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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Summary of Public Comments Received on the Proposed Rule 502
Date: March 15, 2007

Below is a summary of all public comments received on the proposed Rule 502. The summaries of public comment will be placed after the proposed rule change if the Committee decides to recommend it to the Standing Committee for final approval. Many of these comments receive detailed consideration and analysis in the memo on Rule 502, found in this agenda book.

It should be noted that the summary of public comments will have to be changed if the Committee changes the Rule itself. For example, a criticism of language in the Rule that the Committee subsequently changes will have to refer to criticism of the Rule as it was issued for public comment.

Summary of Public Comment on the Proposed Rule 502

Matthew R. Gemello and Steven B. Stokdyk on behalf of the Corporations Committee Business Law Section of the State Bar of California (06-EV-001) "applaud and support the Advisory Committee's efforts to advance proposed Rule 502 and the Advisory Committee's objectives of reducing the burden, expense and complexity associated with privilege evaluations of documents produced in response to a discovery request." They oppose, however, the selective waiver provision of Rule 502(c) "because, among other things, we believe that (1) it will not fully protect the confidentiality of the attorney-client relationship, and (2) it will not advance the Advisory Committee's objective of reducing the burden and expense of litigation." Among other arguments, they contend that the language of Rule 502(c) covering an "investigation" is unclear because it may or may not extend to an inspection of a facility; and that it is unclear whether the holder of the protected information must be the target of the investigation.

Susan Hackett, Esq., (06-EV-002 and 06-EV-045), on behalf of the Association of Corporate Counsel, opposes the selective waiver provision, Rule 502(c). The Association concludes that it may have a "negative impact" in light of a "culture of waiver" that has been "created by government enforcement officials and prosecutors who have abused their discretion by routinely coercing companies to waive their privileges." The Association argues that selective waiver protection "might have the impact of creating a presumption on the part of the government that it is appropriate to demand waiver in all circumstances . . . given that the government can now offer protection against third party disclosures." It states that the selective waiver provision "addresses the collateral impact of the government's inappropriate waiver practices, but does nothing to encourage the necessary abstention from engaging in the underlying practice in the first place."

Gregory P. Joseph, Esq., (06-EV-003) argues that Rule 502(a), which limits subject matter waiver, provides a "problematic conflation of attorney-client privilege and work product protection." He states that under Rule 502(a), the use of a witness statement may result in a waiver of a memorandum of the lawyer's evaluation of the witness statement, on the ground that the memorandum "ought in fairness to be considered" with the statement. Mr. Joseph agrees that the "ought in fairness" language accurately captures the better law on subject matter waiver of attorney-client privilege. But he concludes that the "ought in fairness" language may lead to more and not less subject matter waivers as applied to disclosure of work product. Mr. Joseph generally supports other aspects of the Rule, including the provisions on inadvertent disclosure (Rule 502(b)), selective waiver (Rule 502(c)) and the enforceability of court orders (Rule 502(d)). He argues, however, that if subdivision (c) is not enacted, then the inadvertent disclosure provision of subdivision (b) should be extended to disclosures made in the course of investigations by public offices or agencies. He argues further that state law should not govern the effect of disclosure to a state office or agency, because this will create conflict of law questions when a disclosure is made to a number of regulators in different states. Finally, he argues that the definition of work product in subdivision (e) is too confining because it applies to "materials", whereas "a great deal of work product is oral or

otherwise intangible, and it is protected."

Robert E. Leake, Jr., Esq. (06-EV-004) endorses proposed Rule 502, concluding that "Got ya" is "a game that should be discouraged."

Douglas G. House, Esq. (06-EV-005) supports proposed Rule 502 and favors rules permitting "the selective/potential waiver of the attorney-client privilege."

Phillip R. Sellinger, Esq., (06-EV-006) endorses proposed Rule 502 but urges that its provisions be extended to govern disclosures made in state proceedings. He argues that complete uniformity of privilege law is necessary to assure predictability and to avoid conflicting outcomes in essentially identical matters.

Paul R. Rice, Esq. (06-EV-007) opposes proposed Rule 502 for the reasons stated in his publications that he cites throughout his comment. In his view, Rule 502 is evidence that the Committee has sold out to corporate interests.

George L. Paul, Esq., (06-EV-008 and 06-EV-052) generally supports proposed Rule 502, because the costs of discovery have "strangled" the process of commercial litigation and privilege reviews impose "phenomenal" expense. He recommends, however, that the Rule be extended to cover disclosures made in state proceedings, because the vast majority of litigation occurs in state courts. He is also concerned that the standard for avoiding waiver by inadvertent disclosure — that the party took "reasonable precautions" to avoid disclosure — may be difficult to apply without more guidance in the Rule or Committee Note. Mr. Paul concludes that "reasonable precaution does not necessarily mean eyes on review" and that "search and retrieval technology might be a reasonable alternative."

Thomas Y. Allman, Esq., (06-EV-009) supports Rule 502 as issued for public comment, but opposes a proposal considered by the Advisory Committee that would provide for enforceability of court confidentiality orders that are not based on agreement between the parties. He argues that parties should not be "compelled to surrender the right to conduct privilege reviews on realistic schedules so that a case management order can provide expedited and inexpensive review." Mr. Allman suggests that the Committee Note contain an "admonition to the effect that it is not essential to the validity of the court order on non-waiver that an accelerated discovery schedule be agreed to or ordered by the court in the initial proceeding and that courts should refrain from measures designed to coerce or require accelerated privilege review absent agreement of the parties."

Richard A. Baker, Jr., Esq. (06-EV-010) suggests that the selective waiver provision, Rule 502(c), be expanded to provide protection for disclosures to foreign regulators.

Michael R. Nelson, Esq. (06-EV-011) states that the inadvertent disclosure provision, Rule

502(b), "effectively addresses the challenges that the growth of electronic discovery has placed upon the ability of litigants to perform a thorough and accurate privilege review." He contends, however, that the rule would more effectively address the problem of discovery costs if it were extended to cover state proceedings. He further suggests that the language in the Rule conditioning protections on having taken "reasonable precautions" against disclosure is "somewhat vague." He states that the term "reasonable steps" is preferable because it "serves to better express the idea that a litigant must implement procedures to limit the disclosure of privileged material." Mr. Nelson recommends that the Committee Note explain that the determination of whether reasonable steps have been taken "should focus on the volume of material to be reviewed and the time frame in which the review must be performed. Mr. Nelson opposes the selective waiver provision, Rule 502(c), arguing that it "will only serve to encourage the recent tendency of such agencies to demand the production of privileged documents in order to avoid prosecution or enhanced administrative penalties." Finally, Mr. Nelson states that the subject matter waiver provision, Rule 502(a), should specify that a subject matter waiver is limited to intentional efforts to mislead the opposing party by introducing incomplete information." Mr. Nelson supports the provisions concerning court orders and party agreements (Rule 502(d) and (e)) but states that "the Committee Note to Rule 502(d) should clarify that the provision does not authorize selective waiver agreements."

012 is Frank Verderame, did not testify in Arizona and no witness statement provided.

John Vail, Esq., on behalf of the Center for Constitutional Litigation, (06-EV-013) states that "[n]o compelling circumstances justify the proposed rule on inadvertent disclosure, which pre-empts state privilege law" and that a rule requiring a party to take reasonable precautions to prevent disclosure of privileged information is unlikely to reduce the costs of discovery. The Center supports the proposal on enforceability of court confidentiality orders (Rule 502(d)), as it "addresses concerns voiced by both the plaintiffs' and defendants' bars" and "has the potential to yield benefits to civil litigants and their counsel who choose to waive certain rights in return for quicker, easier access to information." The Center opposes the selective waiver provision (Rule 502(c) as the "wrong solution to the problem of prosecutorial overreaching."

Carol Cure, Esq., (06-EV-014) "strongly" supports the inadvertent disclosure provision (Rule 502(b)) because the burdens of protecting against inadvertent disclosure in electronic discovery cases are all but insurmountable. She argues, however, that the "reasonable precautions" standard that must be met to protect against waiver "may well be too high for most companies." She would substitute "reasonable steps" for "reasonable precautions" and contends that the change "would allow the court to consider each case on its own facts and to take into account whether the organization has taken appropriate steps to implement an effective compliance program such as writing an effective policy, providing training to employees, providing sufficient resources, and monitoring the program to remediate any deficiencies." She also suggests that the inadvertent disclosure provision should be extended to disclosures made to regulators and to disclosures made in arbitration proceedings. Ms. Cure recommends that the provision on court orders (Rule 502(d)) be expanded to cover all court orders on confidentiality, whether or not they incorporate an

agreement of the parties. As to selective waiver (Rule 502(c), Ms. Cure states that if it is to be adopted, it should be made clear that it applies only if the waiver to the regulator is "completely voluntary and not coerced", and it should apply to disclosures made to state regulators where the information is proffered in a subsequent federal proceeding.

015 is Patrick J. Paul, did not testify in Arizona and no witness statement provided.

016 is the Defense Research Institute (No witness testimony, no statement provided).

Paul J. Neale, Esq., on behalf of Doar Litigation Consulting (06-EV-017) supports Rule 502, stressing the importance of amending the rules to address the mounting costs of pre-production privilege review, especially in electronic discovery cases. He recommends that the selective waiver provision (Rule 502(c)) include "privilege protection at the state and federal levels." He also suggests that the Committee should "clarify" the term "reasonable precautions to prevent disclosure" as used in the inadvertent disclosure provision (Rule 502(b)). In his view, the Committee should address "the use of advanced analytical software applications and related methodologies to assist in the determination of privilege and to facilitate a more efficient production of relevant documents. . . . Given the increasing use of these applications even in their relative infancy and the inevitable wide-scale use of them in the future, the Committee should specifically include their use and litigants' reliance on them as reasonable precautions."

018 is Kenneth Mann, didn't testify in Arizona and didn't provide a witness statement.

Thomas P. Burke, Esq., (06-EV-019) makes the following suggestions: 1) the "should have known" language of Rule 502(b) should be deleted; the promptness of a party's efforts to retrieve mistakenly disclosed information should be determined from when the party actually knew of the disclosure; 2) the Rule should clarify that if a mistaken disclosure is found to be a waiver, it can never be found to be a subject matter waiver; 3) the selective waiver provision (Rule 502(c)) should specify that only voluntary waivers will receive the protection afforded against private parties; and 4) the Committee should add language to the Note indicating that there is no intent to encourage waiver of privilege or work-product to public agencies.

Michael J. O'Connor, Esq. (06-EV-020) supports proposed Rule 502 as it will help to limit the "staggering costs" of pre-production privilege review. He notes that privilege review can even be costly in a case with relatively small stakes, because without the protection of Rule 502, counsel will have to worry that a mistaken disclosure in a small litigation might later be used in major litigation.

Daniel J. McAuliffe, Esq., (06-EV-021), on behalf of the State Bar of Arizona, "commends the Advisory Committee on Evidence Rules for coming forward with a proposed solution for what has become a vexing and costly problem in the conduct of civil litigation in the federal courts – the efforts required to protect attorney-client and work product privileges in the course of honoring discovery obligations in the production of requested and relevant documents." He recommends that the relationship between the scope of waiver provision (Rule 502(a)) and the inadvertent disclosure provision (Rule 502(b)) be clarified, to indicate that if a court finds that a mistaken disclosure is in fact a waiver, it will not be a subject matter waiver. He argues that if a waiver for failure to take "unspecified 'reasonable precautions'is to result in the wholesale waiver of the privilege in question, then little will be accomplished by subpart (b). Corporate parties will continue to expend exorbitant amounts, and engage in extraordinary efforts, to avoid inadvertent disclosure of privileged materials, for fear that a subsequent determination that it did not take 'reasonable precautions' will result in a blanket privilege waiver." On selective waiver (Rule 502(c)), Mr. McAuliffe states that the Arizona State Bar "would be in favor of the adoption of a selective waiver provision if it could be crafted in a fashion that makes clear that the decision whether or not to engage in a selective waiver must remain a wholly voluntary one on the part of the holder of the privilege."

Patrick A. Long, Esq. (06-EV-022) believes that Rule 502 "should apply to both Federal and State proceedings as this would be the most effective way to protect both attorney-client privilege and work product." He also states that a waiver of undisclosed materials "should only occur in those situations where it is necessary to explain privileged materials which the disclosing party seeks to introduce into evidence." Mr. Long is opposed to the selective waiver provision (Rule 502c)) because it does not provide "sufficient protection to allow full and frank communications between client and counsel."

Steven K. Hazen, on behalf of the Executive Committee of the Business Law Section of the State Bar of California (06-EV-023) and (06-EV-071), "applaud[s] the activities of the Committee in seeking to establish clarity and uniformity as to inadvertent disclosure of confidential information and the impact that has on the vitality of the attorney-client privilege." The Executive Committee opposes the selective waiver provision (Rule 502(c)). It notes that selective waiver is not recognized by most courts under Federal common law; it will chill candid discussions between corporate counsel and corporate agents, because the agents will be concerned that their statements will be turned over to a regulator and used against them individually; it will allow corporations to use the privilege as a sword and not a shield; it will lead to confidentiality becoming "nothing more than a commodity"; and its application to subsequent state proceedings will serve to undermine federalism.

024, Melissa Smith, did not testify in Arizona and did not file a statement.

Bruce R. Parker, Esq., on behalf of the International Association of Defense Counsel (06-EV-025), "commends the efforts of the Advisory Committee on Evidence Rules and generally supports Rule 502", but opposes the selective waiver provision (Rule 502(c)) and recommends some textual revisions to other parts of the Rule. The Association suggests that the scope of waiver provision (Rule 502(a)) should specify that it covers only waiver by "voluntary" disclosures; it states that the text of the rule as issued for public comment "leaves open the possibility that a court could order subject matter waiver where a party inadvertently disclosed privileged information by failing to take reasonable precautions to prevent disclosure." It further suggests that the "reasonable precautions" language in the inadvertent disclosure provision (Rule 502(b)) should be changed to state that a party who takes "reasonable steps considering the circumstances of the document production" will be protected from a finding of waiver. The Association further suggests that the Committee Note "should discuss specific factors that may bear on a determination as to whether a party acted reasonably under the circumstances of a particular review. The most obvious circumstance is the volume of documents or electronically stored information involved in the review. Another significant circumstance is the amount of time that a party has to conduct the review." The Association also asserts that the standard for protecting against inadvertent disclosure in Rule 502(b) sets forth two factors (reasonable precautions and reasonably prompt efforts to retrieve) while the predominant Federal case law also mentions the scope of discovery, the extent of disclosure, and the overriding issue of fairness. The Association suggests that "the Committee should state with specificity that all five factors are to be given equal consideration when a court assesses the question of waiver through inadvertent disclosure." Finally, the Association objects to the language in the Rule assessing the disclosing party's attempt to retrieve mistakenly disclosed information from the time when the party "should have known" of the disclosure. It states that "some courts may determine that if a party had taken reasonable steps under the circumstances of the particular review, then it should have known about the inadvertent disclosure as soon as it occurred." It concludes that steps taken to rectify the error should be evaluated from when the party had "actual knowledge, or with reasonable diligence after production should have discovered" the inadvertent disclosure.

06-EV-026, Edward Hochuli, did not testify in Arizona and did not submit a statement.

Douglas L. Christian, Esq. (06-EV-027), in testimony, enthusiastically supports proposed Rule 502. He suggests that the term "reasonable precautions" in Rule 502(b) be changed to "reasonably prompt measures." He further suggests adding language to the Committee Note to state that the rule does not affect the lawyer's ethical obligations with respect to receipt of inadvertently disclosed information.

06-EV-028, Christopher D'Angelo, did not testify in New York and did not submit a witness statement.

Linda Chatman Thompson, Esq., Director, Division of Enforcement, U.S. Securities and Exchange Commission, (06-EV-029), states that the selective waiver provision (Rule 502(c)), "is important to the Commission's enforcement program." If adopted, "the selective waiver provision would help the Commission gather evidence in a more efficient manner by eliminating a strong disincentive to parties under investigation who might otherwise be inclined to produce important information voluntarily." Ms. Thompson states that any concern that adopting the selective waiver provision would lead to demands for waiver "is unfounded" because "the Commission does not view a company's waiver as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff." She also notes that providing protected information to the Commission can result in "significant resource savings for the companies by limiting the number of executives and other employees whose testimony has been sought by the Commission staff and reducing the length of the investigation." Ms. Thompson concludes that the selective waiver provision "would be helpful to the Commission in carrying out its mission because the Commission is currently not receiving all of the relevant privileged and protected information that parties want to provide due to their concerns about waiver. The Enforcement Division's experience has been that entities and their counsel consider carefully whether to produce privileged materials to us and a significant consideration for them is the risk that they run in waiving the privilege as to private parties if they do so." She reports that corporate counsel and executives state "that they would be more willing to provide privileged information to us if they could have greater assurance that the information would remain privileged." Ms. Thompson argues that concerns of private parties that selective waiver will deprive them of information is unfounded because "a rule of evidence establishing that producing privileged or protected documents to the Commission does not waive privilege or protections as to private parties would leave private litigants in the same position that they would have been if the Commission had not obtained the privileged or protected materials." Thus, "the Proposed Rule would benefit the Commission significantly without harming private litigants. Also, private litigants may benefit from the Commission's ability to conduct more expeditious and thorough investigations." Ms. Thompson concludes as follows;

> Current law has created a substantial disincentive for anyone who might otherwise consider providing privileged or protected information to the Commission. The selective waiver provision in Proposed Rule 502 would eliminate this disincentive. It would enable parties to make the decision to provide privileged or protected information to the Commission without fear that, by virtue of such a production alone, they will be deemed to have waived the privilege or protection as to anyone else.
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> Proposed Rule 502's selective waiver provision is in the public interest because it would enable the Commission to conduct its investigations more expeditiously and would promote the Commission's interest in protecting investors.

Cyril V. Smith, Esq., (06-EV-030), opposes the selective waiver provision (Rule 502(c)), arguing that the Rule is not needed to encourage corporations to cooperate with government investigations. He states: "Having represented targets, subjects and witnesses in federal white-collar

investigations, I can tell you that the risk of broader subsequent waiver for non-government parties has never been a factor in the ultimate decision whether or not to disclose information to a prosecutor or regulator. . . . The reason is simple: the threat of prosecution or regulatory action (including debarment proceedings and similar actions) to a public company or a company in a regulated industry, or indeed most business entities, is so great that the business' first priority is always to attempt resolution of the criminal investigation or regulatory proceeding. No further incentive is necessary to promote cooperation with government regulators; the business is already fully incentivized to cooperate." Mr. Smith contends that selective waiver protection "would provide a windfall to companies who are the targets of regulatory proceedings. Such businesses would be permitted to resolve their regulatory or criminal matters while fending off claims and subsequent civil proceedings — including claims such as those advance by *qui tam* plaintiffs, who provide direct benefit to the government."

Mr. Smith supports all of the other provisions of Rule 502, noting that it "performs several valuable functions in dealing with truly inadvertent disclosures of privilege or protected material, and brings the Federal Rules of Evidence into conformity with modern electronic discovery."

Patrick Oot, Esq., (06-EV-031) and Anne Kershaw, Esq. (06-EV-049), made a powerpoint presentation to the Advisory Committee at the public hearing in New York City. The presentation illustrated the expenditures that were made for preproduction privilege review in one particular production. The expenses included review of each email by as many as three sets of attorneys; the total expenditure was more than $5,000,000.00. They estimated that if the review had been for relevance only, the expenditure would have been reduced by 80%. They suggest that Rule 502 could be used to permit less stringent review for privilege, for example by allowing searches for domain names of law firms as an initial cut, disclosing the remaining information subject to a clawback agreement, and reviewing the material that went to law firms on an individual basis for privilege. They state that for Rule 502 to be truly effective in limiting the costs of electronic discovery, it must apply to disclosures in both federal and state proceedings.

Henry M. Sneath, Esq., (06-EV-032), in testimony before the Committee, recommends that the court order provision (Rule 502(d)) be expanded to cover confidentiality orders that are not the product of party agreements. He notes that in some cases the parties may disagree about certain provisions in a confidentiality order, and in others one of the parties might not want any confidentiality agreement — yet any resulting order protecting against waiver must be enforceable against third parties in order for litigants to be able to rely upon it and reduce the costs of discovery.

Charles W. Cohen, Esq. (06-EV-033), supports Rule 502 as necessary to limit the costs of preproduction privilege review — costs that have skyrocketed with the advent of electronic discovery. He suggests that the Rule should apply to state as well as federal disclosures, because "[n]o matter how strong the rules are in one forum, if the rule is not in place in all forums, then the

protection is illusory." With respect to subject matter waiver (Rule 502(a)), Mr. Cohen approves of the "ought in fairness" test taken from Rule 106, but suggests that the Committee Note specify that "it is only the rare case where there would be any waiver beyond the specific documents, and even the waiver would be of the narrowest scope that is fair." He also states that "the text of the Rule should state that it is only a voluntary waiver that could result in the waiver being extended beyond the specific materials disclosed." With respect to the inadvertent disclosure provision (Rule 502(b)) Mr. Cohen states that "the Committee Notes should reflect that a document review policy not wholly inappropriate for the scope and volume of the document production meets the 'reasonable precautions' standard. Similarly, the Notes should reflect that a party is not under a duty to re-review its document productions, and therefore it could be long after the production is made when a party first learns or should have learned of an inadvertent disclosure, possibly even just before trial. No matter when the disclosure is discovered, the protection against waiver should be enforced." Mr. Cohen objects to the selective waiver provision (Rule 502(c)), because it "does not further the purposes of the attorney-client privilege and it erodes the ability of the parties to rely on their privilege protections." Finally, he suggests that the court order provision (Rule 502(d)) be extended to situations in which the court enters a confidentiality order even though the parties are not in agreement. He notes that in "asymmetrical cases, in which side has substantially more material to produce in discovery than the other, there may be little incentive for one side to agree to a non-waiver provision. If a court grants a party's request for a non-waiver order to govern its production, the court order should have the same effect as if the parties agreed to it."

Keith L. Altman, Esq. (06-EV-034), argues that the Rule should take account of the obligations of, and the costs to, the party who receives privileged information that has been mistakenly disclosed during discovery. He argues that the Rule should specify that in order to obtain a finding of no waiver, the producing party should bear the reasonable costs incurred by the receiving party in retrieving all copies of the mistakenly produced material.

Taysen Van Itallie, Jr., Esq. (06-EV-035), supports Rule 502, with the exception of the selective waiver provision (Rule 502(c)), which he believes "will further erode the attorney-client privilege." He is also concerned that the concept of "reasonable precaution" in the inadvertent disclosure provision (Rule 502(b)) is an invitation to "satellite litigation that could swallow the benefits of the rule." He would "substitute a standard which would be less of an invitation to litigation, such as providing that if the holder of the privilege 'took reasonable steps in light of the extent and schedule for the review' there would be no waiver." He would also "eliminate the 'should have known' component of reasonable promptness, limiting the start of the clock to when the holder of the privilege 'knew' of the inadvertent disclosure." Mr. Van Itallie expresses his "strong support" for the court order provision (Rule 502(d)), because "the utility of a confidentiality order in reducing discovery costs is unquestionably diminished if it provides no protection outside the particular litigation in which the order is entered."

Russel Myles, Esq., (06-EV-036), in testimony before the Committee, supported Rule 502. He suggested three changes: 1) The Rule should extend to disclosures made in state proceedings, because the benefits of the rule, in limiting the costs of discovery, will be "substantially reduced" if state disclosures are not covered; 2) Subject matter waiver (Rule 502(a)) should be limited to situations in which a party intentionally offers privileged material in a litigation in an attempt to make a misleading presentation of the evidence; and 3) The "should have known" language of Rule502(b) should be deleted.

Howard A. Merton, Esq., (06-EV-037), in testimony before the Committee, supported the efforts of the Evidence Rules Committee to limit the costs of electronic discovery. He argued that Rule 502 should extend to state disclosures, because "attorneys are driven by the uncertainties and have to look to the lowest common denominator." He also noted that if Rule 502 does not cover disclosures initially made in state proceedings, the parties could end up in a "race to the Federal courthouse to get the benefits of 502." Mr. Merton concludes that the court order provision (Rule 502(d)) is "exactly right." He opposes the selective waiver provision (Rule 502(c)) on the ground that it will lead to more waivers of privilege.

Dabney J. Carr, IV, Esq., (06-EV-038), expresses concerns about the rising costs of electronic discovery, and supports the Committee's efforts to address this critical problem. He states that the Rule must be extended to disclosures initially made in state proceedings, otherwise the goal of reducing costs will be undermined: "If there is a substantial possibility that the client will be sued in a jurisdiction that applies a broad subject matter waiver rule or holds that any inadvertent disclosure constitutes a waiver, a client has no choice but to comply with those standards, and so Rule 502 will be of no benefit." With respect to the inadvertent disclosure provision (Rule 502(b)), Mr. Carr does not disagree with the "should have known" language, but suggests that the Committee Note provide "that the time period for the holder of the privilege to rectify an inadvertent disclosure does not begin to run until the holder discovered, or with reasonable diligence should have discovered, the inadvertent disclosure." He explains that in most cases, "a party will not learn of an inadvertent disclosure until the receiving party brings the disclosure to the holder's attention, and the holder should not be penalized if the receiving party does not promptly notify the holder of the inadvertent disclosure."

Desmond T. Barry, Jr., Esq., (06-EV-039), states that the inadvertent disclosure provision (Rule 502(b)), should be included in the Rule "to protect important privileges." He also states the the Rule should be extended to disclosures initially made in state proceedings, in order "to achieve uniform treatment of privileged materials."

John J. McDonough, (06-EV-040), did not testify as scheduled and did not submit a written statement.

Dan D. Kohane, Esq., (06-EV-041), on behalf of the Federation of Defense and Corporate Counsel, recommends that Rule 502 be extended to govern disclosures initially made in state proceedings, because treating parties differently in state and federal forums puts the privilege and work product protections "in jeopardy and provides inconsistent guidance to attorneys and clients alike." The Federation strongly supports the Rule insofar as it protects parties who mistakenly disclose privileged material: "Corporations and their counsel, struggling to comply with short deadlines, are compelled to locate, secure and produce thousands of documents, many of which have not yet been screened for privilege or have been given only cursory review. Using document filters and 'people on the ground,' fair attempts are made to identify documents which are privileged so as to produce a privilege log. However a document or a number of document or a classification of documents slip through despite best efforts, under the time constraints provided, to prevent that disclosure. Once discovered, the corporation and its counsel immediately notify the opposing side of the error and seek to retrieve those documents. Are the interests of justice served by not allowing the error to be corrected? We think not and support Rules changes that would protect the privilege here." The Federation suggests that the term "reasonable precautions" in the inadvertent disclosure provision (Rule 502(b)) "is unclear" and recommends "other, less pejorative words" to describe the efforts that must be made to try to protect against a mistaken disclosure. Finally, the Federation opposes the selective waiver provision (Rule 502(c)), because it would "encourage waiver and underscore the protocols which lead to a *forced* sacrifice of protected materials and communication." (emphasis in original).

Anthony Tagliagambe, Esq. (06-EV-042), states that Rule 502 should be amended "to apply in federal and state court, and in diversity and federal question cases, to ensure that the Rule is effective." He supports the provisions on subject matter waiver, mistaken disclosures, and court orders (Rule 502(a)(b) and (d)), but he opposes the selective waiver provision (Rule 502(c)). He argues that selective waiver "does not enhance and protect the attorney-client privilege or work product protection."

Lawrence S. Goldman, Esq., (06-EV-043), on behalf of the National Association of Criminal Defense Lawyers, opposes the selective waiver provision (Rule 502(c)). The Association contends that selective waiver "would not solve, but rather would exacerbate, what most observers and practitioners agree are real and undeniable problems caused by privilege waivers that are made during the course of government investigations." The Association states that "selective waiver will not operate in a vacuum but must be inserted into a legal environment already tainted by the culture of waiver." It argues that selective waiver "purports to alleviate a symptom (third party lawsuits made possible by privilege waiver in government investigations) while leaving the actual problem (frequent and coercive demands for confidential material) untreated." The Association further argues that 1) selective waiver allows a party to use the privilege as a sword and a shield, which is improper; 2) selective waiver creates an "unlevel playing field" because it benefits corporations and leaves individuals without protection and without access to confidential material disclosed to the

government; and 3) applying selective waiver to state courts runs afoul of federalism principles.

Richard J. Wolf, Esq., (06-EV-044), supports the mistaken disclosure provision (Rule 502(b)), noting that it is a "complex and expensive undertaking" to isolate privileged and work product materials from "the mass of electronic information corporations amass and store." He notes, however, surveys indicating that many corporations have not yet implemented effective records management programs, and that to do so "could take eighteen months and up to three years in a large company." He concludes that the "reasonable precautions" standard in Rule 502(b) "is likely too high for most corporations to meet." He concludes that the test of reasonableness "should take into account whether an organization has followed the steps necessary to have an effective compliance program for records management, which should include an enforceable policy, adequate resources, training and awareness, regular monitoring, and proper remediation." On the selective waiver provision (Rule 502(c)), Mr. Wolf states that "any blanket opposition to proposed new Rule 502(c) is not representative of or consistent with corporate interests in general. Organizations have always wanted the type of protections envisioned under the proposed rule." He suggests that the Rule take account of "the prospect for prosecutorial abuses and coerced waivers by adding the word 'proper' before the phrase 'exercise of its regulatory, investigative or enforcement authority." He also suggests that the Committee Note address "the importance of considering the totality of circumstances, including the effectiveness of an ethics and compliance program, before parties resort to extreme measures such as requesting waiver of attorney-client privilege or attorney work product."

Susan Hackett (06-EV-045) already submitted a statement. Both statements are summarized above at 06-EV-002.

Gregory M. Lederer, Esq., (06-EV-046), did not testify as scheduled. The report of the Lawyers for Civil Justice was appended to his request to testify. That report was independently submitted and is discussed below.

Alfred W. Cortese, Esq., (06-EV-047), states that the Committee "is to be commended for recommending a rule that on the whole should help save significant amounts of time and effort spent in litigation to avoid waiver of the attorney-client privilege, and that will help make the discovery process more efficient and less costly." Mr. Cortese recommends that either the Rule be extended to cover disclosures initially made in state proceedings, or that separate legislation be recommended to extend such coverage. Mr. Cortese opposes selective waiver, stating that "the Committee's and judiciary's priority should be strengthening and protecting privilege and work product, not elevating the interest in efficient government investigations and prosecutions over the rights of individuals and companies to confidential communications with their attorneys." He hopes that the Committee "will report to Congress that public comment has demonstrated that selective waiver is not a viable or workable concept and should be withdrawn from consideration."

Steven Cuyler, (06-EV-048), did not appear to testify and did not submit a statement.

Anne Kershaw, (06-EV-049), testified with Patrick Oot (06-EV-031) and is summarized above.

Lawyers for Civil Justice (06-EV-047), submitted a lengthy comment on proposed Rule 502. LCJ generally supports the Rule, with the exception of the selective waiver provision (Rule 502(c)). LCJ "applauds the Committee's attempts to safeguard and more clearly define the scope of the attorney-client privilege and work product protection through proposed Federal Rule of Evidence 502." LCJ provides the following suggestions for change to the Rule:

1. The waiver standards embodied in Rule 502 should be applicable to both state and federal proceedings. Otherwise, "the Advisory Committee's goal of increasing efficiency and lowering the costs of discovery will be substantially lost" because "parties would not be able to predict in advance the consequences of a decision to disclose privileged information." LCJ concludes that "[s]ince Congress has the authority to enact federal legislation governing the substantive scope of attorney-client privilege and work product materials [under its Commerce Clause powers], it has the power to take the lesser step of creating a uniform federal law governing waivers by disclosure." LCJ recommends as an alternative to amending the rule that separate legislation be recommended to extend identical provisions on waiver to disclosures initially made in state proceedings.

2. The Committee should clarify in the Note that Rule 502 applies to both diversity and federal question cases. "Because under Rule 501 a federal district court sitting in diversity must apply state law to determine issues of privilege waiver, practitioners might question whether a court should apply Rule 502 in a diversity case, even though new Rule 502 would supersede 501 on such matters."

3. The Committee Note on the subject matter waiver provision (Rule 502(a)) should be strengthened "to make sure that subject matter waiver is limited to truly rare situations and to define more clearly the scope of undisclosed communications that 'ought in fairness' to be produced." LCJ asserts that "a subject matter waiver should not occur unless and until a party discloses privileged materials in an attempt to mislead the court or other litigants."

4. The mistaken disclosure provision (Rule 502(b)) should be amended to require "reasonable steps" to prevent disclosures rather than "reasonable precautions", and "the Committee Note should clarify that a party must only act with reasonable promptness upon learning of a disclosure." LCJ contends that a requirement of "reasonable steps" is "less subjective and adequately accomplishes the Committee's goal of ensuring that parties establish reasonable procedures to protect against the disclosure of privileged information." LCJ further suggests that the Note specify that "the reasonableness of steps taken to prevent disclosure of privileged information will vary according to the circumstances presented, such as the number of documents involved and the time constraints for

production. Where a large number of documents must be reviewed within a relatively short period of time, a party should be permitted to employ procedures that otherwise would not satisfy the producing party's burden. Conversely, where a party is not burdened by time constraints, more comprehensive measures might be required to reduce the possibility of inadvertent disclosures."

5. The Committee should withdraw the selective waiver provision, as it will "encourage a growing and questionable presumption amongst government investigators and prosecutors that it is appropriate and 'harmless' for corporations to waive the attorney-client privilege and work product protection." LCJ asserts that selective waiver "would make it difficult for a company to assert the right not to waive the privilege in any government investigation" and "might incorrectly be viewed as ratification by [the] Committee of government policies that even now are coming under increased attack."

6. LCJ "believes that there is an urgent need for the real, substantive protection afforded by proposed Rule 502(d)" because without that provision "parties will be forced to conduct the type of burdensome and expensive review of disclosed documents for privilege to ensure that sensitive information does not become freely available to other litigants." LCJ suggests that the Note to Rule 502(d) "make clear that parties cannot use the rule to enter into selective waiver agreements."

The Federal Magistrate Judges Association (06-EV-051), supports the provisions of Rule 502 that the Advisory Committee has proposed for adoption. The Association takes no position of the bracketed provision, Rule 502(c), on selective waiver. The Association notes that "[a]n important goal of recent amendments to the Federal Rules of Civil Procedure is the reduction of the cost and delay to discovery arising from the need to screen voluminous electronic information, and these amendments specifically encourage parties to enter into non-waiver and clawback agreements." The Association "believes that new Rule 502 will support this goal by providing predictable and uniform standards under which parties can determine the consequences of disclosure of information." The Association states that the rule, "to be fully effective, must regulate the consequences of disclosure at both the state and federal levels" and "supports the effort of the Advisory Committee to encourage Congress to enact the rule directly so that it would be binding on the states."

William McGuinness, Esq., and Michael Russ, Esq., (06-EV-052), on behalf of the Committees on Attorney-Client Relations and Federal Rules of Evidence of the American College of Trial Lawyers, unanimously support the provisions of proposed Rule 502, with the exception of the provision on selective waiver (Rule 502(c)). The Committees acknowledge the benefits that selective waiver would provide to some parties, but they are concerned that "the mounting pressure to waive, encouraged by Rule 502(c), unduly pits the interests of the corporate entity against the interests of the individual employee." The Committees conclude that in an environment of a "culture of waiver," "the imperative of protecting and preserving the attorney-client privilege should take precedence over the ancillary benefits of selective waiver embodied in proposed Rule 502(c)."

Russell J. Wood, Esq. And Bruce R. Deming, Esq. (06-EV-053), on behalf of the Corporations Committee, Business Law Section of the State Bar of California, "support and applaud the Advisory Committee's efforts to advance most of the provisions of Rule 502 and the Advisory Committee's objective of reducing the burden, expense and complexity associated with privilege evaluations of documents produced in response to discovery requests." The Committee opposes the selective waiver provision (Rule 502(c)), however, because it "1) will not encourage cooperation with government investigations; 2) improperly interferes with the attorney-client relationship; 3) will lead to unintended disputes between government agencies and private corporations; and 4) will not be applied uniformly in all jurisdictions."

Matthew J. Walko, Esq., (06-EV-054), has the following suggestions for change to Proposed Rule 502 as it was issued for public comment: 1) the definition of work product in Rule 502(f) should be expanded to cover "tangible as well as intangible information of parties— whether pro se or represented by counsel"; 2) the court order provision (Rule 502(d)) "should not hinge on whether parties can reach an agreement" because the "primacy of the court's order should not be undermined by making its wider applicability hinge on whether parties embroiled in litigation decide to be agreeable"; 3) Rule 502(d) should be rephrased to incorporate language from the full faith and credit statute; and 4) the Rule must clarify that it applies to diversity actions and therefore supersedes Rule 501 on that point.

Jinjian Huang, Esq. (06-EV-055), argues that proposed Rule 502 gives the parties to a litigation too much authority to determine whether a waiver will be found. He suggests that the Rule be amended to specify that court orders are not enforceable unless they are fair, and that agreements should not be enforceable between the parties unless they are fair.

Perry Goldberg, Esq., (06-EV-056), on behalf of himself and a number of partners at Irell & Manella who frequently litigate in federal court, commends the Advisory Committee's efforts "to make litigation more efficient and less costly." He suggests that the Rule could be improved by the following:

1) The standard for avoiding waiver by mistaken disclosure — "reasonable precautions" — "likely would spawn significant litigation" and "would not change how discovery is actually conducted". "To give the proposed Rule greater clarity, and to give producing parties greater comfort," the Note should include examples of precautions that are considered reasonable. "For instance, with respect to electronic discovery, it would be helpful to specify that searching for key words — such as attorney names and 'privilege' — is a reasonable precaution against disclosure."

2) The requirement of "reasonably prompt" measures to retrieve mistakenly disclosed should be explained in the Note. Specifically the Note should state that "action within a 14-day window generally would be considered prompt" and the Note should further state that the "should have known" standard "should be construed narrowly so that the 14-day clock would not start running until a party is on actual notice of the problem."

3) The "ought in fairness" standard for subject matter waiver (Rule 502(a)) should be limited to inadvertent disclosures, and the current jurisprudence for determining the scope of waiver for intentional disclosures "should not be disturbed."

4) The definitions section (Rule 502(f)) is "unnecessary and may become an unintentional source of confusion."

Bernstein Litowitz Berger & Grossman (06-EV-057), opposes the provision on selective waiver, Rule 502(c). The firm states that "the majority view under the existing case law in this area is correct and should not be reversed through rulemaking. The proposed Rule 502(c) does not serve the legitimate purposes of the attorney-client privilege and work product doctrine and should not be adopted." The firm argues that the existing law properly bars defendants "from picking and choosing among their adversaries when waiving privilege." The firm notes its experience in representing shareholders who did not benefit from a regulatory activity in which a corporation turned over privileged information, but did benefit from the use of that information in a subsequent private lawsuit. The firm concludes that "reversal of the law on selective waiver is a question best left to Congress without the implied judicial endorsement that would be perceived if it was proposed by the Advisory Committee" and that "adoption of the proposed Rule 502(c) would be a controversial, value-laden political decision."

Kim J. Askew, Esq. (06-EV-058) on behalf of herself and nine other members in the leadership of the ABA Section of Litigation, supports the court order provision (Rule 502(d)) as a valuable addition that would help fill the gap created by Rules 16(b)(6) and 26(f)(4) of the Federal Rules of Civil Procedure" as it would "solve the problem of the order not binding non-parties in other actions and/or jurisdictions." They also "support the Committee's efforts to limit the scope of waiver" in Rule 502(a). Ms. Askew and the other lawyers oppose the selective waiver provision (Rule 502(c)). They are concerned that support for Rule 502(c) "would be construed as tacit approval of the governmental practice of demanding waiver." They suggest that if selective waiver is to be proposed, language should be added to specify that "[n]othing in this rule authorizes a government agency to require or request a person or entity to disclose a communication covered by the attorney-client privilege or work product protection."

Professor Liesa L. Richter, (06-EV-059), states that the selective waiver provision (Rule 502(c)) "represents a salutary change to waiver doctrine: one that will simultaneously protect corporations cooperating with the federal government from the damaging effect of third party waivers *and* serve the public interest in the effective oversight of business entities." (emphasis in original). She argues that a system of voluntary cooperation with the protection of selective waiver is vastly preferable to "the continuation of federal policies that generate privileged disclosures to the government with no selective waiver protection to provide cover for corporations faced with massive civil exposure." She notes that "a doctrine of selective waiver to federal entities can fit comfortably within the evolving flexible view of privilege and waiver recognized in the case law and academic

commentary." For example, under the provisions of Rule 502(d), waiver doctrine "is being adjusted to permit greater flexibility and less rigid adherence to common law confidentiality requirements" by permitting claw-back and quick peek agreements. Accordingly, "it would be both counterintuitive and counterproductive to tell private litigants that they may share with their allies, they may share with their private adversaries, but they will be punished for sharing with the federal government in pursuit of its law enforcement responsibility. Such a disfavored status for cooperation with government investigations does not serve the public interest any more than the needless waste of private resources to review millions of documents for privileged communications."

The New York County Lawyers' Association, (06-EV-060), makes the following recommendations:

1) Rule 502(a) should be adopted as a reasonable limitation on subject matter waiver. The Association notes that most disclosure of privileged material is "probably inadvertent" and the disclosing party "usually has no plans to make unfair adversarial use of the privileged matter so produced and, in the absence of such contemplated unfair use, requiring that other materials be produced is an excessive sanction for what is generally nothing more than carelessness."

2) Rule 502(b) should be adopted because it is important to have one uniform rule on waiver with respect to mistaken disclosures; Rule 502(b) proposes the majority rule under existing law, and so is the rule to which most practitioners are already accustomed.

3) The Association makes no recommendation on the selective waiver provision, Rule 502(c), as it has not yet had the opportunity to consider the arguments of those who might be expected to oppose the provision. It notes, however, that "[t]o the extent that a culture of waiver exists and is undesirable, it exists under the present rule forbidding selective waiver, and government and regulatory officials have not seemed sympathetic to pleas that revelation of privileged matter to them could result in disclosures to private plaintiffs." The Association concludes that if selective waiver is desirable on its own merits, "it should be adopted regardless of the 'culture of waiver.'"

The State Bar of California Committee on Federal Courts (06-EV-061) opposes the subject matter waiver provision (Rule 502(a)), concluding that the "ought in fairness" test in the Rule will give rise to litigation and will allow gamesmanship. The Committee concludes that "the current subject matter waiver rules operate fairly for both producing and receiving parties" and "there is no need to change the current standard."

The United States Securities and Exchange Commission (06-EV-062) supports the selective waiver provision, Rule 502(c). It states that selective waiver "significantly enhances the Commission's ability to conduct expeditious investigations and, where appropriate, to obtain prompt relief for defrauded investors." The Commission cites as examples five complex, fact-intensive corporate investigations in which the corporations turned over privileged material, which "saved the Commission months of work, as well as large amounts of money."The Commission also notes that "the companies themselves can benefit from providing privileged and protected materials" because

it "can reduce overall disruption for the companies by limiting the number of executives and other employees whose testimony will be sought by the Commission staff and by reducing the length of the investigation." The Commission states that Rule 502(c) is necessary because many corporations are deterred from cooperating by the concern that disclosure to the Commission will result in use of the information in private litigation. The Commission suggests the following improvements to Rule 502(c) as issued for public comment: 1) the Rule or Committee Note should provide "that a receiving government agency may use the privileged or protected materials without waiving the privilege or allowing third parties to use the materials"; 2) "The Advisory Committee should state expressly in the Notes that, even if the communications or information are disclosed or become available to non-governmental persons or entities through the use of the material during an enforcement proceeding, the communications or information will continue to be protected."; 3) the Committee Note should provide that a government agency is not required to disclose Rule 502(c) material under the Freedom of Information Act; 4) the Committee Note should emphasize that selective waiver under Rule 502(c) preempts any conflicting state rule of privilege.

The Federal Bar Council, (06-EV-063), "supports the policy decisions made by the Advisory Committee . . . to ease the burden of discovery and to make uniform the law concerning the waiver of privilege." The Council makes the following suggestions:

1) Rule 502 should be amended to add a new subsection "to clarify that it governs state courts and to overcome the potential ambiguities arising from the scope provisions of Rules 101 and 1101." The Council suggests a subsection stating: "Notwithstanding Rules 101 and 1101, and unless otherwise provided in this Rule, this Rule shall be binding in state court proceedings."

2) The scope of the subject matter waiver provision (Rule 502(a)) "should be broadened to create a federal one-rule analysis to use when determining the scope of privilege waivers." Specifically, the subdivision should be amended to clarify that it applies to federal and state proceedings, and a separate subdivision should be added to cover disclosures initially made in state proceedings when the question of subject matter waiver arises in subsequent federal court proceedings.

3) The "knew or should have known" test of Rule 502(b) "should be replaced with a totality of circumstances approach." The Council states that a "should have known" standard "would invite arguments that parties should make a post-production review to determine whether any privileged information was inadvertently produced."

4) The mistaken disclosure provision should be extended to apply to regulatory investigations, because "disclosures made to federal agencies in connection with their investigations are as onerous — if not moreso — than discovery in litigation."

5) The selective waiver provision (Rule 502(c)) should be deleted "as it is very controversial and might bog down enactment of the remainder of the Rule."

The United States Commodity Futures Trading Commission, (06-EV-064), supports the selective waiver provision (Rule 502(c)), because it "would serve the public interest by enhancing the Commission's ability to conduct expeditious investigations resulting in more timely enforcement,

at a reduced cost to taxpayers as well as witnesses." The Commission "agrees with other commenters that, if the provision is adopted, private litigants will not be harmed. Indeed, they will be in precisely the same position under the proposed rule as they would be if the government had not obtained the privileged or protected documents. That is, if the privileged or protected documents were not produced to the government, private third-party litigants would not be able to argue that the individual or entity had waived attorney-client privilege or work product protection; similarly, they would not be able to make those arguments under the proposed rule." The Commission urges that "the rule prevent waiver under both federal and state law."

David Booth Alden, Esq. an Ted S. Hiser, Esq, (06-EV-065), suggest that Rule 502(a) is not clear on whether the proposed rule on subject matter waiver applies to disclosures of privileged or protected communications in state court proceedings. They suggest that the rule expressly bar a state court from finding a subject matter waiver with respect to a disclosure in a federal court proceeding; otherwise Rule 502(a) will be inconsistent with Rule 502(d), which binds state courts to respect federal court confidentiality orders. They also suggest that the Committee make clear that "notwithstanding the language of Rule 101 and 1101, proposed Fed.R.Evid. 502(b) may apply in state court proceedings under some circumstances." Finally, they state that "the interplay" between Rules 501 and 502 in diversity actions "may create uncertainty" and that the Rule should be changed to state expressly that Rule 502 governs in diversity actions.

Kenneth L. Mann, Esq., (06-EV-066), is opposed to the selective waiver provision (Rule 502(c) and recommends that the Committee "should abstain" from recommending adoption of the selective waiver provision by Congress.

The American Bar Association (06-EV-067), suggests that the two-part test of the mistaken disclosure provision (Rule 502(b)) be changed to add two extra factors: the scope of discovery and the extent of inadvertent disclosure. The ABA recognizes that those two factors "could be construed" as falling within the standard in Rule 502(b)— reasonable precautions. But the ABA states that the best way to assure that these factors are considered by the courts is to include them in the text of the Rule. The ABA also suggests that an "interest of justice" standard be added because it is important for courts to consider other relevant facts that are not encompassed within "reasonable precautions", the scope of discovery, and the extent of inadvertent disclosure. The ABA recognizes that an open-ended "interests of justice" factor could add a level of unpredictability to the question of whether a mistaken disclosure constitutes a waiver — but that this risk is "outweighed by the benefit gained by giving judges flexibility to adapt the rule to each set of unique circumstances presented." The ABA also opposes the "should have known" standard for recovery of the privileged material as "subjective" and likely to lead to litigation. Its policy is that the duty to seek return of the information is triggered only when the disclosing party "actually discovers that a mistake has been made." Finally, the ABA is opposed to the requirement that the holder take "reasonably prompt" measures to seek return of the mistakenly disclosed information. It states that this standard is subjective and

suggests that "within a specified period of days after learning of the inadvertent production, the producing party should be required to raise the privileged status of the documents by simply giving notice to the opposing party that the materials are protected and amending its discovery responses to identify the materials and the privileges."

The American Bar Association (06-EV-068), in a comment submitted after the public comment period ended, proposes an extensive amendment to Rule 502 to cover a topic that is not addressed in the Rule; was never intended to be part of the Rule; was not the subject of any other public comment; and was not one of the issues on which Congress sought rulemaking. The ABA's proposed addition to the Rule would codify federal cases determining whether disclosure of underlying factual information constitutes a waiver of the attorney-client privilege. The ABA also prepared an elaborate Committee Note on the implied waiver provision.

The Commercial and Federal Litigation Section of the New York State Bar Association (06-EV-069), provided the following comments on Proposed Rule 502:

1. The Section does not support the subject matter waiver provision (Rule 502(a)). It argues that different standards for subject matter waiver should apply to privilege and work product. It also states that the "ought in fairness" standard will spawn litigation.

2. The Section supports the adoption of the mistaken disclosure provision (Rule 502(b)), noting that "parties spend large, perhaps inordinate, amounts of time" reviewing discovery materials prior to production to determine whether they are privileged, "which can substantially delay access for the party seeking discovery."

3. The Section opposes the selective waiver provision (Rule 502(c)), "given the lack of evidence as to whether it will actually have the desired impact." The Section states that caution is required because those "who would presumably stand to gain from the potential decrease in cost referenced by the Committee . . . have expressed serious concerns that the proposal will be harmful to the very corporate parties it ostensibly is designed to protect." The Section is "unaware of any situation where concern over privilege waiver vis-a-vis third parties resulted in diminished cooperation with the government. Moreover, this possibility seems unlikely to occur with any significant frequency given the weight of the incentives motivating parties to cooperate with government investigations."

4. The Section supports Proposed Rules 502(d) and (e), "as necessary adjuncts to the limitations on inadvertent disclosure contained in proposed Rule 502(b)."

5. The Section concludes that "if enacted by Congress under its Commerce Clause powers, the proposed Rule will quite likely withstand constitutional scrutiny."

Jeffrey J. Greenbaum, Esq., (06-EV-070), submitted a column from the *New Jersey Lawyer* entitled "Proposed Rule 502: An Important Step Forward."

06-EV-071 is another statement from Steven Hazen once again stating that he is really

opposed to selective waiver. See 06-EV-023

Mark Jordan (06-EV-072) argues that the focus of Rule 502 is too narrow and that it will have a negative impact on small-scale civil litigation and non-corporate criminal prosecutions. He also argues that inadvertent waiver should never be found where the mistake is made by counsel, because the privilege is held by the client.

Kevin N. Ainsworth, Esq. (06-EV-073) states that Rule 502(d) "should explicitly state a good-cause requirement and should give federal courts the power, even in the absence of agreement of the parties, to enter 'privilege protection' orders based on a showing of good cause."