promptly so that they do not become incorporated in other materials and become inextricably intertwined in the other party's work product.

In this connection, the order that was actually cited in the Manual for Complex Litigation in the Bridgestone Firestone case was a very simple and direct order which protected against inadvertent disclosure, and provided that such inadvertent disclosure of a privileged document shall not be deemed a waiver with respect to that document or the documents involving similar subject matter. There was no provision requiring any specific provision for prior review of documents. In short, the proposed provision for a non-waiver order, as provided in rule 502-C is a reasonable rule that responds to the current mass of discovery which is available, particularly with electronic discovery.

Finally, let me just make a couple of other comments on the

rule, which are not directly related to 502-C and D. First, 502-A describes the scope of waiver by disclosure in general. In doing so, it applies the rule to "information". By its terms, therefore, the rule applies to oral as well as documentary disclosures. It would apply to testimony at depositions as well as the production of documents and electronic information. Issues have certainly arisen during discovery with respect to disclosure of oral testimony. For example, on occasion, parties reach agreements that witnesses can testify about certain subjects without waiving any claim that the subject of the testimony is never the less privileged, preserving to another day a determination of whether the testimony is, in fact, privileged. This may happen because the testimony is not very critical and the parties would rather let the testimony go forward rather than seeking a ruling. Never the less, the impetus for proposed rule 502 does not appear to have anything to do with testimonial disclosures. The committee note focuses particularly on the widespread complaint about litigation costs for review and production of material that is privileged or work product. Because the reasons for the rule do not appear to concern testimonial discovery, the rule could be limited to disclosure of "documents and electronically stored information" similar to pending federal civil procedure 34-A. This would cover the concerns that appear to have animated the rule.

Second, consideration should be given to the issue of whether the rule should be limited to the provisions that provide protection against waiver and thus facilitate discovery. Those provisions are centered in rule 502-C and D. The rule, however, provides a statement of waiver in general and also provides a standard for inadvertent disclosure in rule 502-B-2 that does not result in waiver. As the committee note points out, there are several current approaches to determining whether a waiver has occurred by allegedly inadvertent production of materials. Some courts require an intentional waiver of the privilege. Other courts find that mistaken production of information constitutes a waiver. The proposed rule takes a middle ground. The flexible approach in rule 502-B-2, which looks to the reasonable precautions taken to prevent disclosure and the reasonably prompt measures that are taken to rectify the error, is itself a reasonable approach. Indeed, it appears to be consistent with the cases in the second circuit.

And so I would be perfectly satisfied with the rule, because it is the rule that is generally followed in my circuit. But I question whether there is a reason to change the rule followed in some other courts at this time. The existence of the standard for inadvertent disclosure does not appear to affect the ability of the parties to create their own agreement protecting against inadvertent waiver or the ability of the courts to adopt protective orders. Rule 502 could be streamlined into a rule that simply provides for the ability of the parties to agree to non-waiver and the ability of the courts to adopt controlling court orders. I am sure that Dan Capra appreciates the suggesting—

MR. CAPRA: Always, Judge.

JUDGE KOELTL: —to re-draft the rule.

MR. CAPRA: It will be done by 1:00.

JUDGE KOELTL: I commend the committee's work in this difficult area, and hope that the comments are useful.

MR. CAPRA: Thanks, Judge.

JUDGE SMITH: Thank you, Judge Koeltl. Our other Judge is United States Magistrate Judge Paul Grimm. Just a personal note: I have been on a number of seminar panels with Judge Grimm, who also teaches evidence at the University of Maryland, and he has an absolutely – I would say – dazzling command of the federal rules of evidence, and we are pleased that he is able to join us. Judge Grimm.

HON. PAUL GRIMM: Thank you, Judge Smith, Judge Koeltl, Professor Capra, and members of the standing committee on the rules of evidence, and interested persons. If you will pardon the pun, it is a privilege for me to be here today and to speak on an issue which I believe my comments echo those of Judge Koeltl in terms of the importance of the issue. I authored the opinion in Hobson v. City of Baltimore at 232 Federal Rules Decision 228, which is cited in the commentary to the proposed rule 502. That case, I think, contains in excruciating detail most of my thinking on this issue and the problems that proposed rule 502 in my mind would address that are not addressed in the status of the law as it currently stands.

My comments are directed to what I believe to be the compelling need for the substantive provisions for the

proposed rule. In supporting the rule as it would impact on the process of discovery in civil litigation, I am mindful of both federal rule of evidence 102 and federal rules of procedure one that encourage us in the interpretation of rules to promote the fast, fair, and economical resolution of disputes and also to enable the rules to have the ability to accomplish their goals when technological and other developments in the future cause problems that were not specifically anticipated when the rules first were drafted. The challenge of balancing the needs of both the requesting party and the reducing party regarding voluminous document production in civil litigation in federal court, most particularly involving electronically stored records, are great, and the potential costs, as cited in Hobson, can be enormous. The decision in Hobson identifies cost data in specific cases, and it is no longer an exaggeration to say that the process of total pre-production review of information – whether electronically stored or in paper version – to ensure against privilege waiver or work product protection waiver can cost easily hundreds of thousands of dollars, and in some instances millions dollars, in cases the value of which that could be assessed by a reasonable evaluation of the likely financial benefit to the moving party, is completely disproportional. It runs counter to the trends that have been put in place since at least 1993 by the changes to the rules of civil procedure, most notably rule 26-B-2, which has wisely adopted the cost-benefit balancing analysis, allowing the trial court sua sponte or in response to a rule 26-C motion for protective order to balance the needs of the requesting party to get evidence that may be important to prove his or her case against the costs and burden to the producing party to keep in mind the importance of the evidence, the resources of the parties, and whether evidence can be obtained from some other source or in some other format.

The proposed recent changes to the federal rules of civil procedure – which I am told earlier this month were approved by the United States Supreme Court, and therefore will be forwarded to Congress for its review before year-end – specifically focuses on the challenges associated with discovery of electronically stored information. Its changes to rule 16 to encourage the parties to meet and confer about the method of discovery of electronically stored information to include a discussion of non-waiver and confidentiality

agreement, of rule 26 to permit the producing party to produce information which is not reasonably available subject to later challenge in the court's order, or rule 33, which allows information via interrogatory regarding electronically stored information, rule 34, which makes clear that which the cases have recognized for many years, that “documents” includes electronically stored information, and raises an issue which will only heighten the problem currently faced by the committee, by allowing the requesting party to request the format or format in which evidence is to be produced in civil discovery, thereby raising the issue of the question of meta-data, and whether or not embedded information which would not otherwise be visible in the display of information electronically prepared and maintained may be produced.

A recent decision, Williams v. Sprint United Management, 230 Federal Rules Decision 640 in the District of Kansas, 2005, discussed the discoverability of meta-data under the existing rules, concluded that if a court orders the production of electronic or other records in the fashion in which they ordinarily used the default position, if you will, for production, that that includes meta-data, unless the parties agree otherwise or the court orders otherwise. To a non-technically versed person such as myself, this did not hit home until you can realize that what meta-data allows is, it is data about all the data, and therefore, if you have, for example, in an age discrimination case alleging that a reduction in force was motivated by a desire to eliminate “dead wood” over age 40, the final criteria for the selection of how the rift will be implemented, a memo which appears to be age-neutral on its face and is produced in discovery, the meta-data for that record might show various versions of this draft that went back and forth among the high-level decisions makers in the company to include the general councils office, such that not visible to the eye, but only detectable by the running of programs, which I am told by those who know about this are readily available and in use, would then require not simply the review of that record for prior production for privilege and work product, but all the meta-data as well, which would require the cost of producing it in a fashion that could be evaluated by the lawyers and reviewed before production. This issue will only compound the volume of electronic information and the burdens associated with this discovery.

The proposed changes to the rules of civil procedure now on their way to Congress specifically encourage the parties to enter into non-waiver agreements, claw back agreements, or quick peak agreements, and specifically encourage them to take them to the court to incorporate in its scheduling order. As the commentary to the proposed changes to the rules of civil procedure frankly acknowledge, and as the commentary to rule 502 as proposed frankly acknowledges, these rules cannot trump substantive privilege waiver law, and therefore the parties, who are already beginning to enter into these non-waiver agreements, as reflected in the cases cited in the Hobson case, are running ahead of the pack. The need to try to reduce the costs has taken effect. The awareness of the bar of these agreements, and the encouragement of the courts has already taken place, and they are, in fact, in use now.

A uniform and reasonable rule that addresses inadvertent disclosure of the attorney-client privilege and work product protection and allows the parties in litigation to seek and obtain court orders preventing the waiver of this important information, if reasonable pre-production review has taken place, is urgently needed. Document by document, pre-production review for subject matter with subject matter waiver as the penalty can impose cost and time burdens that are completely disproportionate to what is at stake in the litigation. The rule, therefore, to be effective, must address it impact on third parties that are not parties to the agreement not to produce. This is not a remote or theoretical possibility. If you look at the population of cases in federal court that involve the potential for parallel or subsequent state litigation, they would include employment discrimination, other non-employment-related discrimination cases, toxic tort and mass tort litigation, class action litigation, products liability litigation, commercial litigation, and intellectual property litigation. There will be no protection, and no rational litigant could enter into an agreement not to produce or not to waive information with another party if that could be the subject of a decision down the line that it had waived the protection by voluntary disclosure. I have not seen yet, but know it's coming, the interrogatory or document production request identify all records previously disclosed in any other litigation involving the subject matter of this dispute that were produced in accordance with a non-waiver agreement, and

for each such case identify the caption and the court in which pending. That is coming. Let that not be an encouragement to those of you in the audience to correct such an interrogatory.

We know that fewer than 2% of all civil cases will wind their way to trial. The majority of the cases will be disposed of through settlement or dis-positive motions practice. The pre-trial discovery arena is vital to the outcome of the case. We are all charged to be trustees of a dispute resolution system that is viewed by those we serve, the public, that come to our courts for the resolution of their disputes in lieu of other ways of resolving them, to make sure that the methods that we have are both fair-minded and balanced to both sides to litigation, and take into consideration the realities of the world that we now live. And technology is not going away. Many times, I have wished that that were not so.

I recognize that there are concerns that are well-reasoned and well-stated legitimate concerns that have been expressed about the scope of the proposed rule. There are questions that have been expressed about the authority to enact such a rule about whether or not it should be binding on the states or whether third parties should be bound by agreements and court orders they had no opportunity to challenge. I respect these sincere concerns, but in the end, I wind up at the same point where I began. In the civil litigation context, the problem posed by comprehensive pre-production review of all information before it is disclosed, with the pain of waiver if it is determined that the efforts were not reasonable before the production occurred, or in those cases adhering to the strict waiver approach, the mere fact that any information was produced with subject matter waiver being the price tag is such an overwhelming problem that I would hope that those who express reservations or doubts about proposed rule 502 will say how they would propose to address this problem in its absence. Judge Koeltl's comments were overly kind about the Hobson opinion. That is an opinion that gets to a result. It is through some mental gymnastics and contortions to get to that result. The Trans-America case that he referred to is helpful, but does not address all the problems in this case. For the reasons that have previously been expressed and for the reasons I have stated here and in the Hobson opinion, I strongly encourage that the substantive

provisions that propose rule 502 that would address this important problem be adopted as soon as possible. Thank you.

JUDGE SMITH: Thank you, Judge Grimm.

MALE VOICE 1: Do you want to just move to the new, or do you want to have questions?

JUDGE SMITH: I want to see if any of the committee members—

MALE VOICE 1: Okay.

JUDGE SMITH: Any of the committee members have questions of either of our judges? If not, we will keep moving. Thank you, Judge Koeltl and Judge Grimm.

MR. CAPRA: I think we won that round.

JUDGE SMITH: If our five attorneys will come on up, and James will put out the name badges.

MR. CAPRA: I would like to call the practitioners up. I am not going to be here.

MALE VOICE 2: We are all getting to the back row.

MALE VOICE 3: All right. We will wait.

MALE VOICE 4: Great.

JUDGE SMITH: We are privileged to have five practitioners here with us. Jim Robinson will be back in just a minute, but let's start with David Brodsky from Latham & Watkins.

MR. DAVID BRODSKY: Thank you, judge. Thank you for the opportunity to speak to you about proposed rule 502-C-3, the so-called selective waiver permission. I am speaking on behalf of a subcommittee of the ABA Presidential Task Force on the Attorney-Client Privilege, but the four of us are speaking in our individual capacities, because of the lack of time to coordinate our views with the ABA. The four members of the subcommittee are, beside myself, Mark Hassenin, a former member of the Civil Rules Advisory Committee, Bill Ide, a former president of the ABA and current chair of the task force, and Steve Hasin. Our position has been set forth in a letter to the reporter Professor Capra dated April 19th, 2006. I am going to summarize that position in my statements this morning.

In short, we recommend that a portion of the proposed rule,

specifically section 502-C-3 be dropped from further consideration at this time, because believe that the procedure contemplated in it continues an alarming trend threatening the viability of the corporate attorney-client privilege. Since the mid-1990s and continuing to date, the principle law enforcement and regulatory authorities in the United States have developed policies and guidelines that are designed to induce corporations and other business entities to waive or not assert applicable attorney-client and work product privileges and protections. There are a variety of reasons why such authorities adopted such policies, and for a fuller discussion of them, we have referred in the body of our letter to the report of the ABA Task Force and to the report by the Joint Drafting Committee of the American College of Trial Lawyers entitled "The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations", a March 2002 publication.

Regardless of the reasons proferred, the result that the Department of Justice, The SEC, the CFTC, and other regulatory and self-regulatory agencies, as well as many state attorneys' general offices and state regulatory agencies, has been a remarked increase in the compelled or requested or suggested or pragmatically inevitable "voluntary" waivers of the privilege and work product doctrine in order to further enhance the likelihood that the company will avoid significant prosecution or regulatory action. The surge in such waivers has been well documented. A recent survey administered jointly by the Association of Corporate Council – an organization representing nearly 19,000 public companies – and the National Association of Criminal Defense Lawyers found that nearly 75% of both inside and outside councils state that in their experience, government agencies expect a company under investigation to waive legal privileges. 1% of in-house council and 2.5% of outside council disagreed with that statement. Of the respondents that confirmed that they or their clients had been subject to investigations in the past five years, approximately 30% of in-house council and 51% of outside council said that the government expected waiver in order to engage in bargaining or be eligible for more lenient treatment. And of those who had been investigated, 55% of outside council said that the privilege waiver was requested either directly or indirectly. 27% of in-house council confirmed that experience. Of the over 675 responses to the

survey, almost half of the general councils responding on behalf of public and private companies have experienced some kind of privilege erosion caused by the government's policies. Of these, by far, the most were not from global companies with high visibility, but rather from a wide variety of differently sized businesses.

After more than half a decade of increased pressure – explicit and implicit – on companies to waive the attorney-client privilege and work product protections, there has emerged what has been referred to in the survey as “a culture of waiver” in which government agencies expect a company under investigation to waive legal privileges, and many companies do so – most without even being asked any longer, but knowing there is no practical alternative to doing so. Proposed rule 502-B-3 would have the effect of continuing this trend toward waiver and would exacerbate it. Any pretense of request for waiver being infrequent would be lost, and such requests would become item one in the play book of regulators and enforcement agencies, even at the earliest stages of the most generic investigations. We believe that such effect would be impossible to resist, and would have pernicious results undermining the attorney-client relationship, upon which our system of justice is based, and for which informed self-compliance with legal requirements depends. We believe it is beyond serious discussion that the attorney-client privilege and work product doctrine, as applied in the corporate context, are vital protections that serve society's interests, and protect clients' constitutional rights to council. A legal system that fails to assure business entities the benefits of the attorney-client privilege and work product protection denies those entities the effective assistance of council when potentially illegal corporate behavior is discovered within the organization.

As the Supreme Court has stated, impairment of these privileges and protections would not only make it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem, but also threaten to limit the valuable efforts of corporate council to ensure their clients' compliance with the law. But it is precisely those confidential communications between corporate attorneys and the employees of the corporate client that are imperiled when the attorney-client privilege or work product

doctrine is undermined. Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations. Without meaningful privilege protections, lawyers are more likely to be excluded from operating in a preventive rather than reactive manner. And it is not only corporate employees who will curtail and have curtailed the extent of their confidential communications with council to seek legal advice on business programs and strategies.

It is our personal experiences that company legal council – internal and outside – are curtailing their own activities, such as taking extensive notes at business meetings, for fear that if the subject of the business meetings were ever implicated in a governmental inquiry, whether their company might not even be the target, such council's notes would be turned over when the company waived the privilege, and the council would be converted into a potential adverse witness against the company as client. Even outside council retained to conduct internal investigations are having to be sensitive to procedures that might result in their becoming involuntary adverse witnesses. Those pressures create a potential conflict of interest between attorney and client that the privilege otherwise helps to prevent.

The strongest criticism of attorney-client privilege and indeed any evidentiary privilege is that in investigations or court proceedings, potentially valuable evidence may be suppressed and the "truth" harder to find. This debate has been raised countless times and no doubt is the basis for concerns raised by the governmental organizations behind the shift in policy over the last decade. But in our society, the debate was long thought to have been settled. As one court has noted, "The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases." That is United States v. United Shoe Machine Corporation, 89 F-Sub 357 and 358. The Supreme Court has held that this social good extends to companies as well as individuals. (See Upjohn)

Protecting the confidentiality of work product likewise furthers vital public interest. Work product product protection supports a fair adversary system by affording an

attorney a certain degree of privacy so as to discourage unfairness and sharp practices. The work product doctrine is simply a recognition that lawyers work on behalf of a client preparing a response to litigation or a potential claim, even when not subject to the attorney-client privilege, must also be protected, lest all lawyers be discouraged from conducting those preparations effectively, their clients be punished, and their adversaries be unfairly rewarded. Those corporate clients, including their authorized representatives who fear that the work product generated by their council in determining an appropriate response will be disclosed to their adversaries and promptly used against them, will not surprisingly be reluctant to seek legal assistance at all, much less provide information that will assist the attorney in providing such assistance.

But in modern day post-Enron corporate America, the historic policies in favor of protecting privilege and work product are being crowded by the policies of promoting cooperation with governmental agencies and maximizing the effectiveness and efficiency of governmental investigations. Companies formerly expected that the work product their council prepared as a result for example of an internal investigation that advice given as a result of such investigation will be protected. They have come to learn that upon the initiation of a governmental inquiry, whether formal or informal, whether the company is a target or not, such expectations of confidentiality are illusory. Internal investigations conducted by and at the direction of legal council are still a critical tool by which companies and their boards learn about violations of law, breaches of duty, and other misconduct that may expose the company to liability and damages. They are an essential predicate to enabling companies to take remedial action and to formulate defenses where appropriate. But internal investigations no longer have clear and predictable protections of confidentiality in the culture of waiver environment. Privileged information and work product are routinely expected to be made available to governmental authorities – sometimes at the authority's request on a day-to-day basis during the internal investigations. Under current governmental policies, companies do not realistically have the option to preserve the confidentiality upon which an effective attorney-client relationship is so heavily dependent and otherwise protected by the privilege and doctrine, or they run a considerable

risk of being deemed uncooperative by the governmental authority – a characterization that can be and has been a virtual corporate death sentence, or at least extraordinarily financially punitive. Putting it another way, if the government decides a company is not being cooperative, in essence the government can and does act as prosecutor, judge, jury, and executioner. None of this is subject to court review.

In the wake of such governmental policies, none of the court-developed tests or hurdles to establish a third party's right to such materials – such as in the attorney-client privileges so-called crime fraud exception, or, in the case of work product, substantial need and undue hardship – need to be satisfied. As documented in the survey results—

[END TAPE 1 SIDE A]

[BEGIN TAPE 1 SIDE B]

MR. BRODSKY: —an attorney or a state assistant attorney general most often conducts an inquiry and makes the request either implicitly or expressly without even purporting to satisfy such tests or hurdles. The problems that have arisen from this routine demand for waivers has led to a crisis – a true Hobson's choice among companies' desires of maintaining the sanctity of the privilege, but more anxious to avoid being charged with corporate crimes.

And yet we conclude the promulgation of rule of the selective waiver provision of the rule would be an unintended and undesirable by-product of such culture of waiver, and not a cure for the problems. We respectfully conclude and urge that it should not be promulgated until such time as efforts currently under way to roll back government encroachment on the attorney-client relationship upon which the judicial system depends are successful, and corporate clients once again have the ability to make a decision about waiver on a completely and truly voluntary basis. That is already starting to occur. On April 5th, 2006, following hearings on November 15th and March 15th concerning this issue, at the latter of which the survey results were presented, the US Sentencing Commission voted unanimously to reverse a 2004 amendment to the commentary for section 8-C-2.5 of the organizational sentencing guidelines that encourage prosecutors to require companies and other organizations to

waive their attorney-client privilege and work product protections as a condition for receiving credit for cooperation at sentencing. Unless Congress acts to modify or reverse the change, it will become effective on November 1st, 2006. The sentencing commission's action marks a potentially vital change in momentum on the culture of waiver. The section of this rule is not a provision with which we take issue on the substance as drafted, but we want to make sure that such rule can be adopted on its own merit without becoming a tool for undermining the very protections it seeks to preserve.

At first blush, our position may appear counterintuitive. Why are we opposing a rule that would counter some disturbing consequences of governmental policies? In that regard, let me refer to a letter sent on August 15th, 2005 by Congressman Daniel Lundgren to the US Sentencing Commission, urging it to take action that it ultimately did on April 5, rescind commentary in the federal sentencing guidelines recognizing waiver as an indicator of cooperation. The heart of his objection to that procedure echoes in these proceedings with uncanny relevance. He said, "Although the Justice Department has followed a general internal policy under the Thompson Memorandum of requiring companies to waive privileges in certain cases as a sign of cooperation, I am concerned that the sentencing guideline commentary might erroneously be seen as congressional ratification of this policy resulting in even more routine demands for waiver. I am informed," he said, "That in practice, companies are finding that they have no choice but to waive these privileges whenever the company demands it, as the failure to do so simply poses too great a risk of indictment and further adverse consequences in the course of prosecution. Such an imbalanced dynamic," he concluded, "Simply goes too far."

And that is exactly the risk we see here. If the proposed rule is included in a proposed rule making, the process itself might erroneously be seen as a ratification of the very procedures that it would seek to shield. Expectations that corporations turn over materials that are covered by the attorney-client privilege and/or the attorney-work product doctrine. Selective waiver may usefully be the topic of consideration of this process when those policies have been eliminated. Including it now would simply perpetuate that unbalanced dynamic. Thank you; I am happy to answer any

questions you make have.

JUDGE SMITH: All right. Thank you, Mr. Brodsky. Next is Greg Joseph of the Law Offices of Gregory Joseph. Greg is a former member of the Evidence Rules Committee, and we welcome him back to participate. Greg?

MR. GREG JOSEPH: Thanks, your honor. I have sent a several-page memo which the committee has. I am going to talk about some of the particular issues that I have raised in there, but I think as a drafting letter, overall, I support the rule. All right? I share David's concerns. I come down on that difficult question in favor of selective waiver, but there is a problem that I identified in my remarks in connection with B-1, which I think really applies to A also, and it is an equation of the attorney-client privilege and work product simply in the drafting process, because they do not do the same thing. A disclosure of privileged information, if it is privileged, is gone. That is the concept of keeping in confidence, and there are societal values that are preserved. There are all sorts of disclosures of work product that lead to no waiver whatsoever. If I am representing a company and I talk to its investment bankers because we are defending a transaction, the fact that I do not have a privileged relationship with them does not mean that I do not have a protected work product conversation with them. So even when you start in A, and say that a voluntary disclosure constitutes a waiver, it means two different things. I mean, that is a very weak sense of the use of the word waiver and work product. It only means that the banker knows it. It does not mean that I have breached a confidence which suggests that the social privileges which give rise to the consequences are now in jeopardy. So I think that there is a lot to be said for teasing out the two and treating them differently. A disclosure of work product is a waiver if it makes it more likely that the adversary is going to see it. It does not just constitute a waiver, and that has implications in the drafting. I pointed out that right now it says there is a waiver effected if one voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. Well I do not know what information means there, because information is not what is privileged. If my client tells me all sorts of things that I put into a complaint, and that information is in a complaint, those communications are still privileged.

So as a drafting matter, I think you have to separate privileged communications from protected information.

But the problem that I really see comes in the second sentence of A, which now contemplates an an ought unfairness test. Once there has been a disclosure, the waiver extends to all undisclosed information concerning the same subject matter if the undisclosed information, ought unfairness be considered with the disclosed information? Well the hypothetical which I have presented and I do not have an answer to it yet is, auto accident. I represent the plaintiff. There are three witnesses. I take three statements. Two say my client had the green light. One says my client had the red light. I offer the two statements that say he had the green light. In fairness, do I now have to offer the statement that says he had the red light? That can't be right. We have at least two separate rules of civil procedure that say if it's for impeachment purposes, which may be why I took it, I do not have to disclose that at any time – either in my initial disclosures or in my pre-trial order disclosure of 26-A-3. And in 26-B-3, the second paragraph is talking about the fact that only that person who gave me the statement has the right to ask for it. So I think that teasing these out and treating them separately would help resolve some of these problems that I see here, I do think, in work product.

The other example I gave is, I am preparing a client for a 30-B-6 deposition. It is a complicated case. I give this client a whole binder of materials, so when she is asked any question on any topic, she can give the company's position. Well I know a lot more than is in there. Does that mean that all of my other work product is now, in fairness, subject to disclosure? I just think that privilege and work product are not the same and they ought to be treated differently. And I Think that would resolve the issues that I have got with both A and B-1.

B-2 I do think is important. I think it is very important to resolve a circuit split on inadvertent waiver. I mean, it is ridiculous that if the action is commenced in D.C., there is a different result than if the action is commenced in Maryland or New York. I mean, it just does not make any sense that we have different rules on that.

B-3 is the hardest part of it, and I know David, whom I

respect greatly and whom I agree with most of the time, emphasizes this culture of waiver. I think the bigger problem is we have a culture of settlement. The privilege is a litigation privilege, and the problem is, no one wants to try anything anymore. Now there are good reasons for that. I mean, a regulated industry is not in a position to be disputing with the regulator whether or not it is going to waive privilege if that is going to be a condition of its ongoing business. So I accept that that is a very significant issue, but B-3, I think, makes the right choice. I have for 26 years been trying to get somebody to adopt Diversified Industries against Meredith, because the client wants to give something to the SEC and does not want all the plaintiffs to have it. And selective waiver has been routinely rejected. I think that comes out the right way. And I think it has another appealing aspect to it, because there is a thread in the law right now about selective waiver, even in jurisdictions that do not adopt it. The second circuit does not recognize selective waiver. But it came down with the decision. They are always helpfully entitled "In Re: Grand Jury Subpoena".

This one was a 350 F3rd, 299. The situation is that the client benefits from gun sales, but the client does not sell guns; the client rents auditoriums and then gets a commission on every gun sale. Does that violate federal regulations on the sale of arms? The US Attorney's Office opens an investigation. So I as council, and the council in that case, wrote a 46-page letter to the US Attorney explaining why it did not and explaining how there were all sorts of conversations with the Bureau of Alcohol Tobacco and Firearms in order to stop and in order to make sure that it did not violate anything. So the US Attorney then subpoenas the lawyer for the lawyer's notes and the lawyer's conversations with the client about his conversations with ATF, getting the assurance there was no violation. The Second Circuit said that is not a waiver, and it followed the Von Bulo approach, which is that is outside of the litigation process. The First Circuit has an identical kind of case at 348 F 3rd. I think it is 16; it is in my materials. That was a medical device situation. Again: same concept – no harm, no foul; it was not being used for litigation purposes. And I think that having a B-3 helps unify the law that way in making it clear to what extent selective waiver does and does not exist, because it does exist not, and it is just not recognized.

In 502-C, which is the one that Judge Koeltl was talking about and Judge Grimm, I agree with. I have a drafting issue which I will not get into. But I also would say that you could not accept 502-C if you strike B-3 without having the same problem, because then the SEC or the Department of Justice would just say, "I am going to walk you down to 500 Pearl St., and we are going to get an order from Judge Koeltl that you are going to agree to saying there is going to be a waiver." So you could address that by making 502-C only apply to inadvertence. I mean, you could address it, but the way it is written now, if we want to be able to address the quick peak issue for electronic discovery, if we want to permit an intelligent and knowing waiver but still have it protected in that limited sense, then you would have a problem with the same issues that David raised, which are very serious issues, and they are shared by large members of the Bar.

502-D, I have no problem with. It is really more of a tutorial for lawyers. I mean, it is implicit in 502-C anyway. I do think that the definition of attorney-client privilege and work product raise an issue, and that is they are limited to federal and state law. The hypothetical which is more and more common is, you have got a public company in Britain that has a Canadian subsidiary and a US subsidiary – two operating subsidiaries. This company trades on the New York Stock Exchange. So there is an issue – the SEC raises an issue – that requires an internal investigation. So a Toronto firm investigates the Toronto subsidiary; a New York firm investigates the New York subsidiary. Both prepare reports; both have taken statements. Under this definition, only that done by the New York firm is subject to this waiver rule, which means what, that there is a common law of waiver that survives with respect to foreign law? What is the choice of law issue? I would think there are just a lot of complexities that one could resolve by making it subject to applicable law. At least you have got to address the fact that if this is intended to be an all-encompassing waiver rule, it is not, as it is right now.

And I think everything else I have said, I have in my written remarks, so Judge, it is all yours.

JUDGE SMITH: You gave us back a minute. Very good. James Robinson from Cadwalader, Wickersham & Taft. Jim is also a former member of this committee, and we welcome him.

MR. JAMES ROBINSON: Thank you, Judge. Judge Smith, members of the committee, I want to thank you for the invitation to express my views on proposed rule 502, and it is nice to be back with the evidence committee that I served with for two terms from '93 to '98. I commend the committee for addressing the important issues concerning the collateral consequences of disclosures by corporations to the government of otherwise protected attorney-client privileged and attorney work product information concerning the course of government investigations.

As the judge mentioned, I am currently in the business fraud group of Cadwalader, Wickersham & Taft in the Washington office. My practice include the representation of corporations as well as current and former employees of corporations in connection with civil and criminal matters related to government investigations. I am also serving as the independent monitor America Online under a deferred prosecution agreement with the Justice Department – one that was produced ultimately as a result of some cooperation with the government. My experience as a federal prosecutor includes service as the United States Attorney for the Eastern District of Michigan under the Carter Administration, and as the Assistant Attorney General for the Criminal Division at the end of the Clinton Administration.

It was during my tenure with the Criminal Division that the memorandum known as the Holder Memorandum was drafted and approved in 1999 with respect to the federal prosecution of corporations. For many, the issuance of the Holder Memorandum in 1999, with its recognition that a corporation's waiver of the attorney-client privilege and the work product doctrine might entitle corporation to cooperation credit was the equivalent of Corporate America opening a fortune cookie that read, “A change for the better has been made against you.”

A great deal has been written and spoken on the subject of waivers in the Holder Memo and the subsequent iteration and modifications in the Thompson Memo and the McCallum Directive to the United States Attorney's Offices to try to develop internal policies – at least on an office-by-office basis with respect to waivers and the question of whether or not this new trend, culture of waiver, whatever you want to call it, is a change for the better for America or not, I think, is a subject of substantial debate. I know that the American

Bar Association and other groups have complained as David has here today that the approach, this relatively new approach of the government – both in the Justice Department, the SEC, the CFTC, and other places – creating a culture of waiver has seriously eroded the attorney-client privilege and the work product doctrine to the detriment, some argue, of constructive corporate compliance with the law by threatening the confidentiality of communications between corporate employees and lawyers for the corporation. Prosecutors, on the other hand, claim that corporations with serious criminal exposure that seek leniency – including non-prosecution – should be expected to cooperate fully with law enforcement in routing out criminal conduct in the corporate ranks and taking appropriate action against wrong-doers in the corporate ranks, and indeed assisting the prosecution of corporate employees' in appropriate cases. And to prosecutors, full cooperation often does mean the waiver of attorney-client privilege and the work product doctrine in certain circumstances. The scope of that obviously depends in each particular instance.

I think it is fair to say that both sides of this debate have legitimate arguments and concerns, and in my view, there is no clearly right or wrong camp to fall in. Much depends on the particular circumstances of the case and the scope and depth of the waiver involved. It cannot seriously be disputed, however, that with the recent trend towards corporate internal investigations coupled with voluntary disclosures to the government, it has produced many important prosecutions and convictions in the corporate arena. I spent many years as a prosecutor and criminal defense lawyer listening to the debates about how there was a great deal of attention on crime in the streets, but not enough on crime in the suites, and we are getting a lot of attention to crime in the suites – the corporate suites – these days as a result of, in part, the scandals of Enron and others, and this new trend in federal criminal law enforcement.

I think it is fair to say that in some instances, this trend has resulted in substantially improved corporate compliance programs in many corporations – both directly, as to particular corporations, and indirectly through deterrents of criminal activity in the corporate setting, and in encouraging corporations to develop internal compliance programs to avoid these kinds of problems in the future. It

is also true that many corporations and their stakeholders have been spared crippling prosecutions as a direct result of their cooperation with the government – including, in some instances, waivers of the privilege and the work product doctrine. As a result, it can be argued successfully in some cases that this has improved the culture of compliance with the law in many corporate settings. There is, however, a legitimate debate about the cost-benefit analysis. This certainly has increased the cost to corporations, and sometimes substantially so.

Whether that is a good thing or not, I think the jury is out a little bit on it. I think the advocates for both sides of the debate have sometimes over- and sometimes under-stated the benefits and costs of this new approach. There has been a lot of motherhood and apple pie talk about the attorney-client privilege in this setting and the work product doctrine as well. I think at times, however, it is important to step back and consider that sometimes, in the advocacy, the critics of this new approach fail to acknowledge that the setting of the corporate attorney-client privilege in the work product doctrine does not reach back as far as it does in history as to individuals, and the scope and contours of these protections are different – sometimes in important respects from that that applies to individuals as opposed to inanimate enterprises. Corporations, unlike individuals, for example, do not enjoy the constitutional protection against self-incrimination. Thus, the constitutional underpinnings that lay the foundation for much of our doctrine on the attorney-client privilege do not apply at least with equal vigor in the corporate context. It is also important to keep in mind that corporations are creatures of the state. Their owners are accorded significant benefits by doing business through the vehicle of the corporation, including limited liability from lawsuits and other exposure. The attorney-client privilege protects the individual employees who cooperate and confide in the lawyers for the corporation, but only, as we all know, as long as the corporation decides to maintain that protection. As soon as the corporate entity decides that it is not in its interest, it over-goes the employees. Some of them are my clients, as a matter of fact, and I am sure others' on this stand as well.

The righteous indignation that would flow from a corporate policy of the justice department that insisted that

individuals waive the attorney-client privilege in exchange for cooperation simply – it seems to me – does not apply with equal force in this setting. The current issue of the criminal law review contains an interesting article that deals with indicting corporations' revisited lessons of Arthur Anderson that urges that the Justice Department ought to revisit entirely whether corporations should ever been charged and indicted. And of course, the Justice Department takes a slightly different view of that, and – I am sure – will continue to do so. Until that debate is resolved, and unless the Department of Justice changes its policy or the SEC changes its policy with respect to corporate prosecutions and enforcement actions, it seems to me there will always be – whether there is an express request from an assistant US attorney or an SEC lawyer or not – powerful incentive for full cooperation by corporations, including, in some instances, the waiver of the privilege and the protection of the work product doctrine. And even if criminal prosecutions were to cease, there would be this powerful incentive.

So like it or not, it seems to me that the days of hoping to never to get caught – for a corporation never to get caught – the days of circling the wagons, inserting all the privilege, digging in your heels, I think, are over, and although I applaud the efforts of the ABA and others to try to roll back the time on this, I do not think that is likely to happen. I think that the proposal before the committee to limit the collateral costs of a waiver in the context of a government prosecution, however, is a very appropriate and long-needed protection that does allow us to preserve the attorney-client privilege and work product doctrine to the extent that we can. It is as a practical matter, I think, that when a corporation discloses to the government, the SEC, or the Justice Department, it is not truly “voluntarily” in the normal sense of voluntariness that we think of often in the context of other voluntary disclosures, and in that sense, I think it is different.

In light of these circumstances, it seems to me that there is a mutual interest between the government and Corporate America, and stakeholders of corporations under circumstances, to share information to the end that corporations will not find themselves, as Arthur Anderson did, out of business for resisting to an extent that destroys the enterprise. What has happened to a large extent in many

of these internal investigations where people have actually committed crimes in the name of the corporation have been discharged, and substantial reforms have occurred and corporations have gotten the benefit of not getting prosecuted, I think, is appropriate. I think a persuasive case has been made for the selective waiver doctrine by Chief Judge Boggs and the Columbia Health Care case. (283 Fed 3rd, 289, District Circuit 2002 case)

I know that many people will oppose on strategic grounds this new provision, as David has articulated, on the ground that this is a continuation of the slippery slope of the government giving its imprimatur to this culture of waiver that the department and others have come to rely on, and they have. It does constitute a shortcut; it does get things done that they do not have to do for themselves. I think this is different than the Sentencing Commission provisions that were recently rescinded that actually placed an affirmative credit in exchange for cooperation. This simply says, "Look, we have a circumstance here that when I am representing a corporation, and I understand we have a serious problem. We are going to get caught; we have vicarious liability. When I go to the government and turn over my internal investigation, and I can limit it to the factual information that they like, having a rule that says my client does not get anything in exchange for that or indeed telling the government that it is inappropriate to give them any credit whatsoever, that is not in my client's best interests; it is not in the best interest of the shareholders either."

So I think what this rule allows you to do is, in a mutually beneficial way, share information with the enforcers of the law, and as a consequence, minimize the damage that will occur to a waiver to the entire world. I will submit the rest of this in written format – it is fairly short, still. But in my view, I think that the committee's draft of rule 502 which recognizes a selective waiver of the privilege in the work product doctrine is a constructive step in limiting the current – I think – excessive cost of a voluntary disclosure to the government, and I personally would urge the committee to recommend the adoption of proposed rule 502.

JUDGE SMITH: Thanks, Jim. We will now hear from Steve Susman of Susman Godfrey. I should disclose that in the very earliest part of my career, I carried Steve's briefcase. I can remember some pretty exciting discovery trips digging through

the file cabinets of opposing parties, and I say that only to tell you that every time I screw up, you can probably blame it on something that Steve taught me.

MR. STEPHEN SUSMAN: Thank you, Judge. At the outset, I want to emphasize that I oppose the idea of embodying the proposed rule 502 or any rule of evidence or procedure in a federal statute. The proposal from Congress that uses power into the commerce clause to federalize the substance of rule 502 is part of an unsettling trend along the lines of the unfortunate Class Action Fairness Act, or CAFA. Congress self-consciously designed the CAFA to address a perceived problem of form-shopping. The idea that class-action plaintiffs were en masse turning to a handful of states, and even specific counties within those states where courts were supposedly predisposed to certify a class, the statute represents a sweeping change truncating a plaintiff's traditional right to choose among proper venues to bring a suit, and significantly expanding federal jurisdiction. As some commentators have noted, the problem that CAFA was supposedly enacted to solve was not identified through empirical testing. Instead, the assumptions underlying CAFA were based on extreme anecdotes from lawyers and lobbyists, pitched as if these extreme scenarios typified class-action litigation.

I sense a same lack of an empirical basis for legislating a rule that would deprive state courts of the authority to determine what is privileged and how privileges might be waived. I doubt the proposal for federal preemption is being driven by any perceived need to reduce the cost of document production by making more certain the consequences that inadvertent production are benign. More likely, the proposal for change is being urged by corporate targets of government investigations who claim they are being placed between the rock and the hard place and being bullied to waive the privilege selectively or otherwise. But I have not seen any empirical evidence that Corporate America is refraining from conducting internal investigations because prosecutors are too often insisting that companies being investigated cough them up.

I do not think that Congress should be crafting what are really rules of procedure to affect enormous changes in litigants' rights. I do, however, favor a federal rule of evidence that would limit the scope of waiver when privileged

information is voluntarily disclosed, and provide for no waiver when it is inadvertently disclosed during discovery. Indeed, I would go further and provide that production during discovery, whether or not inadvertent, does not constitute a waiver, as long as the document is snapped back as soon as it is discovered. Limiting a change to a rule of evidence does leave the danger that some state courts will require a production of material that are deemed privileged by federal courts. But I believe that many state courts will follow the lead of a new federal rule. I disagree with the conclusion in the committee's note, "If a federal court's confidentiality order is not enforceable in state court, the burdensome cost of privilege review and retention are unlikely to be reduced." In fact, the parties in most civil lawsuits are not terribly concerned whether other litigants in other courts could use documents produced in the case in hand. Sure, there are mass [Unintelligible] cases and other kinds of cases where there is parallel litigation possible, but in most cases, what drives up the cost of pre-production privilege review is not the fear of what will happen in other cases, but the fear of disclosure in the case at hand. I do not favor providing the targets of all regulatory investigations with a way to withhold massive amount of relevant materials from plaintiffs pursuing legitimate claims arising from the same underlying facts and issue in government investigations. I genuinely believe that one of the biggest discovery abuses remaining is the attempt to hide documents as privileged which are not really privileged. Anyone who has recently reviewed a lengthy privilege log in a substantial commercial case knows this, and the problem will get worse unless judges indicate a willingness to conduct random in camera review of privileged documents. So I come down on the side of expanding rather than contracting the obligations to disclose relevant information, because I doubt that will discourage corporations from consulting lawyers or getting them to conduct self-evaluating investigations.

I would now like to comment on a few provisions of the proposed rule. Subdivision A states the general rule that a voluntary disclosure of privileged material constitutes a waiver. But the last sentence obviously captures the need for balance regarding the effect of waiver by disclosure by limiting it to information that ought in fairness be considered with the disclosed information. I favor this provision because I think it is balanced. The standard

proposed is one that federal courts deal with every time they rule on the way a party edits a videotaped deposition over the objection of the other party that something needs to be added.

Subdivision B-2 addresses voluntary disclosures that are the result of inadvertent production during litigation. The proposal resembles the Texas rule that I helped promulgate, but it does not go far enough, because in order to retain their privileges, the parties must still spend enormous time and money in conducting pre-production reviews. Otherwise, they risk being unable to demonstrate that the disclosure was inadvertent. That is why I try at the start of every case to get agreement from the other side that the mere production of privileged information does not constitute a waiver, as long as the producing party seeks its return promptly upon discovery. If the goal is to expedite discovery, you should consider amending the rules so to provide.

Subdivision D enforces the court's approval of a discovery non-waiver claw back agreement. So why not make it mandatory? As I said, I have grave concerns about proposed subdivision B-3. It seems to me designed to make it impossible for plaintiffs to obtain privileged materials already disclosed voluntarily to regulators pursuant to investigations. I thought Corporate America was pushing for the provision, but I am surprised they are not, apparently. The language is quite broad. I assume it would cover any disclosures to government officials – even, for example, the patent office. I mean, an investigation whether an invention is patented is an investigation; there is no definition of an investigation. But who would say that you could keep from the other side what you disclosed to the patent office to get a patent? More over, there is no requirement that the government investigators sanction selective waiver by agreeing to confidentiality. This proposal represents extreme and unwarranted protection that would accrue almost exclusively to the benefit of entities that are implicated in serious misconduct – misconduct that usually has hurt substantial segments of the public at large, which is why the conduct is being investigated in the first place.

Now I know there is concern that enforcement agencies are coercing targets to waive privileges, but can't that abuse be dealt with directly by Congress or state legislatures or the [Unintelligible] Commission or someone else? To the extent

that cooperation is deemed necessary to enforce certain laws, why can't Congress specify on a law-by-law basis when voluntary disclosure should not be deemed a waiver? For example, Congress has granted to anyone who cooperates in an anti-trust investigation and continues to cooperate with private plaintiffs and follow on private litigation immunity from trouble damages. So this could be something that Congress could consider on a statute-by-statute basis, and I think at least the proposed protection should be limited to protect disclosure for those who cooperate with federal investigators, but who are not themselves targets of the particular investigation.

A blanket protection for voluntary disclosure made to the government known as the rule of selective waiver is at odds with the current law in most federal circuits. More over, selective waiver does not comport with the underlying justification for the two privileges at issue here – the attorney-client and work product privileges. So in conclusion, I think it is a bad idea to adopt a rule – the disfavored rule in all of the circuits, most of the circuits – of selective waiver. There are more comments, but I think I basically said what I need to say. Thank you.

JUDGE SMITH: Thank you, Steve. And our final practitioner, Ariana Tadler from Milburg Weiss.

MRS. ARIANA TADLER: Thank you, Judge. Thank you for allowing me to be here today and to speak to all of you about this new proposed rule. It is certainly interesting going last, because I have learned a number of things that are somewhat surprising to me, including the comment that Steve just made with respect to David Brodsky and the representations with respect to what the ABA's position is. I, too, I suppose, my principal concern is B-3, and I will get to that at the end of my discussion here, but I think that there are a number of positive aspects that come out of the proposed rule, but from my perspective there is a lot of work that needs to be done before any real action can or should be taken.

I agree with Steve that taking the approach in terms of how to get this kind of rule enacted is not the right approach. Certainly CAFA is yet another example of where things have, from our perspective, gone awry, and I do not think that we necessarily need a rule that is promulgated in that way to effectuate the necessary protections that, to some extent,

have emanated out of the issues that have percolated over the last five years to decade about the evolution of information which becomes the subject of discovery. I played a fairly prominent role in much of the discussion relating to the new rules,; although I was not, per se, a member of the committee, I was a pretty active commentator about the rules throughout their various iterations. And it was clear, including when were here at Fordham – I believe that was in 2004 – talking about those rules that inevitably, we would be here again today to talk about evidence rules, and I recall specifically Professor Capra having his own specific concerns about how one addresses rules governing privilege and waiver, and that one just could not do that through the procedural rules that we were then addressing.

The fact of the matter is, we are in a situation which, to some extent, we have created ourselves, where information is not simply a bunch of boxes of documents produced in the context of discovery. In fact, ten years ago, I remember being concerned that even then when it was hard copy form, the volume was just so astronomical and overwhelming, because at that time, we did not really even have the tools to review hard copy information. That, of course, has changed, and we now find ourselves in a situation where information is in volumes that are now probably in some instance one-hundred-fold, if you are dealing with companies like IBM, Exxon, et cetera. But one of the things that I am brought back to thinking about, which was relevant when we were looking at discovery rules, is that these rules are not just applicable to Corporate America. These rules are supposed to apply to the entire system. So although Corporate America, or entities who are subject to litigation, may have serious concerns about how information is handled and the risks to which they are subject as a result of the inadvertent or voluntary disclosure of information, this is not just about entities.

This is also about how our system works, the fact that our system is supposed to be predicated on the finding of the truth, the fact that there is supposed to be to as much of an extent possible a level playing field. So I think that what we have to do is continue to talk about mechanisms in which we can balance the problems that we are currently facing with volumes of information. I am an advocate of trying to find a rule that will allow for the claw back or the pull back of

information, which is really what we have all been doing – I mean, to the extent that you are involved in major complex litigation. We all enter into confidentiality agreements or protective order-style agreements, which we do, generally speaking, get authorization and affirmation from the court, where we agree among ourselves that if something is inadvertently produced, and it is identified, it can then be pulled back without the risk of a full waiver. But we have to make sure that we keep some context there. I really do believe that these rules, to some extent, as written, are allowing for further erosion of things like privilege, which is something that our system for so long has held so dearly and so importantly as the kind of protection that is necessary to have a fair litigation, to have a fair opportunity to get to the truth.

Again, I am so surprised by the presentation that David Brodsky made this morning, and I was not prepared for it, but but that being said, I think it just further complements the position that Steve has already articulated, and I myself articulate, that I do not think that it is appropriate for purposes of what at least is trying to be proposed here, that we need B-3 here at all. I mean, to the extent of that the rule, looking at what the committee was purportedly trying to accomplish, which was at least "to get at the issues or the problems that have evolved as a result of the volumes of information", that is one thing, but what does this piece of the rule have anything to do with that? I really think that we have to spend some time really— I know I am personally grappling with what is the balance. How do you find a balance where a rule will allow for the efficient adjudication of matters to allow for a reduction of cost to the extent that we can? And the truth of the matter is, when you are involved in complex litigation, the cost, generally speaking, can be astronomical. That is a fact of life. Are there ways that we can add to the efficiency to try to reduce the cost? Yes. I mean, I personally as a practitioner do that every day. In fact, my adversaries are generally surprised by the agreements or the concessions that I am amenable to making, because I realize – and I have said this in the context of the e-discovery rules – that you have to be careful what you wish for when you ask for things in discovery. I do not want to get too much such that I can't possibly get through it and it hampers my ability to litigate a case. But at the same time, we need to have rules that are

fair, and from my perspective, B-3 just does not belong here at all.

With respect to C and D, I think at least one person on the panel this morning made this comment, although perhaps did not take it to the next level, which is that D, to some extent, is almost implicit in C. In my mind, I think C and D can be combined; I do not think that you need these two separate provisions, and I think that there is a fair amount of work that should be done in not only word-smithing, but taking into account how these provisions, when read in an interactive way, will ultimately apply and will have certain consequences.

[END TAPE 1]

[START TAPE 2 SIDE A]

MALE VOICE: Thanks to each of the five of you. Just quickly, for purposes of discussion, do any members of the committee have any questions of the practitioners?

MALE VOICE: My name is Bob [Unintelligible]. I'm not a member of [unintelligible]. I share with David Brodsky's concern about the [unintelligible] so called pro-waiver or [unintelligible] waiver. At the same time, I [unintelligible] that there are a number of situations where [unintelligible] the corporations to [unintelligible] that prosecutors have to [unintelligible] indictment [unintelligible] outlining all the reasons why [unintelligible] brought, often based on internal investigations, and implicit in that is [unintelligible] be able to do that, make that kind of [unintelligible] without [unintelligible] litigation and [unintelligible] addressing them separately. I just had one other [unintelligible] with respect to the involuntary waiver that was addressed in your proposed agreement [unintelligible] court order in private litigations [unintelligible] may consider that same concept in the context of a government that [unintelligible] we have a matter of [unintelligible] in reference to what [unintelligible] quickly, but not [unintelligible] understanding that we [unintelligible]. But we didn't have the protection of doing that against private litigation. So how do you go about getting that same kind of protection against the waiver [unintelligible] that is now [unintelligible].

MALE VOICE: Would anyone like to respond to that? Yes.

MALE VOICE: I think I'd read C to permit you to do that, to just go with Mr. Pope to a federal judge and get an order, because it doesn't require that there be a pending litigation. You'd have an article 78 proceeding in state court. That's exactly the issue, Bob, and that is how can you practically do it if you don't have a pending litigation.

The only thing I've come up with is an Article 78 kind of proceeding, but we have these kinds of applications are made. And under 1782, on its foreign discovery, if there's a statute that says a court order provides some relief, I think John Kenny put it nicely, I think John may have left already; that there's probably a way to just walk into a judge and get the order, but I can't say that I have the wit enough to come up with it yet.

MALE VOICE: Any questions for members of the committee?

MALE VOICE: For Mr. Brodsky, [unintelligible] is that a survey of 19,000 [unintelligible] 19,900 corporations?

MR. DAVID M. BRODSKY: It was a survey of 19,000 — all the membership of the Association of Corporate Counsel and a large number of outside counsel.

MALE VOICE 4: Was that a ballpark of 19,000, maybe more?

MR. DAVID M. BRODSKY: It may be more, and it's actually one of the attachments to our submission, our two letters to the Sentencing Commission, which are a detailed discussion of the survey and all of the statistical bases on which those numbers were arrived at.

MALE VOICE 4: And so the percentages you report are based on the responses of 675 people who just respond [unintelligible].

MR. DAVID M. BRODSKY: Correct.

MALE VOICE 4: Plus the [unintelligible] for follow up for Mr. Joseph. He identified some concerns about A, and I'm curious whether [unintelligible] that announces this general rule of a disclosure [unintelligible] except for the following circumstances. When [unintelligible] concerns you have would be addressed by a formulation that [unintelligible] that's something more like the law of disclosures is whenever the common law currently provides for, except that —

MR. GREGORY P. JOSEPH: Well, that's the way I have to read B-1. I mean, it says protected and so I have to assume that it doesn't mean that any disclosure actually affects a waiver it if it's protected unless the first sentence of A is effecting a waiver, simply by disclosure. That's the problem I have in reading the two together, which is why my suggestion was to do them separately. I'm not saying that's necessary, but waiver doesn't mean the same thing for both.

MALE VOICE: Well, I wonder if you could get the 500 cases [unintelligible] just by stating that the presumptive rule as [unintelligible] the attorney client or for product is, whatever the common law currently provides for. [Unintelligible].

MR. GREGORY P. JOSEPH: You may be able to do that.

MALE VOICE: In discovery you can give this stuff over [unintelligible].

MR. GREGORY P. JOSEPH: In concept you could do that, and as a drafting matter – and it's always easier to talk in concepts than to have [unintelligible] drafting.

MALE VOICE: Let me just add – David Raspers in [unintelligible] I would just suggest that you wouldn't even have an A then. There's no need to have an A because 501 takes care of that. It would just be restating the obvious, so you would just go straight to the exceptions, and I've been thinking about it [unintelligible] and I'll come up with some [unintelligible].

MALE VOICE: Right. Yeah [unintelligible] that's probably [unintelligible] about the same thing.

MALE VOICE: Right. I just would be hesitant about restating what's already in 501.

MALE VOICE: I have a question for Mr. Susman. There are, with respect to state court proceedings, it seems to me there's two separate situations here and I was wondering which one of you [unintelligible]. What is one [unintelligible] produce documents in a federal proceeding and then the question is, is that [unintelligible]. The second one is a boiler one, which I think is [unintelligible] which is are we going to [unintelligible] state substantive procedures if the documents produced in the state proceedings pursuant to this rule, there now are some [unintelligible] focusing on, but [unintelligible].

MR. STEPHEN D. SUSMAN: Well, I think the federal court can always say that we will respect whatever decisions are made in the state court.

MALE VOICE: Well, I was thinking about the flip side.

MR. STEPHEN D. SUSMAN: Yeah, I think though that's the problem I was focusing on. I think states should be free to say what they want to about waiver.

MALE VOICE: Even if the documents were produced pursuant to such as a confidentiality agreement in federal court, if according to the state substantive rule, that was a waiver and you would be [unintelligible].

MR. STEPHEN D. SUSMAN: Yes.

MALE VOICE: Okay.

MR. STEPHEN D. SUSMAN: Right. A state might say that kind of agreement's illegal. Why not? It's a contract.

MALE VOICE: As the only state judge here, I was more focused and more concerned about the [unintelligible] states have their own rules of privilege, but like I say, there are two separate situations. One is the result of a federal court [unintelligible] and the other one is the simpler result of state [unintelligible] and I was trying to figure out which of the two you were focusing on.

MS. ARIANA J. TADLER: But I read these rules, as proposed right now, as actually telling you what to do.

MALE VOICE: I agree, and that's [unintelligible] from what the consequences [unintelligible]. It may well be [unintelligible] lawyers define state courts anyway, but there are two separate situations and I was going to get some sense of which one [unintelligible].

MALE VOICE: A question here?

MALE VOICE: A follow up on that question for Mr. Susman and others. I think Mr. Susman said that there really is no concern often in [unintelligible] dates about the risk that a subsequent litigation involving others, but [unintelligible] in our current case, which is [unintelligible] a waivered event. And that surprises me, because including the conference we had in this room a couple of years ago [unintelligible] I've repeatedly heard lawyers say that,

unless I can be protected against that, I'm not going to cooperate. I am exposed and I am concerned. Now, is that just an unwarranted expression of concern?

MR. STEPHEN D. SUSMAN: No, I mean, no. I think I tried to make clear in my remarks that — without making it into a federal statute that governs everywhere, I mean, it's not perfect but it is beneficial because there are a lot of cases where no one cares. I mean, it's not to say that there aren't cases where you do care, but I'm usually concerned, in many cases, of is producing this document going to get it before the jury. And if I have a right to grab it back, it's not going to get it before the jury in my case, and then you can discuss with your client, sensibly. But what are the possibilities? Is it worth the expense of all these lawyers and legal assistants going through all these documents to make sure that the privileged material is removed, and that if it's not removed, you can at least claim it was inadvertently produced, or is it — or can the client avoid that money and you can explain to the client that listen, this is, in this case, I can tell you that this document is never going to be before this jury, we get it back but it doesn't prevent, in some other case down the road, someone claiming that the document is no longer privileged.

There are some clients that have a concern that many would not. They would say let's save the money now. Let's not spend the money now. And so it just depends and you've got — to say that all federal litigation, that all litigation has these parallel threads going on is not true, so you save a lot of money by just making it effective in federal court.

MS. ARIANA J. TADLER: I think also that discussion, with respect to the discovery conference, was really in the context of the concept of claw back or quick peek, but in reality, we spent however many years engaging in these agreements anyway, these confidentiality agreements, where we actually have provisions limited to the cases in which we're working where the litigants have taken the risk. They've decided to take the risk.

MR. STEPHEN D. SUSMAN: I mean, I do it right now. I mean, in almost every case I'm in, I try to get an agreement from the other side that we have this snap back, and you can snap back anything. It doesn't depend on whether it's inadvertent or not, and if you snap it back as soon as you realize it's been

produced, which is usually coming across a table at a deposition, then –

MS. ARIANA J. TADLER: [Interposing] – Or getting ready for trial.

MR. STEPHEN D. SUSMAN: Well, usually at a deposition.

MS. ARIANA J. TADLER: Yeah.

MR. STEPHEN D. SUSMAN: I mean, you know, but in any event, if you snap it back you are protected. So why do lawyers agree to these things? We agree to them because it saves a lot of money and we don't have protection right now in every other court. We're agree to amend because it saves money in the cases that are currently – we're handling.

MALE VOICE: [Unintelligible].

MALE VOICE: [Unintelligible] David Brodsky. I hope [unintelligible].

MR. DAVID M. BRODSKY: I hope so too.

MALE VOICE: I hope that [unintelligible] petition is a [unintelligible] policy [unintelligible] a good one, but just that C and D here could be read to, essentially to [unintelligible] if you agree with that.

MR. DAVID M. BRODSKY: I do. I share the same issue that Bob Fisk and Greg Joseph were discussing. I'm not quite sure how, for example, in the context of an SEC enforcement investigation, which is not a court proceeding, how one would get the protection that you say. Assuming that creative minds could get to the point where you have a confidentiality agreement, and then go into a District Court and whether there is a real case of controversy there is not clear to me, you'd go in and get imprimatur of a federal judge that such an agreement is enforceable to all third parties; that would solve a large number of these problems.

MALE VOICE: [Unintelligible] some portion of investigations that you eventually [unintelligible].

MS. ARIANA J. TADLER: Uh huh.

MALE VOICE: [Unintelligible] again with a court order, at least in some [unintelligible] but could the rule make it clear that there can not be [unintelligible].

MR. DAVID M. BRODSKY: Well, let me make it clear that I am not the ABA, and I might – the position that the four of us, or members of the subcommittee took, is not an ABA position. But the four of us – no, I think the four of us would take the view that if we didn't have enshrined a selective waiver doctrine at this moment in time, that other ways of protecting the material, including going into the various federal district courts and ultimately courts of appeals and arguing the diversified and dissenting opinion, for example, in Columbia ACS is in fact the correct way of interpreting production, would be an effective way of continuing to combat the problem. So no, we would not have a problem. I personally would not have a problem using C and D in the method in which you suggest. It's just that if you posit that the selective waiver doctrine becomes federal law today, which I know is not the process of the way the rule has to take, but if it were, I can't conceive of a set of circumstances where an American corporation could ever effectively resist the government's request or suggestion that waiver must be accommodated now; that they must waive with respect to – not just the kind of arguments that Mr. Fisk raised in terms of an advocacy piece, but just the bare raw materials. Handwritten notes of attorneys conducting internal investigations, handwritten notes of inside counsel sitting at a business meeting. All of that is essentially compelled now, and that's the pernicious effect of this rule, unintended, and the rule is well-drafted but it's unintended consequences which we resist.

MALE VOICE: Jim Robinson I think had a question.

MR. JAMES K. ROBINSON: Well, I was just going to ask David whether the ABA or the Corporate Counsel Association had endorsed the suit, because my recollection is over the last decade or so, there has been reasonably strong support among corporate America for a selective waiver document for the very concerns that the cost associated with cooperation carries this burden, and will – but I guess the ABA, also delegates hasn't addressed this particular issue in this way. I know the policy issue generally of opposing this culture of waiver notion has been endorsed.

MR. DAVID M. BRODSKY: Yes, last August the House of Delegates adopted a recommendation that – it had three parts, but in substance, urged that no policies be adopted and that would have the effect of continuing the erosion of the attorney,

client privilege, and urged a roll back of those policies. And it essentially out of that very broad recommendation that the subcommittee began to draft this response.

MALE VOICE: Yeah, my own question for David Brodsky, if you don't mind. You described a culture of waiver, and I infer from that you're talking about primarily the culture within the Department of Justice, and you've referred to a favorable trend from the action of the Sentencing Commission. Of course, the Sentencing Commission is an independent body with its own statutory authority to take specific action. My question is, realistically how is this culture that you describe to the extent that it exists, going to change? I mean, there's no other body – the Sentencing Commission is a specific example, but an unusual one. Is it going to change because an attorney general promulgates a different policy, or you said that it's not time for a rule change until the culture changes, but I don't see any realistic mechanism by which the culture that you describe will change, and I'm wondering what your perspective is on that.

MR. DAVID M. BRODSKY: Well, thank you. That's an extremely good question, and let me just explain the background of the comment that we made. There are the ABA Presidential Taskforce on the privileges then working on this issue for about two years, and we have had meetings. Not me personally, but other members of this – of a very broad force and liaison to the taskforce that meetings with the Department of Justice, and there are members of the Department of Justice who are on the taskforce. We've had meetings with the SEC, we've had meetings with other regulatory bodies in an effort to convince them that the policies that are currently in existence should, at the very least, be rolled back so that explicit mention of the attorney client privilege waiver and work product doctrine waiver be eliminated as a factor in determining cooperation.

We're not saying that under the appropriate set of circumstances a company could not rationally come to the conclusion that its best interest was served by a truly voluntary waiver. What we're saying is that if you incorporate, as the Thompson Memorandum and the Seaboard Doctrine, the Seaboard case from the SEC incorporates an explicit reference to the attorney client privilege waiver as being a factor in determining whether or not a company is being, quote, end quote, cooperative. That impels a company

to take every last step it possibly can in order to be deemed cooperative.

If you remove from the equation the reference to attorney client privilege waiver, there are circumstances in which a company will rightly decide it needs to make a full breast of the affair, including privilege, but there are other circumstances were a step short of a waiver, such as a discussion of the underlying facts with a regulatory but not a discussion of advice given or work product, would be an effective remedy, effective alternative.

As it currently stands, however, those intermediate steps are, by and large, completely swept away because of the mention of the waiver in the cooperation doctrine to begin with.

MALE VOICE 1: And that's a helpful answer, and I appreciate it, but in your prepared remarks though, you referred to explicit and implicit pressure. What do you do about the implicit pressure?

MR. DAVID M. BRODSKY: Well, I think it's implicit pressure because it is an explicit factor. But my own personal experience, and I'm sure there are other attorneys in the room who have had this experience, is that when a company decides – it discovers wrongdoing in its ranks or potential wrongdoing in its ranks, it makes the decision that it should self-report to the SEC and to the Department of Justice because the wrongdoing seems to rise to a level that would, under current corporate doctrine, self-compliance doctrine, require a reporting, and it goes in. It is almost expected. I'll strike almost. It is expected that at that moment there will be a statement by corporate counsel that, in the course of fully cooperating with the regulatory agency, there will be a waiver of the attorney client privilege and production of materials.

It is less explicit – less the norm, but very often the norm, that companies are then asked to show their work product. I was involved in a case not six months ago where the CFTC made a demand for the day to day – end of day report, every single day, of exactly what our investigation had uncovered to that point. And they wanted to have the handwritten notes of the counsels involved in the interviews produced to them every single day. Now, we resisted that, but that suggested very

strongly that there was that kind of expectation, so that's what I refer to as implicit.

MR. JAMES K. ROBINSON: Can I say one thing on this, though, because I think what we need to do, though, is keep in mind that there are corporations who badly want to avoid prosecution of the entity, and any policy that the ABA or others develop that says that if my client, in cooperation with the audit committee, and we found wrongdoing, and we're going to — we're willing to fire those people, change our corporate policy, go to the Justice Department and the SEC, let it all hang out and you're telling me that if I do all of that, I should forget not getting prosecuted.

That's, you know, I think that's not realistic and not in the best interest of the shareholders of the corporation, and I don't see how we're going to change that dynamic. Whether we drive this underground and say you can't put this in the sentencing guidelines, you can't put it in a selective waiver rule. That is a reality that cannot — it's not likely to be eliminated, it seems to me, unless Congress is really prepared to do something I can't imagine they are prepared to do, and you have separation of powers factor as well.

But the Justice Department and the SEC save enormous resources, obviously, by doing this, and we have — the cat is out of the bag here on this. I think the likelihood that that demon is going to be driven underground because we don't have a selective waiver rule is ignoring the realities of life, and therefore, the selective waiver rule is something that can be done, and eliminating it as a possibility in the hopes that maybe the whole culture of what the Justice Department, and the SEC, and the CFCC, and others are going to do, because they can just sit there with their hands folded and get people representing corporations, who are designed to — or whose job is to avoid the silver bullet of a prosecution, are going to be doing this, and they're going to want something in exchange for.

And maybe you're right, maybe it'll all just stop, but I kind of doubt it.

MR. DAVID M. BRODSKY: May I make a very brief response?

MALE VOICE: Sure.

MR. DAVID M. BRODSKY: I'm not suggesting, as I thought I made

clear, Jim, I'm not suggesting that companies should not, on a completely level playing field, should not make the decision. As they did pre-1990, pre-1992, 1993, make the decision to waive. One of the most famous cases of that is Warren Buffet's decision with respect to Solomon in the trading scandals of 1990 and 1991 to make a complete waiver of the privilege. There was no doctrine in the Department of Justice or even policy at that point that allowed for that. He decided, on behalf of his company, to waive — to show complete cooperation.

On a going forward basis, I believe that that would be certainly within the so-called playbook of corporate counsel and corporate executives to make that decision. All I'm saying is make it a level playing field. Withdraw the explicit reference to a waiver of the privilege as being a factor in deciding that cooperation has been had. I've had too many situations, and I know of too many situations, where unless a waiver occurred, the company is being deemed non-cooperative. That's just simply not a factor that ought to be allowed, in my view.

MALE VOICE: Question?

MALE VOICE: In [unintelligible] one I guess, your [unintelligible] is sort of knew that when Mr. Robinson comes in, he [unintelligible] to discover this wrongdoing they want to be [unintelligible] or prosecutor's evaluation, that [unintelligible] that cannot be [unintelligible].

MR. JAMES K. ROBINSON: No.

MALE VOICE: It cannot be a factor in the evaluation because that's what the Thompson Memo says right now. That is one factor of a variety that [unintelligible] whether a corporation's been cooperative, and in turn, whether they [unintelligible] that you want us to not be able to take that into account.

MR. DAVID M. BRODSKY: No, I want you to be able to take into account, but I don't want it to be an expectation; that a company, in order to satisfy all of the standards, and I believe there are nine subparagraphs in the Thompson Memorandum that define cooperation. I would prefer that there were eight, and that the corporate attorney client privilege was not a factor in the decision.

But if a lawyer as esteemed as Jim Robinson came in and said we're going to satisfy all eight, and in addition we discovered enough material by reason of our internal investigation and we think you should have that as well, we're going to start off with displaying to you all the facts, and if you'd like further information, let us know, and that leads to a waiver of a privilege, I think that's certainly a factor you should be taking into consideration.

But in the vast majority of the cases, I think the Department of Justice and the SEC could, consistent with utilizing their resources effectively, obtain terrific results and hopefully rid our culture of corporate criminality without putting explicitly on the table the attorney client privilege waiver as a fact.

MALE VOICE: [Unintelligible] talking in our kind of shorthand, it sounds to me like [unintelligible] sort of your view of [unintelligible] and therefore [unintelligible] and so essentially the Thompson Memorandum [unintelligible] modified [unintelligible] and further modified to say expressly a waiver will not, should not be sought [unintelligible].

MR. DAVID M. BRODSKY: Yes.

MALE VOICE: That's what [unintelligible] the bottom line is [unintelligible].

MR. DAVID M. BRODSKY: Yes, that's right.

MALE VOICE: All right. We've been going for two hours now, and I think we need to go ahead and break from this segment. And I thank all of the panelists and we'll take a ten minute recess.

[RECESS]

MALE VOICE: All right. Let's go ahead and reconvene. I'd like to introduce David Stellings, representing ATLA. He is a partner at Leaf Cabraser [phonetic].

MR. JAMES K. ROBINSON: May I just interject for a second? We had also asked the American College of Trial Lawyers to provide testimony, but they respectfully declined at this point because they couldn't come to a resolution that was satisfactory to them, and so a lone representative of a group is Mr. Stelling. Thank you for coming.

MR. DAVID STELLINGS: Thanks for having me. I'm happy to be here today. I have some experience with the selective waiver issue. I argued the — I briefed and argued the Columbia HCA in a case before the Sixth Circuit a few years ago, and I have to say that I was more than a little surprised when David Brodsky sat up here and took the same position as I'm about to take about selective waiver, because Latham & Watkins represented HCA in the Sixth Circuit decision, and was supporting selective waiver at that time.

As you probably know, the issue in the Columbia HCA case was whether a defendant who shared work product and privilege documents with the government, with a written non-waiver agreement had waived the documents' privilege and work product protection. Based on the committee note on proposed Rule 502, this Committee seems very familiar with the dissent in that case, but I personally prefer the majority opinion.

I'm appearing today on behalf of the Association of Trial Lawyers of America. ATLA is a voluntary national bar association who has approximately 50,000 trial lawyer members representing individual plaintiffs in civil actions. ATLA supports subdivision A of proposed Rule 502. It's reasonable to reserve subject matter waiver to those limited circumstances in which fairness requires further disclosure of related and protected information.

For many years, most federal and state courts have either explicitly or implicitly been using such a fairness standard when ruling on subject matter waiver questions, and so this part of the rule effectively would codify existing common law. The remainder of the rule is more problematic. ATLA believes that beyond Subsection A, the proposed rule flies in the face of decades of settled federal appellate precedent. The rule unnecessarily and indefensibly would weaken the attorney client privilege and the work product doctrine, and we're particularly troubled by the Rule's treatment of voluntary disclosure of privileged or protected materials to the government, which is Section B-3, and by the Rule's attempt to govern both federal and state court practice, which is Subsection E.

I'm also concerned that Subsections C and D would permit, and maybe even encourage, corporate defendants strategically to choose to disclose privileged materials to one adversary, but withhold them from a different one. I'm going to address

each of those issues in turn.

Subdivision B-3 provides that under the selective waiver doctrine, attorney client privilege or work product protected information voluntarily disclosed to a government agency retains its protection. To justify this rule, the committee, in its notes, states that, quote, courts are in conflict over the issue. That's not the case. The only federal court of appeals that ever endorsed the selective waiver doctrine is the A Circuit in its diversified opinion, and that decision was handed down about 30 years ago, in 1978.

The diversified court was the first court of appeals that ever addressed the selective waiver doctrine, and its analysis of the issue consisted of one sentence. Since 1978 all seven of the courts of appeals that addressed the issue rejected the selective waiver doctrine. Every one of those courts held that voluntary disclosure to the government destroys either the attorney client privilege, work product protection, or both. Those circuits include the First Circuit in the MIT case, the Second Circuit in the Steinhart case, the Third Circuit in Westinghouse, the Fourth Circuit in Martin Marietta, the Sixth Circuit in my own favorite, Columbia HCA case, the District Court Circuit in Permian, and the Federal Circuit in the Genentech case.

Arguably, even the Eighth Circuit, the author of diversified, now rejects the selective waiver doctrine. In re Luprine [phonetic] marketing and sales practices litigation, a multi-district litigation in which I'm co-league counsel up in Massachusetts, federal district Judge Stearns of Massachusetts recently held that the diversified case, quote, is probably an orphan in its own home, because the Eighth Circuit refused to apply diversified selective waiver doctrine ten years later, in 1988 in the in re Chrysler Motors Corp. overnight evaluation program litigation.

It may not surprise you to learn that in each of the court of appeals cases that rejected the selective waiver doctrine that this committee is trying to codify, the defendant corporation supported its argument with the exact same policy rationale that the committee now cites; that selective waiver encourages corporations to cooperate with government investigations.

Each of the seven courts of appeals addressed and rejected

that argument. The courts uniformly held that encouraging corporations to conduct internal investigations and to cooperative with the government are laudable objectives, but they're not sufficient reasons to distort the attorney client privilege and work product doctrines.

Some of the courts actually went a step further and explored the question of whether adoption of the selective waiver doctrine actually would result in corporations being more willing to cooperate with government investigations. Again, the answer was unanimous. The courts found no evidence that a rejection of selective waiver has impeded voluntary cooperation with government investigations. For example; in an amicus brief submitted in the Steinhart case, the SEC argued that the selective waiver is not required to encourage compliance with SEC investigations. The SEC noted that it had continued to receive voluntary cooperation from subjects of investigations, notwithstanding that two courts of appeals at that time had rejected the selective waiver doctrine.

Similarly, in the Columbia HCA case in the Sixth Circuit, Columbia HCA and the District Court judge asked the government to weigh in on the side – on the issue of whether corporations would be less likely to cooperate with investigations in the absence of a selective waiver rule. The Solicitor General informed the Court of Appeals in writing that, after thoroughly considering the issue of selective waiver, it was declining to file an amicus brief supporting selective waiver.

The Solicitor General's submission undercut HCA's argument, which is now this committee – apparently is this committee's argument that selective waiver is necessary to encourage companies to cooperate with government investigations. So seven courts of appeals, plus a few government agencies, have rejected the selective waiver doctrine. In light of the Chrysler decision, not a single court of appeals arguably supports the doctrine. It's been the law of the land for more than 20 years now, and corporations still have been cooperating with government investigations.

With proposed rule 502 B-3, this committee seems to be telling 24 federal appellate judges from eight different circuits that their decisions were wrong. With all due respect, it's not the committee's place, nor should the committee be trying to undermine well settled law. If these

corporations insist the government's using its investigatory powers too broadly, then Congress can adopt a more direct solution to that problem, a solution that does not disturb settled law.

The committee should abandon proposed Rule 502 B-3. Instead of trying to overturn 20 years of uniform precedent, the committee should modify its proposal so that it codifies existing law. Such a rule would state that voluntary disclosures of protected material to the government destroy attorney client privilege and work product protection.

Moving past B-3, proposed subsections 502 C and D are as trouble to me as B-3. There are two separate problems with those sections. First, taken together, sections C and D effectively codify the selective waiver doctrine in private civil litigation between two non-governmental parties. The proposed rule would permit, and perhaps would encourage corporate defendants to pick and choose which protected documents they wanted to produce to different litigation adversaries.

Let's hypothetically use a recurring corporate defendant as an example; Microsoft. I think a number of people in this room today have some experience suing Microsoft, including me. Let's say that hypothetically Microsoft is being sued by two different companies, Company A and Company B, both of whom compete with Microsoft. This happens all the time with Microsoft and other corporations. In the hypothetical, Microsoft wants to maintain a good relationship with Company A because it hopes to work with it on future projects, but it has no intention of maintaining a good relationship with Company B. Under proposed Rule 502 C and D, Microsoft could choose to share privileged materials with Company A to foster settlement talks, but withhold those same materials as attorney client privileged or work product in Company B's lawsuit. All Microsoft would need to engage in such strategic disclosure would be a judge's signature on an agreed upon stipulation in the Company A case.

As this committee knows, judges face incredible time pressures today. It's particularly true for federal judges after the Class Action – so called Class Action Fairness Act shifted the burden of virtually ever class action in the country onto the already burdened shoulders of the federal judiciary. Many judges are happy to sign the rare orders or

stipulations to which both parties agree.

Once such an order is signed, litigants under this proposed rule have free passes to disclosure protected materials in one case, when disclosure benefits them, but to refuse to disclose the same documents in another, case when the disclosure does not benefit them.

The proposed rule achieves the remarkable result of codifying the selective waiver doctrine, even in cases in which the sole rationale for the doctrine, which is that it encourages corporations to cooperate with government investigations doesn't even exist. As I explained earlier, the Federal Courts of Appeals rejected the selective waiver doctrine, even when the disclosure was being made to the government. To permit selective waiver when the disclosure is between private litigants would severely undermine the attorney client privilege and work product doctrines.

There's one more problem with proposed Rule 502 C, which is that it forces terms of confidentiality orders in one case onto parties in a different case. Of course every plaintiff and every defendant has the right to decide whether to enter into a confidentiality order if it makes sense or if it's necessary in that particular case. I do it on a weekly basis on my cases. Confidentiality orders, by definition, prevent information from being shared freely. Put another way, they limit the scope of the truth finding process. Sometimes such limitations on the flow of information are necessary to permit parties in a particular case to litigate their case.

A court should not be in the business of obfuscating the truth finding process by enforcing confidentiality orders against entities who never had an opportunity to speak to whether or not the production of the privileged materials in question should have resulted in a waiver. Of course this issue arises on when a document is produced or protected by the attorney client privilege or the work product doctrine. Most documents that are covered by confidentiality orders in civil litigation are neither privileged nor work product, and therefore their continued confidentiality is not at risk.

A confidentiality order cannot protect a defendant from waiver of protection when a defendant voluntarily chooses to disclose protected materials to an adversary. This is just another way that the proposed rule improperly attempts to

codify the selective waiver doctrine, and the committee should modify Subsections C and D to limit the effect of court approved party agreements and confidentiality orders to the parties in the case before the court, or to inadvertent disclosures, which I noticed were the subject of the comments of Judges Grimm and Judge Koeltl when they discussed these subsections earlier this morning.

ATLA also strongly against Subsection E. This rule is unprecedented. It would require state courts and federal courts sitting in diversity where state law supplies the rule of decision to apply a federal rule of evidence. Almost 35 years ago, Congress rejected a similar proposal by the advisory committee. Congress found that the proposed rule interfered unnecessarily with the traditional power of the states to craft privilege law.

In 1972 the advisory committee concluded that testimonial privileges were primarily procedural, and drafted rules to supply a uniform and exclusive standard for testimonial privileges to be applied in diversity and federal question cases. Congress disagreed with the advisory committee. It found that testimonial privileges were substantive, not procedural, and it rejected the advisory committee's proposal.

Instead, Congress adopted Rule 501, which provides that, quote, in civil actions and proceedings with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness shall be determined in accordance with state law.

The house committee on the judiciary acknowledged that deferring to the states on an issue of substantive law might not be mandated by Eerie, but explained in no uncertain terms that, quote, the rationale underlying the proviso is that federal law should not supercede that of the states in substantive areas such as privilege, absent a compelling reason.

There is no compelling here for enacting a federal rule of evidence that would supercede the law of the states in substantive areas such as attorney client privilege and the work product doctrine. Absent a compelling reason, this committee should heed Congress's clear command that federal law should not supercede state law in areas such as

privilege, and I want to thank the committee again for giving me the opportunity to speak today.

MALE VOICE: Well, thank you for being here. Dan Kapp [phonetic], you want to make a comment?

MR. DAN KAPP: I just want to clarify that the – at least the drafters of this were not trying to rewrite a bunch of laws or do something substantive in the absence of congressional direction. We got a letter from Congressman Sensenbrenner saying that we should enter this area. We clearly understand that we're dealing with substantive principles, which is why we made such a – at least I personally made such an objection to some attempts of its civil rules to do this, and so if there's going to be an overturning of this, absolutely, the predominant circuit court precedent, it would have to be by Congress. It can't be by this committee.

MALE VOICE: All right. We'll now hear from Richard Humes, who is Associate General Counsel with the SEC.

MR. RICHARD M. HUMES: Thank you. Good morning.

MALE VOICE: Welcome.

[END OF TAPE 2, SIDE A]

[START OF TAPE 2, SIDE B]

MR. RICHARD M. HUMES: The commission does not constitute a waiver as to third parties is important to the Commission. The present uncertainty about the consequences of disclosure to SEC 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.

The privileged or protected materials that have been of the most interest and benefit to the commission are internal reports prepared by retained attorneys or companies examining financial reporting problems. These reports usually fall in the scope – within the scope of a work product doctrine, include or are produced with memoranda of attorney interviews of many company employees. The reports are also sometimes protected under the attorney client privilege. Now, the Commission has argued in amicus briefs in a number of cases that state and federal court should find that companies under

investigation who provide work product to the Commission should not be found to have waived protection, should they do it pursuant to a confidentiality agreement.

The Commission has also previous addressed this waiver issue in findings accompanying the Commission's attorney conduct rules of the Sarbanes-Oxley in reports that we were required to prepare for Congress under Sarbanes-Oxley, and in related testimony to Congress.

In those contexts, the Commission has taken the position that allowing companies under investigation to produce privileged and protected information to the Commission 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 relief for investors.

Further, the Commission believes that, with a rule of evidence establishing that producing protected documents to the Commission does not constitute a general waiver, the Commission could more easily obtain that kind of information in the future.

Although the Commission must verify that internal reports that it receives are accurate and complete, and must conduct its own investigation, doing so is generally far less time consuming and less difficult than starting and conducting investigations without the internal reports.

The public interest in timely enforcement of the federal securities laws is clearly served when the Commission can properly identify illegal conduct and provide compensation to victims of fraud. We know that even the majority opinion in the Columbia HCA case acknowledged that permitting companies to disclose privileged or protected internal reports to government investigators results in considerable savings in time and fiscal expenditure, and encourages both self-policing by companies and settlement of disputes.

Because the Commission's resources are finite, reducing the cost of investigations allows the Commission to manage its investigative staff more efficiently, conducting more expeditious investigations and more thorough ones. While the advantage to the Commission of obtaining internal reports is clear, a relevant consideration is whether a rule preventing waiver of harm's private litigants by potentially limiting

their access to the same protected documents produced to the Commission.

Private plaintiffs suing a corporation that has produced protected documents to the Commission arguably could benefit from using the same protected documents in their lawsuits, and such plaintiffs routinely claim that they are entitled to these protected documents because the corporation waived any protection when it produced them to the Commission.

However, rule of evidence establishing that producing privileged or protected documents to the Commission does not waive privileges or protections as to third parties, would leave private litigants in the same position that they would have been in if the Commission had not obtained the privileged or protected materials. If the corporation had not produced privileged or protected documents to the Commission, private litigants could not argue that the corporation waived attorney client or work product protection. However, private litigants could still argue that they are entitled to discover that work product from the company by demonstrating sufficient need under the work product doctrine. The proposed rule would not change existing law as to private litigants in that respect. Thus the proposed rule would benefit the Commission significantly, without harming private litigants. Also, private litigants may actually benefit from the Commission conducting more expeditious investigations.

Accordingly, the Commission agrees with the advisory committee that one, the production of privileged or protected information to the government should not constitute a waiver of a privilege or protection as to private parties, and two, the new rule, 502 B, promotes the Commission's interest in protecting investors.

With that background, I would like to comment on some of the terms of Subdivision B-3. The rules should be clear that an agency can use documents that it obtains pursuant to the Rule as necessary and appropriate. The Committee note indicates that the Rule's intent is to allow necessary and appropriate subsequent uses. It states that a government agency might need to use the information for some purposes, and then would find it difficult to be bound by an airtight confidentiality agreement, however drafted.

Two portions of the proposed rule, however, could be read to suggest that agencies are limited in the uses that they might make of information they receive pursuant to the rule.

First, Subdivision B-3 is subject to the introductory clause that provides generally that, quote, a voluntary disclosure does not operate as a waiver if, closed quote. That broad statement applies to Subdivisions B-1 and B-2. However, it appears that disclosure to government investigators does, in fact, waive work product protection and attorney client privilege, otherwise applicable to the disclosed materials so far as that government investigation's concerned.

Thus, we recommend that the current introductory clause be revised so that it clearly does not apply to Subdivision B-3. The introduction for Subdivision B-3 could be, quote, a voluntary disclosure, does not operate as a waiver to any person other than the agency to which the disclosure is made.

Second, Subdivision B-3 states that the disclosures must be limited to persons involved in the investigation. This clause appears to mean that the initial disclosure of the privileged or protected information must be limited to a governmental agency conducting the investigation, and it does not appear to limit how governmental agencies could use the information. However, it is possible that the clause could be interpreted to mean that the governmental agency receiving the information does not have the right to introduce in litigation documents produced to it under B-3, or to bring information disclosed to it to the attention of another government law enforcement agency. Such a reading would impose an unnecessary limitation on the Commission. Although the Commission has generally sought to keep the privileged and protected information that it receives confidential, in some circumstances, disclosure can either aid an investigation or an enforcement action resulting from the investigation.

We recommend that the rule make clear that the government is able to use the information received in whatever manner is necessary for its law enforcement efforts.

An additional issue that is important to the Commission is that the proposed rule should prevent waiver under both federal and state law. Private plaintiffs often bring lawsuits against corporations to the state court. As a

result, corporations will still be wary of producing internal reports to the Commission unless they have some assurance that doing so will not result in waiver under state law.

Although the Committee note indicates that the proposed rule is intended to preempt state law, both the rule and the Committee note should make that intend clear and explicit.

That's all I have. Thank you for giving me the opportunity to appear today.

MALE VOICE: I thank you, Mr. Humes. And now, okay. Hear from Peter Pope, Deputy Attorney General of the State of New York.

MR. PETER B. POPE: I want to thank the Committee for offering the Attorney General's Office an opportunity to appear today. My name is Peter Pope, I'm the Deputy Attorney General in charge of the criminal division of the New York State Attorney General's Office. Among other things, our office prosecutes certain white collar crimes. We also have regulatory authority. We can bring civil lawsuits as well, and New York State and I under New York State statutes, we are in many senses both the prosecutor and the regulator.

We've been asked in particular to talk a little bit about our practice in connection with voluntary waivers of the attorney client privilege, and what a rule like 502 B-3 might have on our practice.

In our view, our practice, what we do, how we reach these issues is particularly relevant to the question of whether or not there's an ongoing erosion of the attorney client privilege, which is very clearly one of the grounds on which this discussion is being dated here today and throughout the nation.

We support the thrust of this world, and indeed have sought in litigation a similar common law exception in New York State. In a discussion about your experience it's useful to distinguish between different analytic categories of privileged materials. They are dealt with practically in very different ways.

One is the category of legal advice rendered to a client. The second is a separate category that's constituted of the factual results of investigations conducted by counsel on behalf of a corporation.

Let me talk about the first of those categories, to begin with. We very rarely ask anybody what legal advice they gave to clients. Typically, the issue is presented to us when the firm wishes to come to us to talk about how it is that their client was acting on advice of counsel in order to negate any possible criminal or regulatory charge. In that kind of a circumstance, we're not the drivers. To the contrary, it is the firm and the defense lawyers who are the drivers. But needless to say, when somebody says this is the advice of counsel on which we relied, we are extremely interested in the precise nature of the advice and the facts that were disclosed to counsel before they rendered the advice so we can make a determination as to whether or not in fact the persons were acting with innocent [unintelligible] and culpable intent.

In our view, this discussion about advice works exactly the opposite of many of the fears that were expressed earlier today, and have been expressed elsewhere. When engaged in an inquiry like that, it shows very quickly, in our experience, it's a very good thing to go seek the advice of counsel, and it's a very good thing to clearly disclose the facts to your counsel when you're getting advice because when the situation hits the fan, you are able then to come forward and say I was worried about this, I fully disclosed it, I got advice, I followed advice, you should take that into account when making charging decisions, whether civil or criminal. And of course we do.

So I respectfully suggest that the notion that a selective waiver exception would somehow dampen people's desire to talk to their counsel is mistaken, and that exactly the opposite is true.

There is another benefit; a collateral effect of the B-3 Subdivision, and it speaks exactly to the situation that Bob Fisk discussed earlier. We had a matter in which the client wished to give us materials as quickly as possible, and we certainly wanted to get them as quickly as possible. There was no question that we were not seeking advice that may have been buried in the hundreds of thousands of e-mails that were at stake, and it was simply a logistical puzzle; how could they possibly go through every one of those things and strip out the privileged information which we would certainly have been happy to have stripped out. It would have cost them an enormous amount of money, it would have taken both them and

us enormous amount of time.

Under B-3, as I read B-3, by making that disclosure to us, they may have waived with respect to us, subject to the other provisions about inadvertent disclosure, and indeed we had an agreement that, as to us, we were not going to hold that inadvertent disclosure as against them. This would solve the problem, B-3 would solve the problem, with respect to other third parties who may have wanted advice of counsel in matters that could be entirely unrelated to what it is that we were looking at. There were, for all both of us knew at the time that we were talking about it, sexual harassment types of advice stuck somewhere in those.

And certainly it served everybody's interest; the corporation's in getting to a quick disposition of this matter, ours in getting quick access to the information, for them to be able to give us the information so we could readily get to the facts of the matter.

The second category that is of concern here is the results of internal investigations conducted by counsel. There are again subcategories of this batch of information. One is the substance of the statements made by employees, and the second is then the memoranda, or the notes, that memorialize those statements that are created by counsel at the time that they are conducting the information.

In our practice, the internal investigations that we see are typically undertaken in response to an investigation of our own, frequently begun after we have issued subpoenas or taken some other action that has made things public. Because we are but a state attorney general, we're usually not somebody's first stop if they have conducted their own investigation, found something — without any external prodding at all, found something. They usually arrive in Mr. Hume's office well before they arrive at our office.

So the internal investigations that we see are ones that by and large are triggered by what it is that we've done. And when that happens, very frequently the initiation of the internal investigation is accompanied by a statement to the public or to shareholders, assuring the public that the corporation is going to do a full and fair investigation, assuring the public that the firm does not tolerate wrongdoing, reaffirming the corporation's culture of

integrity, and pledging to cooperate fully with the authorities.

Now, we have been told more and more that, as law firms embark on these kinds of investigations, they expect that part or all of its results are going to be disseminated. Of course they're doing them to disseminate them to a portion of their firm. They intend to disseminate them, depending on the choices they've made to management, to the audit committee, or to the board of directors, or some subcategory of that, and they do that in order to discharge the duty to the shareholders.

They do not, by and large, intend to disclose the results of their own investigation to employees inside the corporation who are not their clients, typically the faceless employees. The employees who, at least for the sake of a hypothetical, have committed crimes either against the corporation, or against the corporation's clients, or somehow against the public in some other way.

Very frequently, when they begin down the road to doing the internal investigations, the law firms and the firm believe that they're going to disclose the results of the investigation, or some part of the results of the investigation, to the outside auditors, many of whom believe that they can't do their job until they get the report, uh, and there have been occasions where it's announced at the outset where the internal investigation isn't intended to be public to everybody from the very outside, we have, in one of the matters that we've done, the firm hired a – the corporation being invested hired a law firm to do an internal investigation and waived privilege at the outside, knowing full well that whatever it is that they find would be made available to the world at large, and they did that to assure their clients across the world that they were operating an extraordinarily honest shop.

The firms, of course, also use the information to have discussions with us or to make written submissions to us, and in our practice, what we see usually is that the oral discussion comes first. It is usually done at the initiative of defense counsel, and it is extremely common for counsel to suggest after we've issued subpoenas or after we have interviewed a number of people, come in to us and suggest that we should forbear from immediately interviewing

additional witnesses, and we should forbear from insisting on quick document production until they have an opportunity to wrap their arms around the problem themselves and then come in and give us a view of what it is that they think has happened.

Sometimes this conforms to our investigative needs, and sometimes it does not. It is certainly our perception that agreeing to that is regarded as a far more friendly and a far less intrusive investigative method, and if we decide instead to do it the old fashioned way and to go ring people's doorbells at night without first calling inside counsel.

When finally counsel comes to us and talks to us, they speak to us about a variety of information that could otherwise be covered by privilege, and it falls into two categories; interviews of witnesses, typically they're employees, and confessions. Again, typically their employees.

Frequently this discussion is in connection with counsel coming in to our office with a binder or a holder of hot documents and they tell us the story, they tell us the nature of the problem that they believe that they have seen, and they tell us the problem that they do not have. And this is all as they tell us in service not only of full cooperation with us, but making sure that their corporations are being run the way that they want their corporations to be run. In providing compliance programs that are effective, in plugging the holes in compliance programs that are not, and in getting to the truth of the matter because, as they tell us, they have no interest in protecting anybody who has either cheated them or cheating their clients.

When people come in and they reveal these oral statements to us, it is enormously valuable to us. It's also not entirely clear to me that they haven't already effectively worked a waiver by disclosing to us the nature and substance of the conversations that they have had with their employees. They frequently ask, before we begin, whether we would accept this proffer as not a tool to drive a wedge through their waiver ourselves, and we invariably say yes. We are interested in what it is that they have to say to us, but it's not so clear that our saying yes in that meeting at 120 Broadway necessarily is dispositive with respect to third parties all around the country.

In any event, they are conversations that happen with us all the time and don't appear to deeply trouble opposing counsel that we're speaking with. What does appear to oppose — opposing counsel that we're speaking with deeply is the question of notes or memoranda of the interviews.

This is a difficult issue for us, once we've gotten to this stage. And in fact, I think that the courtship that I've described is very close to Mr. Brodsky described a little bit earlier about the step by step of the walk in the door, I want you to waive, I want everything, I want it right now.

But once you get to the stage where somebody has come into your office and their either giving you a witness account which inculcates somebody, or they're giving you the substance of a confession that has been made to them, you're now at the stage where you're making a liberty determination, and you're making a liberty determination based on the credibility of a witness that you haven't spoken to, if it's a witness, and somebody who you are going to need to speak to. And needless to say, the credibility of witnesses, every day, every investigation, every time we do this, is foremost in our minds, and one of the classic ways that we all have of evaluating the credibility of witnesses and a witness over time is by taking a look at their prior statements to see whether or not they are consistent, or to see whether or not they're a variance, or to see whether they have evolved for some reason over time.

So that one of the social goods in having people be able to hand us these notes is greater accuracy in determining whether or not to make a liberty determination, whether or not to arrest somebody. We think that this is a terribly important goal.

Waiving the privilege with respect to turning over the notes will also have an effect down the road, past the arrest when it is time for a trial. That is, if we have the notes, we give them in New York State, the defense lawyers at trial, and that certainly enhances the defendant's confrontation rights. That too, we believe, is another social good.

It is obviously important to us for all of these reasons. Also to get the notes. If somebody walks into our offices and reports that someone in their company has confessed a crime to them, we want to see the notes, we want to see all

of the notes, we want to make sure that the statement, as reported to us, is accurate.

Corporations have had an interest in accountability for their faithless employees for a long, long time. For decades before this issue is raised in the types of form that it's being raised in now, and many of us are familiar and, in fact, if you are a young state prosecutor, some of the first grist for the mill is corporations who have shoplifted from — employees who have shoplifted from their own corporations, who get questioned by their own employers, who get fired by their own employers, and then they get marched across the street to the DA's office to be arrested and to be prosecuted for stealing from the corporations.

Employees like this, and indeed the higher level employees who embezzle from firms who also routinely get turned over to law enforcement don't put the firm at the same kind of risk, because their confessions don't expose the corporation to corporate criminal liability. So it is a far more difficult problem for a corporation if it wants to do the ethical thing and turn a crook over to law enforcement. But at the same time, they are turning themselves in because of the very low barriers of corporate criminal liability, both under federal and at least New York law.

The federal guidelines that were talked about earlier, the Holder/Thompson Memorandum minimize the adverse consequences for somebody who does the moral, ethical thing and who self-reports. At least minimize it with respect to government action, formalizing, in a way, the common sense notion that cleaning house is a social good to be rewarded.

But no such break exists in the private sector. While mercy and discretion, and the weighing of collateral consequences for other employees, for shareholders, for society, are all essential functions. In public they are not, and there's no reason that they should be a break in private action. Therefore, in our view, it is appropriate to treat a discloser to a prosecutor or a regulator in a different way than a disclosure to anyone else.

Very frequently we are told we want to help you, we want to give you this stuff. We're happy to have you have it. We are terribly afraid if by doing that we're going to waive to the rest of the world and propose the Rule 502 B-3 would cure

precisely that harm.

New York State does not yet recognize a common law rule like the one proposed. We have in my office urged the creation of such an exception under the common law, and we provided our letter brief on that subject to the advisory committee, but New York does have other common law rules in related fields that advantage and privilege, private reporting to prosecutors and regulators, and in our view, a rule along the lines of [unintelligible] Rule 502 B-3 is consistent with that body of law, and to our minds, good policy.

For example, New York has what is known as a public interest privilege, and what that privilege protects is confidential communications that a person makes of suspected wrongdoing to authorities. And it protects you, even when the authorities later determine that they are not going to take action.

One of the cases is Klein versus Lake George Park Commission at 261 Ad 2nd 774, when somebody confidentially reported what they believed to be an environmental spill to the Lake George Commission. The Commission looked at it, decided not to proceed, the person who was subject to the complaint wanted the name of the person so they could sue them with defamation, and the identity of the person was protected, and there are a series of cases cited in that case that stand for the proposition that you should be able to come to law enforcement.

The state wants to encourage you to do that, and it's a grant that is made only to public entities, there is case law that says private persons may not have these kinds of confidential informants. Public entities may.

We similarly have in New York a common interest privilege. Now, this privilege is, although it uses the word privilege, is used in the word license in the case law, as opposed to the sense of non-disclosure. But what it does, it protects statements made to law enforcement that would be defamatory if they were made to a private person. Again, it exists in order to encourage people to report crimes to law enforcement. Once again, it's the same notion of Rule 502 B-3.

We strongly support the notion of Rule 502 B-3. There is one

final note, however. Needless to say, deeply implicated in the current draft are very serious federal issues about which we, in our office and at large, have not had broad based discussion, so at least at this early stage, before the issues have been more fully ventilated, we take no position on whether or not the proposed rule should be binding; not only in the courts of the United States, but the courts of each state. Thank you.

MALE VOICE: Thank you, Mr. Pope. Any questions for Mr. Humes or Mr. Pope? Either from the committee or anyone else? No? Thanks to both of you.

MR. JAMES K. ROBINSON: And to Mr. Stellings.

MALE VOICE: To Mr. Stellings. Excuse me. Correct.

MR. JAMES K. ROBINSON: We go to the academics now. Our cleanup hitters or whatever we call them.

MALE VOICE: Right.

MR. JAMES K. ROBINSON: I don't know if this mass exodus is at all relevant or what, but [unintelligible].

MALE VOICE: You said academics.

MR. JAMES K. ROBINSON: Yeah, that did it, huh?

MALE VOICE: Okay. Professor Timothy Glynn from Seton Hall.

PROFESSOR TIMOTHY GLYNN: Thank you. I'll just say briefly that, rather than being cleanup hitters, I think that Judge Smith and Professor Capra scheduled the academics last so that there was some internalized incentive to be brief, and that we're hungry as well, so I will try to be brief.

First of all, thank you for having me speak today, for inviting me to present. We're talking about critically important issues in my view. As I've argued before, the attorney client privilege in particular is of great need – is in great need of attention and reform. I think the confused state of waiver doctrine is a big part of the problem, compounded by the inter-jurisdictional issues that we are talking about today.

The proposed statute on waiver, the Rule 502, is a big step in the right direction, and although I will offer a few constructive comments, I think you should view my comments in

that light. I believe that there is much here that is needed and good, and I'm hoping to add some value to that. I'd like to cover two things today. I'll sort of loosely characterize them as the what and the how. I will first talk a little bit about ways in which we can clarify this statute, what it is designed to achieve, and what it applies to. So achievement and what we intend to achieve, and what is intended to cover or regulate.

Second, I will address the how briefly, and that is why Congress has the authority to enact a statute like this that will apply in both state and federal proceedings.

Briefly, a few comments on the statute's, it's purposes and it's intended coverage. First of all, in Subpart A there is no indication here of the general scope of the provision, so there is no indication that it is intended to reach state proceedings, and it's not until you get to later provisions and the notes that you get that, so I would actually recommend, particularly given the unusual and unique nature of this statute. I would propose adding a section to make clear that this statute is — indeed the entire statute is intended to reach federal and state proceedings.

Another aspect of scope that I am interested in is the question of whether this provision, and particularly Subpart A, is intended to preempt the field, or rather to provide a floor. This actually I think builds on Mr. Joseph's comments and Mr. Tempest's comments, I believe. That there was some discussion about this earlier. That is; as it is currently worded, at least the first sentence in Subpart A seems to suggest that this rule states when something is waived. Well, is that the intend of the committee? To tell state courts that they must find waiver in a particular situation, or rather is the rule designed to provide a floor? That is, the underlying premises here are to provide greater protection against waiver in a number of different respects.

However, if state courts in particular, and perhaps federal courts, depending upon what the committee decides, if courts want to find no waiver in some circumstance, that's fine.

MR. JAMES K. ROBINSON: Can I interrupt? Just a question about that. The idea that was suggested by Ron and I guess Greg kind of agreed to it is just a cutout A, leave out all the 501. Do you agree with that kind of approach?

PROFESSOR TIMOTHY GLYNN: I agree with that. I might actually view the second sentence in A as being protective as well. It's creating a floor, so what that is designed to do is to say no subject matter waiver, unless it is fair. So actually it's the first sentence in Subpart A that's raising this problem.

MR. JAMES K. ROBINSON: Yeah, I know. And then the drafting issue is how to get the second sentence in somewhere, because the first sentence could probably be less defined. And I'm thinking about that, but I just wanted to know your point about it. Sorry to interrupt.

PROFESSOR TIMOTHY GLYNN: Great. No, that's fine. So again those are two issues that go to scope. I would point out briefly as well that — well, I'll hold off on that, given our thoughts.

Another matter that's worth taking a look at is whether or not we — although the rule is designed to address waiver doctrine and only waiver doctrine; we're not trying to regulate the underlying elements or prima facie case of privilege. I think waiver doctrine inherently implicates the confidentiality requirements for privilege. In fact, confidentiality doctrine, and some of this comes out in Professor Brown's memo, is very confused as well. There are jurisdictions, or at least there are cases in jurisdictions suggesting that in order to satisfy the confidentiality requirement, not only there must be an intent up front to maintain confidentiality, but confidentiality must be maintained throughout.

So what I'm wondering is without addressing it specifically, could a state court get around this waiver provision by simply finding that the confidentiality prong is not satisfied. Hence, no privilege at all.

That can be addressed I think through drafting, or at least something in the comments providing that no only does this — making clear that disclosure does not operate as a waiver, again the disclosures that are covered here — does not operate as a waiver, and they also do not breach or defeat confidentiality, or the confidentiality that is required for the establishment of a privilege to begin with, again, because of the overlap between the concept of waiver and confidentiality.

Many others have also commented on Subpart C. I'll just limit my comments to one problem I see as it is currently drafted. And that is that it doesn't make clear what preservation or waiver orders it covers. I think the intent is that it's to cover confidentiality orders by judges basically, and we've talked, and discussed here a lot, talking about fallback provisions and the like; orders that protect the disclosure of information, inadvertent or otherwise, that might otherwise be waived if there were no such order.

MR. JAMES K. ROBINSON: Let me interrupt you there. The suggested fix there is on line 25, we'd add something like; incorporating the agreement of the parties before the court. That's what we would cover.

PROFESSOR TIMOTHY GLYNN: Good. Okay. And then just add to that, then, yes. That would take care of part of the problem.

The other problem then is the language that uses the phraseology binding on other parties. I think rather than viewing this as a court order binding others, we simply view it as another form of protected disclosure. In other words, you could articulate this as the rule in B-3 is articulated; a disclosure pursuant to a court order that provides X, Y, and Z, does not constitute waiver. That is a legal proposition.

MR. JAMES K. ROBINSON: But that's C. When you're talking about binding, that's D, and that just is not binding.

PROFESSOR TIMOTHY GLYNN: No, I'm actually — I'm sorry, maybe I —

MR. JAMES K. ROBINSON: There's no binding in C. There's no word binding.

PROFESSOR TIMOTHY GLYNN: It says it's binding on the parties — I'm sorry, did I —

MR. JAMES K. ROBINSON: That's D. So C is like 3.

PROFESSOR TIMOTHY GLYNN: I'm sorry, but it does say whether it has a continuing effect, a binding effect on —

MR. JAMES K. ROBINSON: Yeah, we were thinking of cutting that too, so I get your point on that. I mean, that point has been made by others as well. Thanks.

PROFESSOR TIMOTHY GLYNN: Thanks.

MR. JAMES K. ROBINSON: Okay. Sorry to interrupt again.

PROFESSOR TIMOTHY GLYNN: Okay. But it's fine.

MR. JAMES K. ROBINSON: It's an iterative process. It works better this way. Go ahead.

PROFESSOR TIMOTHY GLYNN: Good. And you're moving me along. That's great. One other point, and this is a classic point by an academic, but here it goes; the scope of the waiver protection in this statute is currently limited to disclosures during discovery, and others have talked about the during discovery provision under inadvertent disclosures.

But in judicial proceedings, and with regard to select administrative agencies, that leaves out a vast universe of disputes and adjudications, and that is in private arbitration disputes and perhaps some agency adjudications. Now, I think the implications of widespread disclosure of privileged or work product — privileged communications or work product in binding arbitration has the same kinds of — it produces the same kinds of negative effects with regard to the privilege as such disclosures or waiver in judicial proceedings.

I understand that there are potential enforcement problems there, but I was wondering if the committee might consider something that addresses these kinds of disclosures in arbitration proceedings. And for certain kinds of complex litigation, this picks up actually kind of expands Judge Grimm's point. In certain kinds of complex litigation you not only have federal and state proceedings, but state securities. Federal proceedings, some state proceedings you will also have a huge number of arbitrations out there. If there's an agreement in an arbitration to disclose certain potentially privileged documents, what effect does that have on the rest of the litigation? Well again it's the same kind of concern there, so I would ask the committee consider expanding at least some protection potentially to private arbitrations and other proceedings outside of the judicial context.

Let me turn then briefly to the how question; Congress's power. Congress's power to enact Rule 502, as a preemptive statute, would require that Congress act under its commerce clause power, rather than just under its Article 3 power, bolstered by the necessary and proper clause. So to do what

was being proposed here, Congress needs to act under the commerce clause, potentially bolstered by the necessary and proper clause.

In my 2002 article I made the basic case for why federalizing the law of attorney client privilege would be a valid exercise of Congress's commerce clause power and would not offend the Tenth Amendment. I think this argument would apply with equal force to the lesser step of federalizing just waiver doctrine, and I think for similar reasons it would also apply to a statute that governs waiver doctrine for work product.

I think the argument is — again, that's a 2002 article — has been bolstered by two recent supreme court cases. One is Pierce County versus Gillian, 537 U.S. 129, 2003. In that case, the court upheld a provision of the Highway Safety Act which precludes that is privileges from discovery or admission into evidence any reports and information compiled or collected by state departments identifying potential accident sites or hazardous road conditions.

So in fact there is a privilege contained within that statute. The court found that that was a proper exercise of commerce clause power.

Secondly, in the recent case of Gonzales versus Rike [phonetic] 125 Supreme Court, 2195, 2005, in which the court upheld the application of the Controlled Substances Act to the manufacture, distribution, and possession of marijuana by intrastate growers and users for medical purposes.

Congress's commerce clause power extends to three broad categories. I'll cut out the other two and just stick with the one we're talking about here. The third category is those activities that substantially affect interstate commerce. Or in other words, those activities having a substantial relation to interstate commerce.

Pursuant to its authority to regulate activities that substantially affect interstate commerce, Congress has enacted an enormous variety of legislation regulating interstate and intrastate activities, sufficiently related to interstate commerce. As you are well aware, in United States v. Morrison and United States v. Lopez, the supreme court has made clear that this commerce clause power has limits. In both cases the court found that the activity Congress sought

to regulate was beyond the purview of the commerce clause because it was non-economic or non-commercial in nature, and had only an attenuated effect on interstate commerce.

Although Morrison and Lopez emphasized the Congress's power under the commerce clause has outer boundaries, these cases do not, in my view, stand in the way of national privilege legislation like that, that is being proposed here. A valid exercise of commerce clause power first requires the regulation of, quote, interstate commerce, unquote. That is commerce that has interstate effects.

Unlike the matters at issue in Morrison and Lopez, the proposed rule clearly satisfies this requirement. It regulates, indeed fosters and protects economic and commercial activity, namely commerce between attorneys and clients. The provision of legal service is usually in exchange for compensation. Indeed, as we are all well aware, the nation's legal industry, there's a huge amount of business. The privilege and work product document protects communications and materials upon which the industry's article of commerce; that is the provision of legal services depend. Thus, there is little doubt that legislation providing for this kind of protection would be aimed directly at regulating commercial activity.

[END OF TAPE 2, SIDE B]

[START OF TAPE 3, SIDE A]

PROFESSOR TIMOTHY GLYNN: … interstate commerce, the regulation of the communications underlying the provision of legal services would have a direct and substantial affect on interstate commerce. The sheer volume of legal commerce would have an enormous effect on interstate commerce generally, even if the provision of legal services were entirely intrastate.

Yet, there is a substantial amount of interstate legal activity. Nationwide legal practices and national litigation continue to grow, and counsel [unintelligible] routine to assist clients with national or regional business interests. Moreover, in our modern regulatory regime of varied and complex legal rules, businesses and individuals engaged in interstate commercial activity must resort constantly to attorneys for their continuous and sound advice. And in addition to that, they must resort to attorneys to comply with broad federal regulatory regimes which would themselves

govern interstate commerce.

Thus the class of activities regulated here exerts an enormous effect on interstate commerce. It is precisely because of this nexus between what attorneys do and interstate activity, or the interstate activity of their clients, that a uniform national treatment of waiver doctrine is needed.

Attorneys provide legal services to clients engaged in activities that may subject them to suit or regulation in different fora, with conflicting privilege rules. These conflicting rules not only burden interstate commerce by inflicting transaction costs for those engaged in interstate business, but they also threaten to discourage the communications that facilitate the legal services on which these activities, legal compliance, and the effective administrative of justice depend.

Of course let me state then that the provision of legal service is not exclusively commercial, and there are certainly circumstances in which the provision of services is wholly intrastate, addressing purely local matters that at least do not relate directly to interstate activities.

Yet, the supreme court's commerce clause jurisprudence does not require that regulated activity be exclusively economic or commercial in nature, nor that it always have a direct impact on interstate commerce. Although the court found the particular regulations invalid in Morrison and Lopez, it did not overturn longstanding precedent establishing that legislation under the commercial clause, or alternatively the commerce clause, bolstered by the necessary and proper clause, can reach instances in which the activity is noncommercial in nature, or wholly intrastate.

As long as the class of activity is regulated, has a substantial effect on interstate commerce or the national economy. Indeed, on this point the majority in the recent Gonzales case provided the following guidance; quote, our case law firmly establishes Congress's power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce.

As was stated in Wickerd [phonetic] even if [unintelligible] activity be local, and though it may not be regarded as

commerce, it may still, whatever it's nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. We have never required Congress to legislate with scientific exactitude. Where Congress decide that the total incidence of a practice poses a threat to the national market, it may regulate the entire class.

The court went on to state then, in terms of the standard of review, that it need not determine whether respondent's activities, taken in the aggregate, substantially affects interstate commerce, but only whether Congress had a rational basis for concluding so. So it's a deferential standard to Congress.

Alternatively, regulation of interstate commerce may be extended to intrastate and noncommercial activity under the necessary and proper clause analysis set forth in Justice Scalia's concurrence in the Rike case. He stated Congress may regulate even non-economic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are reasonably adapted — again, deferential standard, to the attainment of a legitimate end under the commerce power.

But, where Congress regulates interstate activity, it may extend such regulation to intrastate and noncommercial activity if such extension would be a reasonable means of achieving a legitimate regulatory end.

Because Rule 502 would regulate interstate commerce and the ends it seeks to achieve, including enhancing and protecting the benefits of the privilege and work product doctrine, through greater uniformity and the lowering of transaction clause, because that depends upon uniform application of certainty, Congress could reasonably conclude that seeking to exclude individual cases of non-commercial and/or purely intrastate legal services from the regulation would undercut the statutory object.

I think, and just I'll wrap up here, this is also consistent with the court's inclusion in Pierce. Although the court was relying on a different commerce clause power in that case, what the court did make clear is that the means chosen for effectuating statutory object, the creation of a privilege that would apply in state court is perfectly fine. Although

the court did not reach the Tenth Amendment issue there, it did find, under a commerce clause analysis, that that was a valid exercise of power.

I will stop there. I won't go into my Tenth Amendment analysis. That hasn't changed much since I wrote the article. Look back at that if you wanted to. If you have a lot of time on your hands. Otherwise, I would just say that from that I see here, this is the kind of self-executing statute that is not going to cause commandeering problems that you see in the Tenth Amendment area, so there would not be a Tenth Amendment problem here as well. [Unintelligible.]

MALE VOICE: Thank you, Professor Grimm. Professor Richard Marcus from Hastings.

PROFESSOR RICHARD MARCUS: It's a pleasure being here. You don't have any background on me, and I'm going to impose a little because I think that's something I can bring to the group today. I've been working with the Civil Rules Committee for a long time about discovery issues, and this one, along with others, has been a cloud hanging over our efforts for much of that time.

If you look around the peanut gallery, you'll notice that there are several members of the Civil Rules Committee, and at least one former member here, so I'm not speaking on their behalf, but at least it's useful to have some idea with that group, because a major portion of the concerns raised are concerns which we've been addressing.

For me, this topic has been of abiding interest for a long time. More than 20 years ago I wrote an article about it that Ken Brown was thoughtful enough to mention in some of this materials here. It's been a subject in my complex litigation casebook since the first edition appeared in 1985. And the background for all of that was what I might call classic absolutist privilege attitudes that led to the notion that any disclosure to anyone at any time works a waiver as to everything that has anything to do with what was disclosed.

That gave rise or came from an antagonism towards the privilege that was sometimes, among those who felt the antagonism, solved by the waiver doctrine. It was the escape hatch. McCormick said, for example, that the privilege's obstructive effect has been substantially lessened by the

development of liberal doctrines of waiver.

When I signed on in the early 1990s to take up the writing of the discovery volumes of federal practice and procedure, I was a little startled to discover over in the evidence volumes that that attitude continues to prevail there.

It does not prevail in Volume 8 because that's the part that I wrote, and I think that that's partly because things have changed since those folks who had these attitudes were speaking. One, the discovery boom has meant that a more realistic view is necessary, and even more recently the information boom with electronically stored information has compounded that concern. Fifteen years ago, for example, Judge Ellis echoed thoughts you hear here today when he said, quote, the inadvertent production of a privileged document is a specter that haunts every document intensive case.

For many, all cases are document intensive. Nine years ago, when David Levy and I went representing the Civil Rules Committee to an ABA section of litigation event, where there was an open mike with hundreds of lawyers present to talk about discovery issues that concerned them, privilege waiver was one that began showing up repeatedly. In September of that year, 1997, when we had a conference at Boston College, privilege waiver was an issue that arose, and for the years since then, the Civil Rules Committee has grappled with ways to deal with that.

In late 1999 it seemed there wasn't any suitable solution, in part and conjunction with our discovery project, we conjured up — or I should say I conjured up for discussion purposes at a meeting in this room a rule that would have adopted a version of the middle test on inadvertent waiver, based upon the prevailing case law that existed, and in this room Dan Capra told us we could not do that under Section 207 4B.

Many thought it was a good idea. Maybe that idea's time has come. What's in the package that is now before Congress in Rule 26B 5-B is not a stopgap measure, but a partial measure designed to deal with these concerns without taking the step of saying here's what defines a waiver in conjunction with federal court discovery.

Frankly, some of us, the academics, think there is a perfectly valid argument for doing that as a regulation of discovery, but that has not been undertaken. This approach

is straightforward, and would accomplish the purposes indicated. The purpose that we've heard about, or a concern that we heard about repeatedly and wasn't unanimously echoed today, and that's why I asked the question of Pete Susman, was that you've got to do something that ensures that it's what is regulated in terms of waiver in this case, also applies in other cases; be they in state or federal court.

So what's before this group now is — I wouldn't say the culmination of a dream, but is the logical outcome or direction of something that's been under consideration in regard to federal court discovery for a long time; eight or nine years, and it is entirely consistent, or certain can be entirely consistent, with what is now before Congress so that that can work together with Rule 26B 5-B.

I'm well aware that I'm the only thing sitting — standing — sitting between you and lunch, so let me just touch on a couple of points, and I have a bunch of sort of reporter's drafting thoughts that I will communicate perhaps in the meeting or writing, or in another way.

First, it is extremely satisfying that this committee is moving away from the classic absolutist attitude towards waiver as a gotcha kind of opportunity with regard to privilege.

Second, just as a reaction to something that's been brought up; I want to endorse the notion included in proposed 502A to borrow from Rule 106 with regard to subject matter waiver. It seems to me that's an extremely desirable way to deal with an ongoing problem, and probably is roughly consistent with the way sensible courts have dealt with that sort of problem without recognizing the analogy or saying so.

Third, I think that there is a great benefit in 502 B-2, to adopt the middle course. That's what was proposed in the rule we had for discussion — or was proposed for discussion purposes in the rule we discussed here two years ago; that is the predominant view of the courts and that's something I want to say a word about more later, in terms of implementation.

And finally I think that it is extremely valuable that this initiative seeks at least to make federal court's orders with regard to disclosure, or disclosure in connection with federal court discovery, regulated by this rule in connection

with later litigation in state or federal court, because that's this big cloud that we've been told hangs over anything that the civil rules committee could do.

So let me touch on two concerns that are semi-technical, and then wrap up with an observation about ambitiousness or less ambitiousness.

First, an overall concern that may relate to combining 503 C and D and emerges from something I heard repeatedly in connection with our E discovery proposals. Repeatedly, corporate counsel resisted the idea that a court order could insulate disclosure of privilege materials against being treated as a waiver because of concern that judges, federal judges who were in a hurry would insist that they produce material on a schedule that would not permit the review that they felt was necessary before production.

So that it was extremely urgent to those lawyers that a rule provide that a judge can do this only upon agreement of the parties. It may be the combination of C and D —

MR. JAMES K. ROBINSON: Well, what about the language that I was talking about?

PROFESSOR RICHARD MARCUS: I think you may be getting exactly at that. I mean, I haven't seen that and probably — I'm just reinforcing the notion that something along those lines may address this [unintelligible] concern.

Second and only other issue, besides my wrap up; on 502 B-2, I note the, I believe the ABA section of litigation counsel last week adopted something that sort of relates to what I'm going to say. I think a lot of attention needs to be given to the content of what I'm calling the middle ground on inadvertent waiver.

The proposal we had was based somewhat more on the case law and involved this fairness criterion that the think the ABA proposal also — or resolution mentions one can treat that as too squishy, and I don't want to get into details, but I think that, as it's more than a mere implementation matter to say that it does matter how that is handled, and that is at the implementation level.

So let me then get around to my little wrap up observation. There's sort of three circles of ambitiousness here, and I'm aware I'm going to stay within my ten minutes, I hope.

Circle one is let's accomplish something like what the Civil Rules Committee has been trying to accomplish and has not been able to do. Let's give effect to the regulation of federal court discovery by federal judges and by the federal rules, even if that becomes a matter of importance in a later litigation, another case, and so I think that's the first level, and that is extremely important.

The other two levels are also important. The second level is let's do the same thing with regard to litigation in state courts. That's a more ambitious undertaking.

And the third or a different undertaking is 502 B-3, which has been the focus of a lot of discussion here. I'm not going to get into the wisdom or constitutionality of the second or third levels. Instead, I'm going to leave you with the following thought; if, for whatever reason, you decide not to be that ambitious, doing what's on the first level is an extremely useful thing, and it carries through on something that's been important to the handling of federal court, discovery court, a very long time, so I'm here to applaud what you're doing, and to try to help as you continue doing it. Thank you.

MALE VOICE: Any questions for the academy?

MALE VOICE: [Unintelligible].

MR. JAMES K. ROBINSON: Are you asking me?

PROFESSOR RICHARD MARCUS: He's looking at you.

MR. JAMES K. ROBINSON: Yeah, he's looking at me.

MALE VOICE: That would [unintelligible]. But [unintelligible] that none of this is intended to [unintelligible] a limit to [unintelligible].

MR. JAMES K. ROBINSON: Thanks.

MALE VOICE: But it goes to [unintelligible] constitutionality. Continually we have [unintelligible] to consider. One is the federal disclosure and then [unintelligible] disclosure agreement in state decisions [unintelligible] proceeding and [unintelligible] in that same state. I guess I [unintelligible] the rule right now is that a clause is that stipulation, and I guess I wonder whether [unintelligible] is yes we can regulate in that area, and [unintelligible]

somehow [unintelligible] related to interstate commerce is [unintelligible].

PROFESSOR TIMOTHY GLYNN: Yes, although rather than conclude, I'll use predict. And not predict with 100 percent confidence, but yes, but even in the fourth situation, what you look at for commerce clause purposes, and commerce clause are necessary and proper clause purposes is the entire area, and then whether or not the regulation of pure intrastate activities, whether commercial or noncommercial, has, well, whether or not Congress can conclude reasonably that that would have a sufficient impact on the whole, that would in some way affect the statutory object, and Congress clearly could find that here.

I mean, for example, there are — well, you could [unintelligible] examples on both sides, but one example would be that there are, there are many situations when you have state litigation, state law claims, that themselves are intrastate proceedings, and currently state law and law privilege would apply.

The question is could Congress come in and mandate some federal law that would govern the privilege aspects of that, and a state proceeding involving just state law. The answer is yes, because the object of the regulation is not to regulate merely the mode and manner by which that proceeding is taking place, but rather to regulate the underlying primary conduct, which is the provision of legal services and the preparation for litigation, and that provision of legal services has all of the commercial affects that I was talking about, even it's a purely intrastate proceeding.

So the answer is that the fourth category is a tentative yes, although again I don't know what obviously downstream what would happen with the new supreme court justice, but currently law the answer is yes.

MALE VOICE: [Unintelligible] the first part [unintelligible].

MALE VOICE: Is there a question over here?

MALE VOICE: [Unintelligible]. This is not a [unintelligible]. There are many [unintelligible] we believe that one of the [unintelligible] we haven't talked about [unintelligible] is [unintelligible] and that is that once you disclose privileged information to the other side, they may be current

to you. [Unintelligible] during the deposition, but he read it, and he knows what's in it, and that's when [unintelligible] strategy, and I do not want to be deprived of the chance to spend [unintelligible] money to take a look. And it's not a [unintelligible] or produce it. Now, I understand here you correctly state that [unintelligible] proceeding that [unintelligible] to that effect was a different kettle of fish, and perhaps that's a way to —

PROFESSOR RICHARD MARCUS: Yeah, that's in the framing.

MALE VOICE: There was an inference in your first panel today that the Transamerica case and that the [unintelligible] Adidas rested on forcing people to turn something over when they didn't want to turn it over, and [unintelligible] on behalf of the [unintelligible].

MR. JAMES K. ROBINSON: Well, we had the offer and he disavows that.

MALE VOICE: Well, I'm saying that he [unintelligible] right now.

MR. JAMES K. ROBINSON: Right. That's the way we had to work it, the other way you wouldn't have to worry about it.

MALE VOICE: [Unintelligible.]

MR. JAMES K. ROBINSON: So Jim wouldn't have had to go through all the mental gymnastics he had to go through, had we had a Rule for him.

PROFESSOR RICHARD MARCUS: Can I make a comment about that? Because that's a terrific opinion, and there's something in my notes there about my suggesting some uneasiness about the compulsion aspect.

My uneasiness there really in a sense went to B-2, and the notion — the compulsion aspect to the Transamerica's decision, 20 X years ago, it seems to me is not a helpful concept today, that this committee need not adhere to embrace, and so I'd sort of like to put that behind us.

MALE VOICE: I think that the point that you raised is terribly important. We have some of the types of [unintelligible] now with the bond rules, electronic [unintelligible] look at. We have 120 to 180 days to do it in a [unintelligible] scheduling order. That is in a — if you look at what happened in Transamerica, and the court [unintelligible]

records there to look at. And the whole point is that – you raised [unintelligible] very important [unintelligible] once they know about that [unintelligible] now they know the fax exists, then they'll go around trying to reject the same information that's on the report, so the parties [unintelligible] like to be able to say that they have a reasonable amount of time. That's with [unintelligible] review [unintelligible] the court means you have to [unintelligible]. Transamerica only is this in absence of the rules being proposed now as [unintelligible] disclosure, and so you have to be [unintelligible] now, not to where [unintelligible] accomplish your goal [unintelligible] talking about [unintelligible].

MALE VOICE: Any other questions? If not, thanks to all the –

MR. JAMES K. ROBINSON: Okay. Let's – I just wanted to give you information about lunch possibilities. And we were going to reconvene at what time, Judge?

MALE VOICE: 2:15.

MR. JAMES K. ROBINSON: 2:15 in room 430, okay? When you go up to – take the elevator up to 4, you'll see the signs, they'll take you to 430 and we'll kind of be around, and that's where we're reconvening at 2:15.

In terms of lunch, there is a diner – Judge Osenvell [phonetic], you know where this is right? We were there once if you remember. Okay. John? Is John here? You know where it is, the diner? Oh, man, we were there only three years ago. It's on Amsterdam and Sixth.

[END TRANSCRIPT]