

THE PHILIP D. REED LECTURE SERIES

**EVIDENCE RULES COMMITTEE:
SYMPOSIUM ON RULE 502**

PANEL DISCUSSION

REINVIGORATING RULE 502*

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Hon. Paul Grimm

Hon. Paul S. Diamond

Hon. John Facciola

Hon. Geraldine Soat Brown

John Barkett, Esq.

Chilton Varner, Esq.

Ariana Tadler, Esq.

Maura R. Grossman, Esq.

Steven Morrison, Esq.

Daniel Smith, Esq.

Edwin Buffmire, Esq.

Prof. Ken Broun

Prof. Allyson Haynes Stuart

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Prof. Rick Marcus

Prof. Ann Murphy

Prof. Liesa Richter

JUDGE FITZWATER: Earlier this week, the Advisory Committee on Evidence Rules lost a close friend and leader, Mark Kravitz. Judge Kravitz passed away on September 30, 2012, his final day as Chair of the Standing Committee, his life cut short by ALS despite his unflagging courageous fight.

Mark took a keen interest in the work of this committee, and he had intended to attend today's Symposium on Rule 502. Only recently did he inform us that his failing health would not permit this. Then, just a few days ago, came the news we had resigned ourselves to hear someday, but had hoped would not come so soon.

In memory of Mark and as an expression of our deepest respect for him and our profound loss, I ask that before these proceedings begin, we observe a moment of silence. If you will, please, join me at this time.

Thank you.

On behalf of Judge Jeffrey S. Sutton and the Members of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, my colleagues on the Advisory Committee on Evidence Rules, and our Committee Reporter, Professor Dan Capra, I want to warmly welcome you to the Symposium on Federal Rule of Evidence 502.

I would like to begin by expressing our appreciation to the Charleston School of Law for hosting this Symposium, and in particular to Dean Andy Abrams and Professor Allyson Haynes Stuart.

The Dean of the law school welcomed us yesterday evening by hosting a lovely reception for the participants in the Symposium and in the fall meeting of the Evidence Rules Committee.

This is the second in a series of symposia that the Evidence Rules Committee has convened in recent years. Last year we held a symposium on the Restyled Rules of Evidence at the William and Mary Marshall-Wythe College of Law. The underlying purposes of that symposium included enhancing understanding of the Restyled Evidence Rules by exploring the painstaking process by which the restyled rules were formulated and identifying evidence rules issues that remain to be resolved even after restyling. Today's Symposium has a somewhat different purpose: to review the current use—or perhaps I should say, lack of use—of Rule 502 by courts and litigants and to discuss ways in which Rule 502 can be better known and understood so that it can fulfill its original purposes, including reducing the sometimes enormous costs of pre-production privilege review.

Like last year's symposium, the participants in this Symposium on Rule 502 represent a distinguished group of judges, lawyers, and scholars. They are distinguished not merely because they are accomplished individuals, but

because they have expertise and extensive experience addressing the Rule 502 issues that are most pertinent to the bench, the bar, and the Academy—indeed, to the purposes for convening this Symposium.

Rule 502 took effect in 2008, after Congress approved it and the President signed it into law. Unlike other rules of procedure and evidence that are adopted by the Supreme Court of the United States under the Rules Enabling Act, Rule 502, as a privilege rule, required approval by Act of Congress. According to the Advisory Committee note, Rule 502 has two major purposes.

The first is to “resolve[] some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver.”¹ The second purpose of Rule 502 is to “respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information.”² The Advisory Committee note points out that “[t]his concern is especially troubling in cases involving electronic discovery.”³ Accordingly, “[t]he rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection.”⁴

One might expect that a Rule of Evidence adopted by Act of Congress at the request of the Judicial Conference of the United States—especially one with these salutary purposes—would enjoy widespread, successful use after four years. But as our panel of experts will undoubtedly point out, this is not the case. Rather than enjoying rather robust usage, as had been anticipated, procedures and court orders permitted under Rule 502 are implemented relatively infrequently. This circumstance invites a number of important questions: Why are Rule 502 procedures and orders used so sporadically? Have court decisions interpreting or applying the Rule undercut its utility? Is the infrequent usage simply a matter of ignorance that can be remedied by educating judges, lawyers, and clients about the benefits of the Rule? Should the Federal Rules of Civil Procedure be amended to point more directly to Rule 502 or to require, for example, that litigants address it specifically when developing a discovery plan? These are important questions, and they are among the ones that our experts will attempt to answer. And it is likely that our panelists will identify other issues that must be addressed before procedures permitted under Rule 502 will enjoy more frequent use.

1. FED. R. EVID. 502 advisory committee’s note.

2. *Id.*

3. *Id.*

4. *Id.*

By convening this Symposium—and by arranging for these proceedings to be added to the legal literature through publication in the *Fordham Law Review*—the Advisory Committee on Evidence Rules is attempting to make Rule 502 better known and understood so that it can fulfill its original purposes. We are fortunate to have assembled a group of noted judges, practitioners, and academicians to assist in this worthy goal.

Professor Capra.

PROF. CAPRA: Thanks, Judge Fitzwater, thank you very much for that excellent setup, which set a great roadmap for what we're going to be doing today. I want to note for the record that it's Judge Fitzwater who had the idea to do the series of symposia, and I think it's really been a great idea, and hopefully we will continue as we go along, because we have one planned for next year as well, which we'll talk about at the meeting of the Evidence Rules Committee later today.

I want to extend my thanks to Charleston Law School, particularly Dean Andy Abrams, and also Professor Allyson Haynes Stuart, who has been great and helped us out a lot with the arrangements, and her assistant, Marlene Urena, who is just wonderful.

Thanks to the Administrative Office, particularly Ben Robinson, for all the work on the ground, really excellent. And thanks to the *Fordham Law Review*, which will publish a transcript of this Symposium in a forthcoming edition as the yearly submission from the Philip Reed Chair; and Julie Albert, the Executive Symposia Editor, who is here to help us out today.

So I'm going to start with quick bios of our participants. You have bios in the materials, but I just want to tell you, and proudly, about the outstanding backgrounds and qualifications of our participants. So we're going to start with the judges.

Definitely, we start with Judge Rosenthal. Without Judge Rosenthal, we wouldn't be here today in terms of Rule 502, because there would be no Rule 502. She's the person who got it through. So there you are. She is a district judge in the Southern District of Texas, former Chair of the Rules Committee, former Chair of the Civil Rules Committee, and really the guiding light behind Rule 502.

JUDGE ROSENTHAL: That's so much better than calling me the Mother of 502. Thank you.

PROF. CAPRA: I was thinking of Godmother.

JUDGE ROSENTHAL: I was so afraid that you would come up with an alternative.

PROF. CAPRA: I toned it down just a bit.

Judge Paul Diamond is a district judge from the Eastern District of Pennsylvania, a Member of the Advisory Committee on Civil Rules, liaison from that committee to the Evidence Rules Committee, and we thank him for being here today.

Magistrate Judge Paul Grimm, Chief Magistrate Judge of the District of Maryland, Member of the Civil Rules Committee, Chair of the Discovery

Subcommittee, and author of the *Hopson* case,⁵ which provided the first steps toward enacting Rule 502, and also the author of an excellent piece in the *Richmond Journal of Law and Technology* on how Rule 502 is and should be applied,⁶ and we'll talk about that some today.

Magistrate Judge Geraldine Soat Brown, presiding Magistrate Judge for the Northern District of Illinois, author of the *Coburn* case,⁷ which is the leading case on interpreting Rule 502(b), and a member of the Rules Committee of the Magistrate Judges Association.

Judge John Facciola, Magistrate Judge for the Federal District Court in the District of Columbia. There he is. After a long struggle to be here today, we thank you for coming. Author of a raft of important decisions on electronic discovery and privilege and privilege logs, some of which we'll talk about today, including the *Amobi* case,⁸ which provides the correct course in interpreting Rule 502(b).

Practitioners. John Barkett—Shook, Hardy & Bacon, Miami office—a member of the Advisory Committee on Civil Rules, Adjunct Professor at Miami Law School teaching electronic discovery, and author of two books on the subject of e-discovery.⁹

Edwin Buffmire, formerly an associate at Jackson Walker in Dallas, now clerking for Judge Clifton on the Ninth Circuit in, of all places, Hawaii; author of an excellent piece on Rule 502, recently published in the *Tennessee Law Review*;¹⁰ and a graduate of a place close to my heart, Princeton University.

Maura Grossman, counsel at Wachtell, Lipton, Rosen & Katz, noted expert on e-discovery, appointed by Judge Scheindlin—who, by the way, I should just say could not be here today because she's taking on Judge Kravitz's docket and is engaged in some trials. Maura was appointed by Judge Scheindlin to the Discovery Subcommittee of the Attorney Advisory Group on Judicial Improvements and teaches electronic discovery at Columbia Law School.

Steve Morrison, a partner at Nelson, Mullins, Riley & Scarborough in Columbia, South Carolina, a well-known trial lawyer, outside counsel to many Fortune 500 companies, Adjunct Professor at the University of South Carolina where he teaches Trial Advocacy and Legal Writing.

Dan Smith, a trial attorney in the Environmental Enforcement Section of the Department of Justice where he has been since he was accepted in the DOJ's Honors Program. He co-chairs the Discovery Working Group for

5. *Hopson v. Mayor & City Council of Balt.*, 232 F.R.D. 228 (D. Md. 2005).

6. Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 RICH. J.L. & TECH. 8 (2011).

7. *Coburn Grp., LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032 (2009).

8. *Amobi v. Dep't of Corr.*, 262 F.R.D. 45 (2009).

9. JOHN M. BARKETT, *E-DISCOVERY: TWENTY QUESTIONS AND ANSWERS* (2008); JOHN M. BARKETT, *THE ETHICS OF E-DISCOVERY* (2009).

10. Edwin M. Buffmire, *The (Unappreciated) Multidimensional Benefits of Rule 502(d): Why and How Litigants Should Better Utilize the New Federal Rule of Evidence*, 79 TENN. L. REV. 141 (2011).

the Environment and Natural Resources Division of the DOJ, and he's here because he's the author of an interesting article on Rule 502 as it applies to governmental litigation.¹¹ And so, hopefully, we can get into that today.

Ariana Tadler, partner at Milberg, LLC, one of the foremost litigators of complex cases from the plaintiff's side, Chair of the Sedona Conference's Steering Committee for Working Group I on Electronic Document Retention and Production. And, hopefully, we can get into some Sedona issues today. Ariana frequently speaks to federal judges and educates them in e-discovery issues. And I'm proud to note she is a distinguished graduate of Fordham Law School.

Chilton Varner, a partner at King & Spalding in Atlanta, and a former, a much missed—I've got "much missed" in my notes—Member of the Civil Rules Advisory Committee. She's a senior partner on King & Spalding's product liability team, and she is the President-Elect, soon to be the President, in two weeks, of the American College of Trial Lawyers.

Professors; academics. Ken Broun, again, we wouldn't be here without Ken. Ken is the Henry Brandis Professor Emeritus at University of North Carolina Law School. He's an original Member of the reconstituted Advisory Committee, which began in—1993, Ken, is that right?

PROF. BROUN: Yes.

PROF. CAPRA: Ken was an original member of that committee until 1999, and he is the last professor to hold a position on the Advisory Committee on Evidence Rules. It has never been refilled, which is a story for another time. And so we've kept Ken around. He is a consultant to the committee, and he's the principal drafter of the text of Rule 502.

Allyson Haynes Stuart joined the Charleston School of Law faculty in 2004 after serving as director of the Legal Department at Sony Corporation of America. She served as Chief Judge Norton's law clerk—Chief Judge Norton is also a much-missed member of, in this case, the Evidence Rules Committee—and she teaches, among other things, Evidence and Electronic Discovery, and she is an expert on digital evidence.

Rick Marcus, Horace Coil Chair in Litigation at U.C. Hastings College of Law School. He teaches Civil Procedure, where he's got the amazing casebook, Complex Litigation, E-discovery, and Evidence. Since 1996, he has been the Associate Reporter of the Civil Rules Committee, frequently focusing on discovery issues, and he has written what is still the predominant article on waiver of privilege, published in the *Michigan Law Review*.¹²

Ann Murphy, Professor at Gonzaga Law School where she teaches, among other things, Evidence, Litigation Skills, and Professionalism. She

11. Daniel S. Smith, *Privilege Review in the Discovery Process: The Role of Federal Rule of Evidence 502*, 59 U.S. ATT'YS' BULL. 57 (2011).

12. Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605 (1986).

has written a great article in the *New Mexico Law Review* on Rule 502,¹³ which is why she is here. So you see the pattern. She wrote also a good article on the privilege for communications to public relations agents,¹⁴ which I relied on in a case I was working on for Judge Norton, the Bausch & Lomb MDL.¹⁵

Liesa Richter, Thomas P. Hester Presidential Professor at the University of Oklahoma College of Law. She teaches Evidence and Corporations, among other things. Her research focuses on federal evidentiary policy, as well as the attorney-client privilege in the corporate context. And she was one of the original commenters on Rule 502, which is where we met. We're happy to have her here.

Before we get started I want to make a disclaimer for myself and everyone on this panel. The opinions we are going to express today are our own. We are not speaking on behalf of a law firm, a court, a law school, the government, or any committee. We are just speaking on behalf of ourselves.

So we're going to start with today how did we get here with 502, how 502 came to be, and try to get some perspective on what we can do about energizing it. And we're focusing—I should say you've got Rule 502 in your materials—we're focusing on three provisions of 502 today: 502(b), which deals with protection against waiver from inadvertent disclosures; 502(d), which is really our foremost focus, providing for court orders that protect against waiver; and 502(e), which relates to 502(d), as it allows parties to agree on clawback and quick-peek agreements, but you need an order under Rule 502(d) to make such an agreement enforceable against third parties.

So for the process of enactment of 502 and how we got here, there's no better person to start with than Judge Rosenthal.

JUDGE ROSENTHAL: Thank you, Dan. Dan has set the stage beautifully. When we left the Judicial Conference with our version of Rule 502, under the Rules Enabling Act, the next usual step would be to go to the Supreme Court, and then over to the Hill, where all they had to do would be nothing.

For this Rule, because of the carveout from the Rules Enabling Act that requires us, when rules that deal with waivers of privilege or matters of privilege, you have to get an affirmative Act of Congress, we could not rely on our usual procedure. But we weren't worried. We had the forces of right and justice on our side. We were going to make American litigation

13. Ann M. Murphy, *Federal Rule of Evidence 502: The "Get Out of Jail Free" Provision—or Is It?*, 41 N.M. L. REV. 193 (2011).

14. Ann M. Murphy, *Spin Control and the High-Profile Client—Should the Attorney-Client Privilege Extend to Communications with Public Relations Consultants*, 41 SYRACUSE L. REV. 193 (2011).

15. *In re Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig.*, MDL No. 1785, 2010 WL 2132245 (D.S.C. May 24, 2010).

less burdensome, less expensive, faster. We were Rule 1 heading over to the Hill.

And, thanks to Dan and to the Chairs that had preceded Sid and me, it was beautifully presented. Dan had spent literally a year talking with the Conference of State Court Chief Justices, ensuring that there were no concerns about the interplay of the federal and state proceeding provisions in the proposed rule and had gotten them to say, we are fine, overcoming initial concern would be an understatement, resistance would be perhaps a little bit of an overstatement, to the notion that if there was a disclosure in a state court, that the federal court could nonetheless say, "That's not a waiver"; and if there was a disclosure in the federal court, as to which the federal court had said, "That's not a waiver," the state court would have to say, "That's not a waiver."

The State Chief Justices were a little bit unhappy about some of those provisions initially, but Dan had done a masterful job of addressing their concerns.

The initial concern over an earlier version of the rule that had selected waiver provisions, those had been taken out. Those concerns had all been addressed, and we walked over to the hill with a turnkey package. All they had to do was say, "Where have you been? We've been waiting for you." And there was at the time we walked over essentially no opposition. This was just good governance, and it was responsive to a number of concerns that their constituents had related to them.

So in our naïveté, we assumed that this would be the proverbial warm knife through butter, and we were quite naive. What we did not understand is the profound degree of both cynicism and skepticism that would accompany almost any effort to change the current state of affairs, no matter how unsatisfactory the operation and application of that state of affairs is.

So when we walked over and proposed this change, we were met with an immediate assumption that we had ulterior motives that were only to be met with suspicion, that we either could not do what we wanted to do or should not do what we wanted to do. And the way in which all of that manifested was entirely at the staff level, that we are fond of complaining about the twenty-five-year-olds who run the Hill, we were actually met with very senior people, who had not perhaps practiced in a while; but the twenty-five-year-olds have never practiced. So I'm not sure which is the better or worse for people in our position. But we were met with people whose perspective was entirely political in nature and who lived in fear that they were going to recommend something to their superiors that would later attract criticism from important components of their support. So we spent—how many hours? I couldn't begin to count.

PROF. CAPRA: Maybe 100.

JUDGE ROSENTHAL: It became a full-time second job, in other words, in email correspondence addressing their concerns, meetings addressing their concerns, getting third parties to help address their

concerns, getting scholars to help address the underpinnings of what we were doing. It was a full-blown campaign. And at the end of the day, we had met every question they asked, promptly. I have never been so deadline-compliant in my life. We had successfully overcome their desire to take what had been carefully styled, written in plain English. They literally blacked out every clear statement and turned it into passive voice, inserted a ton of “whereases,” and made it read like a statute, which meant you really could not easily understand what it said. So we had to convince them that it didn’t need to read the same way every other statute read, but would stand out like a sore thumb in the middle of the soon-to-be restyled Rules of Evidence.

And we had to add to the committee note that, in this context, serves as the legislative history, we had to add the addendum that you see in the materials on page 22 and 23 that basically said, we really are not trying to do too much here. Don’t worry. Don’t worry. And it got through.

And it got through on unanimous consent. But at the same time, we were reaching out and trying to find people in both Houses who we could prevail upon to introduce it as a bipartisan measure, to write four statements that would quell any concerns so that it could go through on unanimous consent, and it finally happened. It happened in September of 2008, an election year.

PROF. CAPRA: Three days before Lehman Brothers went down the tubes.

JUDGE ROSENTHAL: That’s exactly right, after which nothing went through. So at the end of the day, we got it through, because we were able to calm their fears, but also make the case that here was the potential to address what we had been told was a significant source of delay and expense in discovery in civil cases in particular, which was the need to exhaustively conduct pre-production reviews out of a fear that any disclosure of privileged material would be a waiver, not only of what was disclosed, but also of the subject matter, and that efforts by agreement, even if written in a court order to move away from that consequence, could not be enforced as to third parties or in subsequent proceedings. We plugged those holes. We told Congress that we had been told that if we could plug those holes, life would be better.

So imagine our distress when we are told four years later, the problem of cost and delay, for privilege review of large productions, particularly of electronic discovery, it’s not much better. And one of the reasons is, we think, that Rule 502 is underutilized. So we are here, and thank you for convening this.

PROF. CAPRA: Ken, do you have any perspective you want to add?

PROF. BROUN: Let me just add a little bit from a drafting perspective. And I am not trying to deflect blame for 502, but simply not to accept credit for it. I think that the only words I was responsible for, the word “waiver” I think was mine, “inadvertent” was mine, “scope” and “court order.”

PROF. CAPRA: “Inadvertent” was yours, yes.

PROF. BROUN: Yeah, it was mine. I do take blame for that. This was truly a product of some wonderful joint drafting. They say that committees ought not to draft things, but they ought to have drafted this. I think, despite its underutilization, this is a very well-drafted rule. And I take no credit for that, but I'm happy to be a part of it.

We were faced with, as most of you in this room know, a body of case law that was inconsistent, to say the least. There were three different rules on when something was an inadvertent waiver. There were three different rules on scope. There were all kinds of possibilities. Many of the courts, we think, have gotten it right. Many of the courts prior to 502 in fact were dealing with the issue much in the same way that we tried to do in the rule, with the exception that we could provide, and common law courts could not, over the binding effect of clawback and quick peek by way of a court order.

But before the rule there was still the very real possibility that a court would apply the law in a way that would scare the heck out of any lawyer seeking to comply with discovery, particularly in a case involving millions of documents. The worst case scenario, I think, that was in all of our minds actually hadn't happened, but it certainly could have under the law that existed. Among the millions of documents produced to the other side was something that the young lawyer or the paralegal missed that said, "Dear Ms. Lawyer: Attached is a copy of a draft of the XYZ contract. Please let us know what you think." That gets through and is produced to the adversary.

Well, that's a privileged document. The fact that that's disclosed to the other side may well not be so important as is the information is not exactly sensitive, but it was certainly conceivable under the rulings that some courts had made that every document relating to the XYZ contract would then be subject to disclosure. That wasn't the right rule. It wasn't a good rule. But it was the rule that certainly could exist based on some of the case law.

I, for one, thought that because of this possibility, scope was a more important concern for me than the inadvertency. If it's an inadvertent waiver, usually the document itself is out. But if that inadvertent waiver extended to all documents involving the same transaction, then you were in deep trouble.

Rick Marcus in his article had proposed a limitation on scope of waiver that would deal with the question of fairness, and that's the direction that we decided to go, borrowing very heavily on Rick's work. And that made sense to us.

As far as inadvertent waiver goes, we knew, I think, in our drafting that we were not going to make a rule that would be definitive, that you could predict precisely how it would come out. Any time you use the word "reasonableness," you're at the mercy of different judicial interpretations. Well, we believed, I think, that the courts would work it out and that the case law would develop. And to some extent, I think that's happened. I think the better cases are—

PROF. CAPRA: Well, we'll see. That's our next topic.

PROF. BROUN: Right. I think all of us believe that the most important part of Rule 502 is 502(d). I think that the idea was, and having talked to a number of lawyers who were regularly using clawback or trying to use clawback or quick-peek agreements, they wanted something—they wanted to be able to rely on that kind of an agreement, not only in that litigation, but in other litigation, either in the state or in the federal courts.

We worried a bit about the constitutionality of trying to force state courts to follow a federal court order protecting against waiver, but I think we ultimately came out with a notion that this is a ruling in aid of federal jurisdiction, and it is—

PROF. CAPRA: And we got a legal opinion from Professor Dan Meltzer of Harvard, which helped.

PROF. BROUN: Yeah, and that really made us feel more comfortable.

Particularly, I might just say a word or two about selective waiver. The first communication we received that kind of spurred us into action on this was from Congressman Sensenbrenner, then-chair of the House Judiciary Committee; and in his communication, he referred to selective waiver, the idea that you could disclose your documents to a governmental agency, but not have that waiver apply to private plaintiffs. The courts—most courts have rejected that limitation on waiver. And we flirted with it; and, finally, for both policy and political reasons, cut it out. So I've read with interest the cases on Rule 502, and I'm interested to see what the rest of you have to say—

PROF. CAPRA: Just parenthetically, do you know who wrote Sensenbrenner's letter to the Rules Committee?

PROF. BROUN: I do not.

PROF. CAPRA: I did.

PROF. BROUN: That's a shocker.

PROF. CAPRA: I wrote myself a letter. The way that worked was, Judge Levi, who was the Chair of the Standing Committee at the time, was in contact with Sensenbrenner, with the idea that it would be better to get some expression of support at the outset before the Rules Committee started on a waiver rule. And Sensenbrenner said, "That sounds good. Write a letter." So I wrote the letter.

I'd like to make two observations from the previous presentations. One is, you can see how difficult it is to get something through Congress, even if it's not controversial. So one thing that's really not on the agenda for today is to discuss ways to amend Rule 502. That's kind of a low priority, because I think that's probably never going to happen.

And, secondly, Ken referred to the need for predictability in case law on privilege and one of the things that's happened after 502 is that sometimes the case law is not as uniform and predictable as the Evidence Rules Committee thought it would be. I'd like to turn to Judge Grimm for a description of what's going on with the case law under Rule 502.

JUDGE GRIMM: Sure. The notion that there was so much hope and expectation for what this rule would do, and the disappointment, to say the least, that, four years later, it seems to have been the shout not heard round the world, it reminds me of the line from that great Gilbert and Sullivan song, which is, *When Britain Really Ruled the Waves*. And it says, “The House of Lords throughout the war did nothing in particular, and did it very well.”¹⁶ So the nightmare for me is that, if 502 four years from now has done nothing in particular, but very well, that would be a tragedy.

I think that the concept of why 502 is so important and why we had so much hope for the implementation was, you will recall—and this is an area where Professor Marcus’s great work has its fingerprint as well—in 2006 when the package of changes to the Civil Rules was to come in dealing with discovery of electronically stored information, one of the changes was Rule 26(b)(5)(B), which would allow a mechanism, a civil procedure mechanism, to assert privilege or work-product protection after you had already preserved it. And that was put in, and the advisory note talked about what was then very current in the literature among practicing lawyers of these quick-peek and clawback non-waiver agreements, which logically make a whole lot of sense when you’re trying to conduct discovery in a proportional fashion, which is an absolutely essential goal that, if we don’t achieve, then all of this is just window dressing. And it was very logical to have an agreement that you could claw back something and then assert privilege. And then if someone said, “Well, the privilege doesn’t apply,” you could go to the court for resolution.

But in the advisory note to the amendment to Rule 26(b)(5)(B), in recognition of the limitations imposed by the Rules Enabling Act, there was the little notation saying, listen, if you get this—we’ve been talking about waiver. That’s the common law. And so you may have this terrific clawback agreement, but it may not be any good, particularly if a third party in litigation that would involve the same information took the position that we may have agreed with your adversary in that particular case, that it wouldn’t be a waiver, I didn’t sign on as a party to that, and there was a possibility of use of the material in other litigation.

So when the cases came out, and from my view, having had the honor of going up to Fordham when the discussion took place about what 502 would look like and seeing the final product, it is a masterpiece of clarity and efficiency.

But what have the courts done with it? I will tell you that there are, it seems to me, three areas where there has been disagreement, two of which are current and problematic, and one of which I think, has finally sorted itself out.

The first one, Professor Broun, was about the meaning of “inadvertent.” You would think that the word “inadvertent” would not cause a great deal

16. W.S. GILBERT, *IOLANTHE* act 2 (1882).

of mischief. And not being the sharpest tool in the shed, when I think of inadvertent, I mean a boo-boo, it was a mistake, “owie” kind of thing.

PROF. BROUN: That’s the word we thought about using.

JUDGE GRIMM: Yeah, that’s right. But as a result of common law development before Rule 502, what had happened is that courts had developed a multi-factored test to determine whether or not the production of something that was privileged or work-product protected would constitute a waiver. And that analysis turned out to encapsulate all of what became 502 and its requirement of reasonable steps to protect against waiver. Because it involved how much time did you have, what efforts did you take, was it reasonable, and fairness was one of the elements.

And that body of case law is discussed in the advisory note as being relevant, but not adopted. Okay. The other thing is that somehow kind of lost in the shuffle is that because 502, unlike ordinary Rules of Evidence, was codified by Congress, it supersedes inconsistent case law from whatever authority it may be, Supreme Court, Court of Appeals, or District Court. And so the notion that anything that happened before here may be informative, but not dispositive, kind of got lost in the shuffle.

And there was a series of courts that, when they first came out to talk about inadvertence, went through the whole multiple-step analysis to include reasonableness to decide if it was inadvertent, and then said it was inadvertent, and then got to the next step under 502(b), which was, was it reasonable?

Now, didn’t we already do that? And so the conjoining of reasonableness in the pre- and post-production analysis to determine if it’s inadvertent got folks really off track. There were a number of decisions that said that. Eventually—and my dear friend and colleague, John Facciola, is responsible for one of those cases, the *Amobi* case—the center of gravity has become inadvertence as boo-boo. Don’t worry, reasonableness is important, but it drops down into 502(b)(2) and (3). And so it’s useful, but inadvertent now does mean boo-boo, essentially. I think that’s the common majority view.

The second area, which, to me, is more problematic, far more problematic—and it ties in with the third—is about the concept of pre-production reasonableness under Rule 502(b). Now, keep in mind that, if the notion is that we look at the case and we say we’ve got a half-a-million-dollar case and we’ve got a terabyte of electronic information and if we look at every one of the documents that we have to produce, it’s going to cost us two-and-a-half-million dollars to decide a half-a-million-dollar case. And that’s probably not a model of efficient dispute resolution.

So how are we going to get through this? And the lawyers come up with steps that they might take. And the *Mt. Hawley* case is an example of what happened.¹⁷ It was a very advanced search done. They had an ESI consultant that came in. They tested for privilege. They had a package

17. *Mt. Hawley Ins. Co. v. Felman Prod. Inc.*, 271 F.R.D. 125 (2010).

from a company that was well known for doing that. And about a handful of privileged communications were put forward. But the judge, somewhat because of the substantive issues in the case that suggested that there was some mischief going on and because of some excessive production that the judge considered to be a data dump, really came up and said that efforts that most of us in this room, I think, would think were extraordinarily reasonable, computer search, producing information, properly configured software, that it wasn't reasonable and resulted in a waiver. The court set the bar so high that what was reasonable meant that, to rely upon the cost efficiency and let the parties deal with that on their own, would not be possible. And that theme of a strict standard of reasonableness was reported in a couple of other cases.

So there is authority out there that stands for the proposition that what you must do to meet the reasonableness requirement of Rule 502(b) is, by another view, unreasonable.

PROF. CAPRA: If I may interrupt, maybe that's actually good case law. It provides parties with an incentive to go to 502(d), instead of seeking protection in a Rule 502(b) ruling after the fact that they are not going to get.

JUDGE GRIMM: Well, exactly, which is why I—I asked you to say that, so I could say—don't get too concerned about it, just keep reading down in the rule.

The next area of concern that has come up is that 502 has multiple subsections that interrelate, but the requirements of (b), for example, do not have any impact, at least were not intended to, on (e). So if Maura and I are in litigation together and we have an agreement, I can make the agreement, "Maura, I'm not going to look at any documents. This is a \$150,000 case. I'm going to give them all to you. You tell me the ones you want to use. I'll then review them for privilege, and then we can sort it all out."

Now, when I had done that, trust me, that's not inadvertent production. That's as advertent as you can get. And by the measure of reasonableness, while we would say it's reasonable given the low value of the case, a number of courts when looking at the agreements that the parties have entered into have said, oh, no, we can't possibly—when they came to 502(d), said, no, we aren't going to approve that. Your poor client, this is attorney-client privilege, you have to genuflect when you think of these things. And you have to go in there and take a look at all of the documents, because it would be improper or unreasonable to just turn them over. You have to take more steps. And as a result that was never intended for Rule 502(d) or (e).

If the court couldn't get the parties to agree and come to the court for an order under 502(d), the court should take a look at what is proposed, ask questions for clarity. But the notion of the combination of 502(e), which is binding only on the parties who agree to it, having the effect that it has in other litigation against nonparties is central to the courts being able to say, we're going to cede to you, the parties, the ability, because you know the

case better, to come up and say what is right. And what is right, if you agree, can be intentional disclosures.

Moreover, what compounds the problem of allowing intentional disclosures is some lawyers, under 502(e), have adopted reasonableness as part of the agreement and hamstrung themselves by incorporating some of the language or standards from Rule 502(b) that they didn't have to in a Rule 502(e) agreement. And some of the courts have said, "I'm not saving you from your own folly. I know that you wanted to allow free disclosures. But you put reasonableness or 502(b) in there, and you're stuck with it."

PROF. CAPRA: Thanks very much Judge Grimm. Anybody want to follow up on the case law under Rule 502? Ann, have you got anything you want to add?

PROF. MURPHY: I think what's interesting about the cases—and I looked at a lot of the cases that Judge Grimm looked at as well; and, actually, my article was at the same time Judge Grimm was writing his. So I was horrified because mine was delayed a lot. And so I actually talked to Professor Capra, and I said, "I have information, metadata that shows that I actually did write this along with—"

JUDGE GRIMM: You did preserve that.

PROF. MURPHY: Yes. I think what amazed me was, even within the same district, you have differing opinions.

JUDGE ROSENTHAL: Right.

PROF. MURPHY: And that is very difficult for lawyers to work through, to have no idea how it's going to be interpreted. And I think that's creating quite a problem.

MS. VARNER: Dan.

PROF. CAPRA: Yes, Chilton.

MS. VARNER: We'll talk about this a little more later, but I think that unpredictability of results is a primary reason—not the sole, but a primary reason—that 502 has not been used more broadly. I think the notion that you can't tell in Maryland, for example, with Judge Grimm writing his article and then one of his colleagues writing another opinion that's in another camp, is really troubling, because the stakes remain high. The rule has tried to contain the damage. But if you guess wrong and you end up in a court where you're not sure which way a judge is going to go, the stakes are very high. You're back into subject matter waiver and all of those things that are of grave concern. And you have no appellate remedy to speak of, because no courts are taking discovery disputes anymore, whether they involve privilege or not. So you're just stuck.

JUDGE BROWN: You can't. How can you appeal?

PROF. CAPRA: Yeah, you can't appeal in that situation. It's not a final order. Rick.

PROF. MARCUS: I thought I should interject at some point, having lived with the rule process as long as you have, this is the rulemakers' cry

of pain.¹⁸ Number one, judges don't pay attention to what we said. Number two, lawyers don't read what we adopted. Those problems don't go away.

PROF. CAPRA: Ariana.

MS. TADLER: I'd like to second what both Chilton and Professor Marcus said, but it really does come down to the fact that most practitioners really don't understand how the rule works. And part of the problem—and I apologize on behalf of all lawyers—they don't keep reading down the rule. And one of the things that we grapple with, certainly with respect to the rules in the e-discovery world, is how much do you have to put on the face of the rule in contrast to committee notes and other content, because, regrettably, lawyers—and I'm sure none of you judges here—but some judges don't keep reading. And that's a problem. And, clearly, we need to clean up the mess.

PROF. CAPRA: Judge Diamond.

JUDGE DIAMOND: I have a Rule 16 conference in every civil case, and Judge Rosenthal does as well, and I know Judge Brody [a member of the Evidence Rules Committee in attendance] does, because I used to appear before her. What I started doing in crafting a case management order is, I said to the lawyers—and these are big cases, small cases, and in-between cases—“Would you guys like to draft a 502(d) order?” And almost invariably, they look up at me the way the dog does when you smack the newspaper on the table. They had no idea.

PROF. CAPRA: That is in fact the next issue on the agenda. It seems that one of the reasons why Rule 502 is underutilized is because people don't know about it. Judge Brown has been doing some work on that, and I'll go to Steve Morrison as well. Judge Brown.

JUDGE BROWN: That's a great segue into what I was going to say. As magistrate judges, we go from the theory right down to the practice, down to where the rubber hits the road. And I've had exactly that same experience. We get our cases usually on referral, and the district judges are the ones who have the initial scheduling conferences. We get them after life has gotten messy, and there is a big dispute and a big pile of papers. And then, oh, referral to the magistrate judge sounds like a good idea.

JUDGE FACCIOLA: That is frequently how that happens.

JUDGE BROWN: So I've had that same experience. To give you an example, last winter I got such a case where the district judge set a tight deadline for discovery conclusion, and it was totally bogged down because the defendant was doing a document-by-document review. And I said, “Well, have you folks talked about Rule 502, either a 502(e) agreement or 502(d) order?” And they looked at me like, totally blank, no idea what I was talking about. So I ordered them to go back and read it and come back.

But that's not an unusual experience. In fact, getting ready for this conference, I talked to one of my friends, who is a leading lawyer in the

18. Richard Marcus, *The Rulemakers' Laments*, 81 FORDHAM L. REV. 1639 (2013).

area of employment law. And I said to her, “Do you ever incorporate in your protective orders a 502(d) order?” And she said, “What’s that?” I said, “We’ll take clawback agreements and turn them into protection for you in other circumstances.” And she said, “Oh.” And I talked to Judge Koeltl before I came here—he is heading the FJC project on initial discovery protocols in employment law, and I said, “There is no 502(d) reference in your draft protective order. Did you decide not to do that?” He said, “It didn’t come up.”

I have a theory.

PROF. CAPRA: Yeah, let’s talk about that theory.

JUDGE BROWN: I have a theory that lawyers don’t look for help in the evidence rules when they’re dealing with discovery. They just don’t look there. And thinking about why that might be—civil trials are so rare today. I don’t think that the evidence rules really are considered in the process of discovery. Discovery has become divorced from trial and divorced from evidence, even though, in theory, discovery is to lead to admissible evidence or likely to lead to admissible evidence.

PROF. CAPRA: If I could, I’d provide some background on why Rule 502 was put in the Evidence Rules. There was a discussion at the beginning of the process—do you want to go through that Judge Rosenthal?

JUDGE ROSENTHAL: No, you go through it.

PROF. CAPRA: The Evidence Rules Committee took the position—and not because it was going to be their work and they should get the credit—that the rule would be applicable in both civil and criminal cases. So putting it in the Civil Rules would not be sufficient. Also, privilege rules are evidence rules. Rule 501 is the rule covering privileges and it is in the Evidence Rules. And it would make little sense to have Rule 501 on privileges in the Evidence Rules, but a rule on waiver of privileges in some other set of rules.

But I guess the point of this discussion, one of the things we’re going to be discussing today, is how we can better integrate the discovery Rules and Rule 502.

Judge Facciola, do you have a comment?

JUDGE FACCIOLA: Well, just to agree with you, but I think one of the things to bear in mind—this is going to sound silly—a lot of this discovery work is not done by human beings. We’ve reached a point where the creation of most privilege logs that assert the privilege are done by a data processing system. You are dealing with the most junior people imaginable, and they may be in Bangalore. So they are just told, “Hey, kid, go look at this stuff. And anything that’s privileged or anything that’s from a lawyer is privileged.” That hits a button and spits all this out. So when it comes to Geraldine or Paul to me, it is such a God-awful mess because, frankly, nobody has thought about it. Nobody has even thought about the nature of the privilege, let alone reached the point of what we can do about waiver and Rule 502. We are at the most fundamental level of

understanding that's imaginable; and, as I say, I fear it's being done by machines.

JUDGE BROWN: And the practicing bar is not a monolith. I mean, the lawyers on this panel are all sophisticated and do high-stakes litigation, and they've thought about these issues thoroughly. But then we get the people that are in the court because of diversity jurisdiction, and they don't have a clue. Our evidence rules in Illinois, which adopted the Federal Rules of Evidence as they were before the restyling, of course, don't have any equivalent to 502.

And the question of reading the commentary is a very good point and very important. It would be great if people did that, but a lot of people have a version of the Evidence Rules that appears in what we call Sullivan's. It's a directory of rules and lawyers and all collected information. It's just the rule. There is no commentary that goes with it.

PROF. CAPRA: I'm going to turn to Maura and her thoughts on practitioners and knowledge of 502.

MS. GROSSMAN: First, back to Judge Brown's point and people looking to the civil rules, I've often been asked by people, "What's the difference between Rule 502 and 26(b)(5)(B) of the Civil Rules?" They figure that 26(b)(5)(B) deals with a clawback and a protective order provision as well, so they must be the same. They haven't a clue about the difference. That's to your point, they're not looking at the evidence rules, and they don't understand the difference. One thing we talked about, those of us who are in the Sedona Conference, which is the preeminent think tank in the e-discovery area—we call it the "Sedona bubble." Some of us do e-discovery full-time. We're a special breed. We live for decisions from Judge Grimm and Judge Facciola, and we're always watching the airwaves—

JUDGE FACCIOLA: You need a life, Maura.

MS. GROSSMAN: —for when they come out, and we read John [Barkett's] and Professor Marcus's papers with real excitement. But we live in the Sedona bubble. We think the rest of the world is like us, but the average lawyer at my firm is not reading Sedona pieces, is not reading e-discovery blogs, is not reading 502 opinions.

And I was talking with a very senior partner at a prominent law firm very recently, and he kept referring to e-discovery as "back office." And I finally said, "Well, what do you mean by 'back office?'" And he said, "Well, it's technical. It's not legal." And some of this is just an attitudinal problem that this stuff is for the idiots to do. It's for the janitors. It's not the macho legal stuff.

PROF. CAPRA: Interesting. Yeah, John.

MR. BARKETT: Two points. First, the ABA House of Delegates in August adopted technology amendments to the Model Rules of Professional Conduct. As they percolate through the states, maybe they'll change the attitude that Maura just expressed. For Model Rule 1.1, which is the competence rule, there is a new Comment 8 providing that lawyers have to

stay abreast of changes in technology. And then there is a change to the text of Rule 1.6, the rule that deals with protecting client confidences. Rule 1.6(c) now states that lawyers must take reasonable steps to prevent unauthorized or inadvertent disclosure of client-protected information.

PROF. CAPRA: So now we're assuming they're going to read those rules?

MR. BARKETT: Yes, indeed. Well, of course, it's going to take a while for the states to adopt these.

PROF. CAPRA: Lawyers have personal incentive to read those rules to avoid discipline—as opposed to protecting their client or anything like that.

MR. BARKETT: The point is that back office moves to the front burner when the Rules of Professional Conduct start saying that. Entering a 502(d) order, you would think, would be a reasonable step to prevent the inadvertent disclosure of privileged information.

MR. MORRISON: Dan, just two quick comments. One, on the passage of time, four years, Mao Tse-Tung was asked in the middle of the twentieth century how he felt about the French Revolution, and he looked back at the Western reporter and said, "It's too early to tell." And so this is a little of a situation where, you know, lawyers haven't caught up with the rule change, and judges haven't caught up with the rule change.

PROF. CAPRA: So you think we're panicking?

MR. MORRISON: Well, let's take a look at what's working. The inadvertent definition is starting to work, and it's working in the right direction. And the scope issue is working, this subject matter waiver versus the waiver of only the document inadvertently disclosed. So those are working. And clawback is working. Clawback is universal now and being actually plugged in. So what's working is making a lot of sense to lawyers.

What's not working? What's not working is the feeling of I can just flush these documents out of one of my clients into the hands of some plaintiffs' lawyers and possibly into the hands of whoever else happens to be around. And so I go back on my second point to Judge Rosenthal's excellent opening remarks where she said the three key words that guide us as lawyers: skepticism, cynicism, and suspicion.

And so when you look at the body of people that you work with every day in litigation, they are by training, and by almost genetic determination, skeptical, cynical, and suspicious. And in that regard, you have a client base, an in-house client base that says, if I don't employ all of this prior pre-discovery reasonableness, put together all this expense, some day I'm going to be sitting in the general counsel's office with the chief executive officer explaining how come that stuff ended up in the media outside of my case. And I can't explain that unless I spend all the money to say, "Boss, it wasn't my fault." So that's kind of where we are, I think.

PROF. CAPRA: That's actually two points. One is just base ignorance of the rule, which some have been talking about; and the other is concerns about the risks of using the rule, even when you know about. And as to both use and risks I want to call on Judge Diamond. And then I want to talk

to Edward Buffmire, who has done some research on use of Rule 502 by lawyers.

JUDGE DIAMOND: There is enormous discomfort, if—I'm sure when Chilton speaks, or if you ask Bill Hangle [a practitioner and member of the Evidence Rules Committee in attendance] or a criminal practitioner, defense attorney, somebody representing a major corporation that's been indicted by the government, how he or she would feel about the prosecutor having confidential documents and then giving them back.

And we're going to get to this, and I really don't want to get ahead of the hounds with the notion of using fruits of disclosed information even if there is not a waiver. But the idea of putting the toothpaste back in the tube is difficult to grasp. But let's forget about the toothpaste being put back in the tube. The adversary has your most confidential documents because you have an agreement and you saved money by not going through the documents first. A lot of lawyers are—those who are aware of 502 are awfully uncomfortable with that.

PROF. CAPRA: Edwin, do you want to talk about your research at this time?

MR. BUFFMIRE: Sure, sure. So basically Mr. Morrison's point about clawbacks being often used—that's been successful. Attorneys know about clawback agreements. What I did to try and get a snapshot of how attorneys were using or not using Rule 502 and how they were really addressing privilege in litigation, I went through the dockets for the Northern District of Illinois for all cases that were open at the time I was reviewing that had been filed or reopened in January or February of 2009, several months after the rule, and then looked—compared those dockets to those cases that had been filed in January or February of 2010, a year later, to see if attorneys had picked up on the rule. And in 2009, I thought those would be good months because it was within a reasonable time of when the rule was enacted, so I figured there is the largest amount of commentary about this new rule coming out, all the litigation magazines that attorneys get and other kinds of notice.

I excluded some cases. So when you hear these numbers, I don't want to be under-representing the work that Judge Brown and her colleagues in the Northern District of Illinois are doing. Cases like habeas and ERISA were excluded. But I wound up reviewing more than 500 dockets.

And what I found was that a number of attorneys in cases had protective orders that contained clawback agreements; and as we suspect, and the reason we're here, nobody was really mentioning Rule 502—let alone specific reference to Rule 502(d). There were three references to Rule 502 in the 2009 cases out of roughly 150 dockets there, and then there were seven references in 2010. But there were roughly double the number of cases that remained open at that time. So really no difference in the use of Rule 502.

However, there were quite a few, as you would suspect, protective orders that included clawback agreements and the parties were very concerned

about privilege. So attorneys were clearly contemplating some type of non-waiver agreements in their protective orders, but not utilizing Rule 502(d)'s protection, which I think raises a number of issues for me. What language in a protective order, when a judge goes to look at it, is really necessary to invoke the protections of Rule 502(d)? Because a lot of these protective orders are actually quite inconsistent.

The orders that used Rule 502, in specifying who was bound by the agreement, only referenced the parties or their experts. And so one wonders, okay, well, you thought about Rule 502, but one of the main protections of Rule 502 is that it goes beyond the parties. So how that language, apparently limited to the parties, would be constructed by a later judge looking at, okay, well, did this actually bind third parties or not, I think, is one of the things that remains uncertain.

PROF. CAPRA: One of the things that we all know we'd like to have come out of this Symposium is, not drafting on the floor, but a draft 502(d) order that we can consult on and agree upon after the Symposium.¹⁹ And specifying protection beyond the parties is a really good point. Rick.

PROF. MARCUS: A quick observation about use of protective orders: the long-term, decades-long orientation of the debate about them has focused on the parties and the experts and others involved in the pending case, more than other cases. It sounds like folks are just adding on to a format they use for a different purpose.

PROF. CAPRA: Judge Brown, what are your thoughts on consistency of protective orders?

JUDGE BROWN: In connection with protective orders, one of the reasons why they're so internally inconsistent is that the process is usually something like making sausage. You're taking something somebody had and used in another case a couple of years ago, adding a few clauses from the other party who used it in another case. The whole—they tend to be internally inconsistent, which is a problem.

PROF. CAPRA: Steve Morrison and Judge Diamond raised the issue of, even if you know about Rule 502 as a lawyer, you might not be willing to invoke its protection. I want to talk about that for a couple minutes. Judge Rosenthal.

JUDGE ROSENTHAL: Steve has, I think, hit on an important issue, and that is the need to separate and the apparent lack of attention to the separation that we see in our Rule 16 conferences, the need to separate the concern that drives pre-production review based on a fear of waiver, and the concern that drives pre-production review because you know you've got gems in there that you can't afford the other side to look at. They're very different worries.

502 helps remedy the fear of a finding of waiver. But it doesn't help you on the other, protecting the gem. But lawyers don't appear to be, even as they plan their discovery and their pre-production review, making any effort

19. *Model Draft of a Rule 502(d) Order*, 81 *FORDHAM L. REV.* 1587 (2013).

to distinguish between them. And when I ask, they look at me like I am introducing this marvelous new thought.

It's quite bizarre, and I wonder if the practitioners, as we go through the discussion, can help us work through why there is so little attention being paid to saving costs when there is an absence of anything that could be disclosed that is really going to hurt, and yet the lawyer insists on taking anti-waiver steps in the name of taking anti-disclosure steps.

PROF. CAPRA: Let's turn to a lawyer for a response. First Chilton, then we'll turn to Ariana.

MS. VARNER: Judge Rosenthal and Dan Capra and I had a discussion at the ABA meeting in Washington on 502, and Dan and I got into a dust-up about why 502 is not being used any more regularly, and he found it distressing. I went back, and I canvassed my litigation partners. I should start by saying, Dan, that we negotiate 502(d) orders in every case. We do it as a best practice, because regardless of whether we review or don't review, the chances are that something is going to slip through the filter.

So we routinely negotiate such orders and agreements, and we style them as 502(d) orders and agreements because of the reasons that we just touched on.

But I got these responses from my partners about why their clients won't agree—because we believe we can't do this without client approval. We can't unilaterally make the decision not to review. And this is what comes back. And, Steve, it usually is from the client who is an in-house lawyer.

Number one, you can't put the toothpaste back in the tube. If you reveal sensitive or confidential or competitively sensitive information, you can't tell your adversary, forget about it, even if you institute all of the procedures to reclaim. The possession of that information by the adversary or by third parties can generate additional discovery that would not have been done, additional claims that may not have been made, additional problems that have to be resolved.

Then when review is done, even with a 502(d) order in place, we at least are trying to figure out where we put the expensive time to review those documents. We don't want expensive timekeepers looking at stuff that doesn't matter, but somebody, or some technology, has got to make that kind of call. Perhaps Judge Facciola has to make that call. But that's something that in-house lawyers are very interested in.

I think the next issue is the uncertainty of the case law, and in Dan's materials, the phrase that an uncertain privilege is no privilege at all, comes to bear here. And we see time and again courts confusing 502(b) with 502(d), which is one reason that we style our orders specifically as a 502(d) order.

And, again, as I said, there is no appellate review, if you happen to get in front of a judge who doesn't agree with Dan's and Judge Rosenthal's interpretation of 502.

PROF. CAPRA: We should be on call.

JUDGE ROSENTHAL: It's like the turkey hotline at Thanksgiving.

MS. VARNER: The next reason that I was told is that, presumably, at some point, some human being, if you trundle toward trial—I agree that we suffer from the vanishing trial syndrome, but as you lumber toward trial, what you may do for a long time before the settlement occurs, somebody is going to have to know what is in the documents. And so frequently clients tell us they would rather know at the front end and thereby avoid waiver of the sensitive crown jewels, or—instead of waiting until the eve of trial, that it makes them better negotiators in settlement, and it gives the client a much more realistic expectation of whether this is a case that ought to go to trial.

And then I guess I would fall back on perhaps the most prevalent factor which Steve touched on, which I would call human nature. I do believe that there is an inbred reluctance to say that what would have been five years ago the gross negligence of not looking for privileged documents before they were produced is now a get-out-of-jail-free card. I think that is a very hard leap of faith for people to make, and it's especially hard when the client is a lawyer who was trained, brought up to believe that waiving a privilege was one of the—maybe the worst thing you could do as a lawyer. And I think it will take more time before people believe that Rule 502(d) means what it says.

PROF. CAPRA: Chilton brings in two new ideas. The first thing is, after everything is said and done, there is no reason not to get a 502(d) order. That's a fundamental point. Even if you're going to spend a billion dollars in privilege review, you want to get a 502(d) order, because there is going to be human or machine error and privileged information will slip through. So whether to get a 502(d) order is a different question from whether to lessen the costs of preproduction privilege review in reliance on a Rule 502(d) order.

Second if a client says, okay, I really don't want this kind of information out to the other side, the toothpaste out of the tube, but they're willing to pay for it, that's not a problem that we were trying to address in Rule 502. If they're willing to pay for a billion-dollar privilege review to avoid disclosure of a particular little smoking gun document, there is nothing that we can do about that. What we were trying to do was help those who complained about those costs as being unnecessarily imposed by draconian waiver rules.

JUDGE ROSENTHAL: That's where you and I differ. I am much more guilt-ridden than you are. That is my problem. That's all of our problems—because that thinking increases the cost of litigation in the system, but it's a longer term issue.

PROF. CAPRA: What I fear is that the clients are not really involved in the dialogue about ways to lessen costs of review, that the lawyers are just, you know, going at it looking at every single document, redacting drafts that nobody cares about word by word. I just had one as a special master. I told a biglaw lawyer, "The drafts are not privileged because they're public documents, unless the lawyer took information out of the draft before the

final was disclosed to the public.” They go through every single draft, thousands of drafts, to make sure that words nobody cares about are kept from the other side.

Judge Facciola has been at the forefront of reining lawyers in from extravagant costs of privilege review. Judge Facciola?

JUDGE FACCIOLA: You know, I’ve had it. I mean, I have looked at my last—you know, I’m an old man. I looked at my last damn privilege log. Because, you see, I have to say to Steve and Chilton, I can’t tell you how many times Geraldine and Paul and I are reviewing documents and somebody has claimed privilege to a dinner reservation.

PROF. CAPRA: Right. “I’ll meet you at 2:00. Sorry I’m late. My taxi is late.” And that’s privileged? That email is on the log.

JUDGE FACCIOLA: And, you know, if I could find a smoking gun, I’d kiss it. Most of this stuff are what Professor Broun said, “Joe, here is the brief.” “Why does that disclose your mental processes?” “Well, I was communicating the idea, here is the brief.”

And you can’t keep going before the federal judiciary and demanding the immense amount of time doing this if you aren’t going to help us at all by separating the wheat from the chaff. So, believe me, read the recent opinions about privilege logs. We have had it.

PROF. CAPRA: And so the lawyer, say the same one you have in the last two opinions that you’ve written Judge Facciola, this lawyer says, “Well, I know the document is not important, but I don’t want disclosing it to be a subject matter waiver.” Well, that’s what 502 is going to do for you, dude. Protect you from subject matter waiver, or any waiver at all, if it is really privileged. Ariana.

MS. TADLER: The challenge here is what is it that 502 can address? It’s in the litigation context, and it’s on privilege. 502(d) is really not to deal with the gem document that really is not even a litigation issue at all. It’s not a privilege issue. But it could end up being a litigation issue, because if that item gets out, who knows what the consequence is.

The challenge for us and others who are looking at this issue is, well, maybe that’s just the dilemma that you have when you have such information. 502 can’t deal with it. In fact, none of the rules can deal with that.

And then you come to the issue that, if you have clients that some of you obviously do, who are repeat clients, you represent them in all contexts, that is that much greater of an issue, because it just has legs, and it keeps moving; in contrast to the defendant that you know only has this litigation. It’s really pretty compact. Is this something that can help move this process along?

There are some things that are around this table and other tables around this country that maybe we can solve. But there are other issues—they’re not our issues here.

PROF. CAPRA: I just get the sense though that there isn't this dialogue that you refer to with your client with a lot of lawyers and that they just go ahead, and then give them the bill, assuming that this client wants every single thing looked at.

MR. MORRISON: Yeah. Two fair comments, Dan. One it's fair to be cynical about the economic incentives, for at least my side of the *v*, the defense side of the *v*.

PROF. CAPRA: That is what I was referring to.

MR. MORRISON: And so it's fair to say, yes, there is money being made here, and a lot of money being made. In interest of making the money, now, the kind of clients that I work with every day, you are dealing with general counsel's office, and they're asking for a budget for everything nowadays. And so you really—you've got to have these budgets.

And if I could turn back to Judge Facciola, I also agree with you that it's a very fair point on the quality of privilege log that's being done, and the quality of privilege log is often generated as cheaply as possible, and it is very much technology driven. If it's got the lawyer's name on it, the inside counsel's name on it, it shows up on your dadgum log. And nobody wants to pay to have that reviewed. It should be reviewed by lawyers in advance.

Third point, going back to Judge Grimm, to your issue earlier, what I think troubles us on the practitioner's side about utilizing Rule 502(d) in the sense of pushing the document across the table and saving the money, a pre-disclosure review, is the constant overlay of what you called mischief and dumping, two key words.

Any time our side of the bar pushes a lot of documents over to the other side, we get accused of mischief and dumping. That becomes an infection in the courtroom that creates an odor that we can't get rid of that then creates a judicial suspicion that we are trying to get away with something; hence, then your fear of this waiver ruling coming down the wrong way, and multiple other issues coming down the wrong way.

So I've got to get back to the practicality of that dispute that takes place in almost every discovery case.

PROF. CAPRA: Well, I guess I can say that with 502(d), at least the drafters didn't think that there was going to be a document dump going both ways. I mean, the drafters didn't envision that there would be no review whatsoever.

MR. MORRISON: No, some kind of a relevance review.

PROF. CAPRA: What was contemplated was a case-by-case approach in which the lawyer and client conferred to balance the cost of privilege review with the value of the information subject to disclosure. And I think one of the reasons we're here is that the lawyer-client dialogue of costs and benefits in production under a Rule 502(d) order is not happening. I've spoken to corporate counsel who are, you know, your clients, right, 200 people in a room, and I asked, "Have you heard about 502?" "Have outside counsel discussed it with you?" Not a single one said yes. And these

weren't like low-rent corporate counsel. So there's a problem, and I think it is in part that outside counsel has a disincentive to enter such a dialogue.

Liesa Richter, I want to refer to you. And then I think we'll take a break for ten minutes.

PROF. RICHTER: When I looked at 502 and the question before us today was just why there wasn't more robust use of 502(d), I was struck, as many in this room are, by the nature of the change that litigants and judges are being asked to make—from an eyes-on, page-by-page type of review, to a let-the-documents-walk, if you will. That is a 180-degree turn, and given human nature, I started to think about what has to happen before you can actually successfully ask litigants to make that kind of a change.

And I used something from my psychology background, conceptual change theory, which basically says, before you're going to have an about face from one standard, page by page, to something inconsistent, you don't have to review it all, let it go, you have to have sort of data-driven dissatisfaction with the traditional model, eyes-on review—some showing that it's not working to solve our problems. And you also need data-supported, viable alternatives.

And I think what we've heard around the table is there is not necessarily data-driven dissatisfaction with eyes-on, page-by-page review. Lawyers feel safe. They are concerned about malpractice, ethical sanctions, that meeting in the general counsel's office, why did you let it go? The lawyer says, "I'm not dissatisfied with page-by-page review, because it gives me some insurance in that situation." The realities of financial incentives operate here as well, given that eyes-on review is more lucrative in a time when the legal market is shrinking. We can't ignore that. I don't think it's twisting of moustaches for most high-level lawyers who are saying, I can bill this file needlessly, but maybe coupled with the fear of malpractice or ethical sanctions—

PROF. CAPRA: Yeah, you feel better about it.

PROF. RICHTER: You feel better. It's a safe and lucrative process. And then viability of the new regime. I think we talked about a number of impediments to viability, visibility being one. People don't know that it's there. Operation being another. What's the end game? At what point do I know what I have? Am I really getting out of review or just delaying review to a later time when I'll need to do it anyway? And I think all those things are going to need to be addressed before you can have this kind of concept change that is meaningful.

And there are ways to do it, I think hitting all these things. But I don't think we've hit them all yet. And so it's not surprising that lawyers haven't made that type of about face yet.

PROF. CAPRA: That's a good close to the first act. Wouldn't you agree? So we're going to start in ten minutes. And what we're going to start with is fruits. We're going to talk about the *Kastigar* issue with Judge

Diamond.²⁰ And then we're going to move to the problem of accelerated discovery as it relates to Rule 502(d) orders. So we'll start in ten minutes, sharp. Thank you.

[A recess transpired.]

PROF. CAPRA: So where we were, we ended on the idea of data-driven issues, and Professor Richter led us on this area of what needed to change. So during the break, Professor Marcus thought that it might be a good idea, and I agree, to discuss some of the new things that are happening in discovery and how they might relate to an energized Rule 502(d), particularly the concept of predictive coding. Rick, start us off, and then I'll move over to Maura.

PROF. MARCUS: Well, I guess it would be useful to introduce a thought—and I think Maura can elaborate on that: It may well be time for us to think about the world of the second best. That is, if we think there is a gold standard way of doing discovery with the quill pens and the nineteenth century mode—obtaining every relevant document—at least we should think about alternative ways of doing it. Maybe that leads us to the conclusion that the gold standard wasn't so golden after all. I think that's where Maura's work has been pointing.

PROF. CAPRA: The question is whether the tradition of eyes-on review and perfect and complete discovery is something that is and should be changing. That is what I would like Maura to talk about.

MS. GROSSMAN: I've done a fair amount of research in this area, and if you actually look at how well attorneys—or how good they are at reviewing documents when you sit them in front of a computer and they spend the whole day doing this, they're actually nowhere near as good as we think. They're not consistent. I've done many studies where we've looked at inconsistencies where the same email and the same thread—one associate marks it relevant or privileged, and another marks it completely differently.

So that leaves some room for technology-assisted review for using these computer algorithms that are, in fact, more consistent. It's been a challenge to get lawyers to move to using these technologies, even in the relevance area. And I'm probably, as my colleagues would say, I'm at the forefront of using this search technology and have a lot of experience with it. I have yet to use it for a privilege review, even though there is no reason, in theory, that you couldn't program the computer to make the same distinctions between privilege and non-privilege as you could between relevance and non-relevance. And these technologies are game-changing in terms of speed and cost.

Some of the fear is the same fear we've talked about here already. Some of it is the fear that if in fact it can be done quicker, the judges will order shorter time frames for discovery. And there are many psychological and other factors that go into it.

20. *Kastigar v. United States*, 406 U.S. 441 (1972).

But usually with the privilege review—and we were talking about this before—it’s the youngest associates at the firm who do this. And I remember when I was a junior associate, the thought of making one error and being the one who blew it and disclosed something that shouldn’t have been disclosed and being taken down to 52nd Street and shot, or ruining my partnership chances, anything like that—

PROF. CAPRA: Which would be worse than being shot.

MS. GROSSMAN: —made me very conservative, very conservative. And combine that with no training, or a range of lawyers—from some who actually did see that cover fax as privileged to some who were much more thoughtful in their analysis. So, again, you’re going to go with the lowest common denominator.

PROF. CAPRA: So you’re saying that having taken an evidence course did not fulfill your qualifications to go through the six factors that determine the attorney-client privilege and apply them to an email string.

JUDGE ROSENTHAL: Unless it’s your course, Dan.

PROF. CAPRA: We’ll get to Allyson on that and what we can do for law students.

MS. GROSSMAN: Right. So I do think there is promise for these technologies to be very helpful. Unfortunately, they don’t solve the privilege log problem because they can’t make the nuanced decision of whether it’s work product or attorney-client privilege and why.

PROF. CAPRA: There’s a special difficulty in reviewing for work product. If it’s a memo to a lawyer, you automatically think privilege. But that doesn’t have to be the case with work product. It doesn’t have to involve a lawyer at all. And so that’s even a harder concept for low level associates to review.

MS. GROSSMAN: It’s also harder in training the computer about those subtleties. But a 502(d) order should take care of that.

PROF. CAPRA: Let’s hope. John.

MR. BARKETT: Two points. One is just a reaction on finding privileged documents. There are some interesting reported cases where, like in the old days when you have a note on a document and you didn’t know who wrote the note, well, you’re seeing that also in electronic documents. So that doesn’t go away. You may not be able to find those without reviewing them or having somebody realize who wrote the document or whether legal advice was being captured in the document.

Second, with respect to predictive coding, Rule 502(d) may play another role which could be quite significant, because one of the hot issues is whether or not lawyers conducting the predictive coding process of training the computer are required to be “transparent,” to use a word from a reported opinion, and whether they must discuss with their adversary their decisions on relevance to populate a seed set. At least one reported decision urges lawyers to be transparent during the predictive coding process. And a number of lawyers have said to me—I’m publishing an article soon on this,

and I sent it out to some folks for review—“We don’t plan to be transparent. That’s not what we want to do, what we regard as our work product.” And so there is a place for a 502(d) order in the predictive coding arena as well.

PROF. CAPRA: Judge Facciola.

JUDGE FACCIOLA: Two questions. First of all, all of this, as we think about it, particularly as we go through a mechanized universe, we’re ignoring the problem of redaction. The example Professor Broun started us with this morning, it would seem to me the first sentence is not privileged, but the second is. You can’t do that anymore with a fifteen email string. The law is unequivocally clear in my circuit that it is a gross abuse of discretion not to force redaction. And merely because one sentence in the document is privileged doesn’t mean the whole document is protected.

Now, the second problem that John talked about that I have struggled with—and I think Paul wrote an article about this several years ago, and I struggled with it in a case called *Disability Rights Council*²¹—is whether the process of deciding what is relevant and what is—how you do it, whether that is opinion work product. If it is, then any hope of transparency is gone. And that is a very significant problem, because the little authority out there is in a paper universe, a Third Circuit case about going through a box. That doesn’t have anything to do with the world in which we live.

I, as a judge, would love to see rulings that say that that process of relevance review is not work product; or if it is, there is a substantial need to find it out so we can assess it during discovery, or else Rule 502(d) never begins to operate, because we don’t know what you did.

PROF. CAPRA: Judge Grimm.

JUDGE GRIMM: The notion of these computer-assisted reviews where you input into a software program an analytical approach that lets it go out and then grab and come back as being something that is—that there is a fear about using that, maybe not before as the only method of review, but as a beginning method of review, is part and parcel the notion that a debate about what do we have to show to the judge? If we spend the money on doing this, do we let it in? Does that get into evidentiary issues that would come under 702 because of scientific, technical, or specialized knowledge? And is the judge going to require some level of reliability that is overwhelming; and, therefore, we can’t prove it, and we wasted the money going into it.

There is this assumption—and I think, Steve, your point is very key here—most people will say, I have a comfort factor if we looked at everything because I think we’re going to be able to screen everything and do it right and the other side thinks they will get everything relevant.

But what really opened my eyes about five or six years ago was the data—and Maura has some more recent studies on that—that eyes-on

21. *Disability Rights Council of Greater Wash. V. Wash. Metro. Transit Auth.*, 242 F.R.D. 139 (D.D.C. 2007).

review, the gold standard, gets you maybe 20, 25 percent of what you should be really getting. So we have small shoes to fill for a computer to be able to beat that. And most computers will do that with the plug pulled out.

PROF. CAPRA: Dan Smith.

MR. SMITH: Just to expand a bit on the research that's being done with computer-assisted review. Not only is it showing that human review captures only 20 to 25 percent of the relevant material, but in attempting to figure out what is the gold standard to compare against the computer's performance, I think the research has shown there is 60 to 65 percent agreement among experienced attorneys as to what constitutes relevant material, and probably the same level of agreement as to what constitutes privileged material. And if you take that level of performance and apply it to a database of electronically stored information where you have multiple copies of the same document and different people reviewing them, it's inevitable that privileged material is going to be released.

And I think that should be the data-driven dissatisfaction with the current system that we have. I'm just at a bit of a loss to understand why it's not more widely understood.

PROF. CAPRA: Right. You know, another problem with the computer-assisted review is that predictive coding is an iterative process. So you have to see how you teach the computer over time. But that iterative process has to be bilateral. It really can't be unilateral, because the plaintiffs—it's usually the plaintiffs—want to know what defense counsel is saying to that computer, information is being fed to it, so that the computer can figure out what's relevant. So the problem is that you get a seed set, and it has to be reviewed by both sides.

And so my understanding and my experience is that plaintiffs have to see how the process is going; and, therefore, they get to look at the data that goes into the computer. Hence you would have the same problems that Steve is having with disclosing information to the other side, the same problem of fruits, and so the same reluctance to use a procedural that would cut the costs of discovery.

MS. GROSSMAN: Well, if you look at the *Da Silva Moore* case,²² people have spent—there were, I think, 15,000 documents reviewed as part of the seed set, and 3,300 of them ended up before the judge with parties arguing. That is not going to be a cost savings. That's going to eat every penny that was saved in using this process.

The truth of the matter is, Ariana and I are not going to agree on scope, and we're not going to agree on relevance. And my view is, until somebody shows a material problem with what I've done in my process, or gaps, I should be able to do it.

PROF. CAPRA: How do they show that though?

22. *Moore v. Publicis Groupe*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012).

MS. GROSSMAN: They'll show that things are missing. They'll have emails from other sources. The problem is clients are starting to say, "I don't want to use this technology that's available, because I'm going to have to have these daily conferences with the other side. And it's too expensive, and there are too many disputes. So why don't I just use the inferior process, because it's going to be less of a hassle."

PROF. CAPRA: Right. Ariana.

MS. TADLER: So here is the real problem. If I'm on the other side with somebody like Maura, we call that the Sedona bubble. I don't personally really need to know every little detail. There is a level of trust and confidence that I'm dealing with somebody who is working at a very high professional level. There are certain questions I'm going to ask. I anticipate Maura is likely going to answer them. I can say that about many adversaries that I have, because I see them regularly, or I know their partners, or maybe one of you I know. And because of your relationship with them, there is just this communication that goes on. And we've created this rapport to have that high-level discussion.

If I'm with somebody who is behaving in a way that is particularly defensive or obstinate or ignorant, that sends a red flag far up for me where I'm saying, "You know what, I'm not even confident you know what you're doing. Why should I sit here and just say we'll see how it's going to play out?"

Again, this comes back to many of the types of issues we've talked about coming up this morning, that there is this level of education and understanding, that there is a select group of people that have it, and there are lots of others who don't. They know the rule; they don't know the rule. They read the rule; they don't read the rule. How do we get to a place where we can have that high level of professional discussion?

PROF. CAPRA: Rick.

PROF. MARCUS: I want to come back to something Judge Facciola mentioned and suggest a comparison. The work-product problem—which goes to transparency—resembles an issue we've encountered in regard to litigation holds: Do you have to tell the other side what you did? If you want the judge to say that what you did is good enough, eventually you're going to have to tell the judge what you did. Where you draw the line in the interactive process regarding preservation, it seems to me, it can't be absolute for all cases, but is important. And eventually, if you want this to be accepted in a Rule 502(d) order, then you're going to have to tell a judge what you're doing. And it seems to me that decision about transparency is out there somewhere. And the question is when do you get to that door?

PROF. CAPRA: Steve Morrison.

MR. MORRISON: Two quick issues that pop up here. One is on this dissatisfier question that Dan Smith talked about and that Liesa Richter talked about. The dissatisfier is not that we're only 25 percent effective. I mean, God forbid that Maura and I go to our client and say, "You know,

we're about 25 percent good." You know, we're going to tell our clients, "We're really busting our hump here, and we're about 100 percent good."

So that's not going to be the dissatisfier, Dan. What is the dissatisfier that I'm seeing is the cost. It's the economics from the client's side. And where you see them okay with spending the money, that's not a big problem in a pattern case where maybe I'm the national counsel for somebody. But if you go to Judge Grimm's point about proportionality, where they really get upset is I've got a discovery problem in a one-off case or that I've got a little series of small cases, maybe fire cases or something where there is property damage only, that's where the dissatisfier is, from my point of view. So if we could capitalize on that distinction, then where would we go—your question, Ariana—where would we go to educate the guys that are doing the regular work, right, the cases that are coming up all the time.

I go back to Judge Brown's point, which is that whole issue of could we plug the evidence rule, which is the trial lawyer's rule, into the civil rules, which is the discovery lawyer's rule, and could we plug it in at three places: proportionality, management—case management—and protective orders. And those are the places where, if you plug it together, I think we'd get a deeper knowledge base that you're seeking.

PROF. CAPRA: Good points. And civil rules is on the agenda today. But before we get to that, we still have a couple of things I'd like to talk about in terms of what's holding up a greater use of Rule 502(d). So I turn to Judge Diamond about the fruits issue, a problem that you referred to earlier today, and talk a bit further about the proof problems that are going to exist.

JUDGE DIAMOND: I will skip even a little further ahead to where I'm supposed to discuss 502(d)'s application in criminal cases. About a week ago, I called Dan, and said, "Dan, I can't find a reported criminal case that discusses 502(d). Should I do shadow animals on the wall?"

PROF. CAPRA: Which we considered for a time.

JUDGE DIAMOND: Anyway, I started thinking about two areas of the law relating to the fruits of protected information. In *Sells Engineering* in '84,²³ the Supreme Court said that the Civil Division of the Justice Department wasn't automatically entitled to what the Criminal Division ferreted out in their Grand Jury proceedings, and had to go through a Criminal Rule 6 proceeding. And those of us at the bar thought, "Well, this is great. We can get civil counsel from the DOJ disqualified if they've seen stuff they shouldn't have seen. Otherwise, what remedy do you have?"

And people who are in what is now my profession smiled at us benignly and said, "Oh, no, we're not disqualifying government counsel," and that possibility died a very quick death.

23. *United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983).

But perhaps the more interesting analogous area of the law is in use immunity and the so-called *Kastigar* Hearing. *Kastigar vs. United States*²⁴ was a 1972 case written by Justice Powell where the Supreme Court held for the first time that use immunity in a criminal proceeding, not transactional immunity, is coterminous with the protection of the Fifth Amendment, meaning that, if Dan were summoned to the Grand Jury to talk about his robbery of a bank and he was use immunized, the government, if it decided to indict Dan later for the bank robbery, could not use his testimony or make what they call derivative use of his testimony—

PROF. CAPRA: But the problem is proving what's immunized and what's—

JUDGE DIAMOND: Exactly what I'm coming to—as opposed to transactional immunity, which everybody thought before that was what the Fifth Amendment conferred, which is, you can't ever be charged with that bank robbery, Dan. That's transactional immunity. So the Supreme Court said no, use immunity is what the Fifth Amendment requires.

And there is a *Kastigar* hearing. Meaning that in the unusual instance that the government has charged someone that is use immunized, it has to meet the heavy burden of proving—it says, the heavy burden of proving by a preponderance of the evidence, which is interesting—but the heavy burden of proving that all the evidence it proposes to use was derived from a legitimate independent source.

Those of you who may remember Colonel North whose testimony at the Iran-Contra Hearings was televised, know that he was use immunized. And Lawrence Walsh had created a separate team of lawyers who didn't watch the hearings, who gathered all their evidence and put it in a lock box, and it was all unsealed after the testimony. He was charged. He was convicted. His conviction was reversed with the court saying, you didn't meet the heavy burden of *Kastigar*. We don't know whether or not the witnesses that you called, Mr. Walsh, saw this testimony. It might have affected them. However slightly, it might have affected them. You haven't met the heavy burden.

Now, I bring all this up, first of all, because Rule 502 applies to criminal cases. And I think that some of this analysis, I'd be interested to hear the same analysis in a criminal—the concerns in a criminal case where you have the Sixth Amendment right to effective counsel, who has seen something privileged that devastates the government's case and has to give it back.

But putting that aside, when you talk about the fruits, when you go down that road, what do we do with the fruits of an inadvertent disclosure where the document is given back, if you follow it to its logical conclusion, do you have a *Kastigar* situation?

PROF. CAPRA: Or disclosure even under a clawback order.

24. 406 U.S. 441 (1972).

JUDGE DIAMOND: Even under a clawback order, you've given it back. But the lawyers are still there. They've seen it. Chilton has described some of the things that may happen. What do we do with the fruits? Where do we draw the line? And in the case of *Kastigar*, as a practical matter after the *North* case,²⁵ there is no line.

PROF. CAPRA: So I was telling Judge Diamond that I was involved in a case a number of years ago where it was an inadvertent disclosure by a defendant. The judge said, okay, you get it back under the pre-502 test. And then the plaintiff, about two weeks later, amended its complaint to include all the information that had been inadvertently disclosed. And the judge held what was in effect a *Kastigar* hearing, and found that the amendments were derived from the protected information and so the amendment had to be struck.

Turns out that under the common law, it's not absolutely clear that a recipient is barred from using the fruits of privileged information. There are some courts that say you can use fruits. In those courts the protection of getting back what you disclosed under Rule 502 is diminished. The Second Circuit says you can't use fruits. In that court, it would appear that *Kastigar* hearings will be needed after a Rule 502 clawback.

JUDGE DIAMOND: There is a division respecting the actual use at trial and non-evidentiary use, whatever that means. And if it somehow—now, the Supreme Court hasn't weighed in on this. But if it somehow sharpens the prosecutor's focus, courts have held that's okay, it's not a violation of use-fruits immunity. But I don't understand the line. To me, it's a distinction without a difference. But if the Supreme Court gets hold of it they will probably say there is no such distinction. But, still, the circuits have held there is a distinction.

PROF. CAPRA: So all this leads to possible unpredictability, and, again, to Chilton and Steve's point that the other side is going to use the protected information in some way, even if they have to turn it back. So it's a concern.

JUDGE GRIMM: What about requests for admission. How are you going to deal with that? They're not using it, but they now know about it, and they ask you to admit it. You either deny it, in which case—I mean that's a real Hobson's choice. You can't get around that.

MR. MORRISON: Yeah, yeah.

MR. BARKETT: This doesn't relate to the criminal side, but I have seen an offensive use of Rule 502(d) where lawyers argue to judges, "Just let them produce the documents, Your Honor, and just throw in this 502(d) language, and there is no harm done if we see it." And that's been in situations where, on the producing party's side, there is a concern that the requesting party is going to use the information in other cases, even though it may not relate to the particular matter in which production is made. They'll learn things that will help the requesting party in other matters even

25. *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990).

if it can't be used directly. And a judge can be seduced by the idea that there is really no harm done, you're protected, just go ahead and produce it because we're going to use Rule 502 to protect you.

PROF. CAPRA: Does it make any sense to put in something about prohibiting use of fruits in a 502(d) order? That would seem to be something that needs to be done because of this uncertainty of whether fruits can be used, and the possibility of abuse.

MR. BARKETT: Normally the lawyers are—if they violated an order that requires them to keep something confidential, there's a contempt issue there.

PROF. CAPRA: Let's go back from the fruits issue to the provisions of Rule 502 for a minute. Judge Fitzwater mentioned this at the break that one of the innovations of 502 is that it extends to state court proceedings as well. If there is a disclosure in a federal court proceeding, pursuant to 502(d), it's not a waiver in any court. And I wondered if that's something that the lawyers on the panel discuss with their clients. And if clients know about this protection, that can be a factor in energizing the rule.

MR. MORRISON: It does energize the rule, and you do end up in discussions with the clients. But if you talk about skepticism and suspicion, the order of magnitude is tenfold, at least, with your client regarding state court outcomes. The uniformity is different. The jurisdictions are different. And so what you end up with is a lot of skepticism that this would ever actually protect you in state court.

And so in the cases that Chilton handles, for example, every day, almost everything she produces is under some kind of a sharing order that the plaintiffs can use wherever they want to and shoot it out to whoever they want to. And that alone will cause people not to use 502, because if there is a sharing order, the defense lawyer is going to say, "Wait a minute. I've got to look at this before they look at it," because you just don't know what's going to happen. And you take an overlay on top of that sharing order, if you add on the current digital media issue where you don't know where the disclosed information might pop up, and as soon as it pops up on a blog or some rumor monger pops it up, it gets hooked in, and all of a sudden, everything that's said about your company is highlighted by some media guy who has reported to the chairman's office.

So it's real difficult. The state protection is very helpful; but the skepticism is very high.

PROF. CAPRA: Chilton, what's your position on the issue of 502's protective effect on state proceedings? How useful is that factor in a dialogue with the client?

MS. VARNER: I think that's an element, but I would agree with Steve that any lawyer's ability to assure a client of uniformity when you are in state court on a repetitive basis, it is not there. And the law of privilege in those states varies from state to state. The law of waiver in those states varies. And so—

PROF. CAPRA: Yeah, but it can't vary under Rule 502(d).

MS. VARNER: I'm going to call you when my Alabama judge says, Ms. Varner—

PROF. CAPRA: I'm just an ivory tower professor. I just expect the law to be applied as it's written, and not ignored. So there you are.

MS. VARNER: Is there any case law on state courts enforcing Rule 502(d) orders?

PROF. CAPRA: I don't purport to know every case, but there are a couple of cases where the state enforced the 502(d) order.

MS. VARNER: Do you know of any where they refused to enforce?

PROF. CAPRA: I've not heard of one where they refused. But, again, I'm not comprehensive on that. Rick.

PROF. MARCUS: Just to underscore what I think Dan just said in terms of what rulemakers can do, there is only so much one can guarantee.

PROF. CAPRA: We do not have troops.

PROF. MARCUS: Yes. Andrew Jackson said, "Chief Justice Marshall has made his ruling, now let him enforce it." There is a limit.

PROF. CAPRA: Exactly. So now let's turn to another concern that's been expressed about 502(d) orders, and that is the possibility that because a 502(d) order has been issued, discovery will be accelerated, and that could really lead to a party's reluctance to seek such an order. So I'd like to start with John Barkett on that.

MR. BARKETT: There is an interesting decision on accelerated discovery that predated 502. It's *Williams v. Taser International*,²⁶ a 2007 decision from the Northern District of Georgia. There the judge was very frustrated with the progress of discovery. As the judge put it, "This case has been ongoing for more than 18 months, and yet discovery has progressed little and we remain far from its resolution."²⁷

So he ordered the parties to produce documents on an expedited basis and then said, "I recognize that could mean that privileged documents are going to be produced inadvertently because of my order."²⁸ And he then entered an order which I think, Dan, should be looked at as you look at the form, a form order, because it's actually very well done. But the point is that if you're in a situation where a judge is upset with the pace of discovery or it's some sort of an injunction hearing, where discovery is moving very, very rapidly, you can't and shouldn't ignore 502(d).

PROF. CAPRA: So I just heard a concern from defense counsel that we're going to accelerate discovery, and I'm concerned about an effective privilege review. And the response from the judge is, "Why should you be concerned? I've got a 502(d) order." I just wanted to explore that for a minute. Edwin, what is your view on that?

MR. BUFFMIRE: That could be one of the valid concerns about 502(d). I think some of the other concerns can be explained away. The concern

26. No. 1:06-CV-0051-RWS, 2007 WL 1630875 (N.D. Ga. June 4, 2007).

27. *Id.* at *7.

28. *Id.* (paraphrasing).

about the toothpaste in the tube, for example, doesn't address whether or not to get a 502(d) order in place, because it's only a protective order, and the review is then up to you and your client.

But to the extent that a judge, *sua sponte* or by one party's request and objected to by the other party, then expedites discovery and, because of that deadline, is in effect curtailing the amount of review that can be done, this steps on the parties' rights to their attorney-client privilege.

PROF. CAPRA: At some point there, an accelerated burden will be so great, despite the protection of Rule 502(d), that the court is actually going to be ordering the disclosure of privileged information, and 502(d) does not authorize such an order. So it's a case-by-case approach, I guess. Yes, Ariana?

MS. TADLER: Which is all the more reason why you want these agreements to come up front. I mean, I cannot get my head around why parties would have such an agreement and not go to the court and have the court enter it? I just don't understand logically why you wouldn't take that extra step.

I have had cases where these 502 issues have come up midstream, and it creates all sorts of insanity, because you have panic, you have anxiety, and then you have the people who end up inevitably being at the table who don't know the rule, don't understand how it works, have the great cynicism. And now we're delaying even in trying to deal with the issue.

So now imagine you're standing in a courtroom, and a judge says, "You know what? This gives you your safe harbor. Off you go." If I'm sitting there, okay, that works for me. That's to my advantage. But I have now an adversary who, adding on to all the other issues we deal with in working with one another and against one another, this level of anxiety that creates more problems sometimes than they're worth.

Even though it is to my advantage, from my perspective—and, again, I'm speaking in my individual capacity, not on behalf of Milberg or in any other capacity, not on behalf of Sedona. But from my perspective, I would rather have had that dialogue all up front. It creates a totally different dynamic in the case.

MR. MORRISON: And if it comes midstream, you get overproduction. What you get if you're forced into an accelerated production without an up-front agreement, you get too much stuff produced, which then puts a huge burden on the process otherwise.

MS. TADLER: And that overproduction, by the way, costs me money.

MR. MORRISON: Yes.

PROF. MARCUS: I think this relates to a piece of Rule 502 that I may recall incorrectly, but it certainly relates to a piece of history of 26(b)(5)(B) that I recall correctly. The 26(b)(5)(B) history is as follows: Repeatedly as we were considering that, corporate counsel would tell us, only with an agreement should the civil rules say that the court may under Rule 16 enter an order that sanitizes disclosure that was inadvertent or under a quick peek or with a clawback. All of that should be only pursuant to an agreement.

My recollection is that in an event we had at Fordham followed by the Evidence Committee meeting afterwards, I urged that an agreement be included as a feature of 502. And the preliminary draft that was published for public comment had a prior agreement requirement, to which the response was: Well, wait a minute, you mean people can come back later and say, I didn't really agree, and therefore the 502(d) order doesn't work? And I think that, therefore, there is no agreement provision in 502(d). There is just a tension of sorts there.

PROF. CAPRA: The reason there is no agreement provision in 502(d) is because there are situations in which the discovery obligations are asymmetric. And so there was a concern that the defendant would not be able get an agreement out of a plaintiff in certain cases, but the judge should still be able to issue an order in absence of such an agreement. And there's cases in which that has been happening, such as *Rajala v. McGuire Woods*.²⁹ So that's an important point.

PROF. BROUN: This was something that was talked about.

PROF. CAPRA: Yeah. The version that went out for public comment conditioned a court order on agreement of the parties. And I believe it was Judge Swain who said that courts needed the flexibility to enter protective orders without regard to party agreement. Indeed it should be possible for courts to have standing Rule 502(d) orders.

PROF. RICHTER: The question that was raised to me, too, is should different standards apply to the judge if the order comes before the court by agreement or as an opposed order. So should it be a 26(c) good cause type of standard if it's opposed or not agreed to. And if it is an agreed 502(e) situation, should it be more of a pro forma type of order.

PROF. CAPRA: It's a good question. Rule 502(d) provides no standards for adopting an order. And maybe that's a good idea; maybe that's a bad idea. What do you think, Judge Grimm—about leaving the order and its terms to the judge's discretion?

JUDGE GRIMM: I think the notion is that it can't work if it can only be done with consent. The problem is that the lack of a statement on the terms of an order has caused some to believe that the court can order the production of what is privileged or protected. But that can't happen unless the court finds that either the privilege doesn't apply or it's been waived. Or the clever but devious "fine, you've got five days to produce it all," in which case, effectively, you can't do any review because of the deadline for doing that. And the problem is that there is no effective way of getting such an order. What are you going to do, file a mandamus action?

MR. MORRISON: Every time a federal judge says, "You need to do this in two weeks," and we say, "Gosh, we just really can't get it done in two weeks," and the judge then says, "I order you to do it in two weeks," and then you do it, the judge says, "I told you you could do it." Every time.

JUDGE FACCIOLA: Well, you could.

29. No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010).

PROF. CAPRA: So I want to proceed to another issue which, I guess, Judge Brown and Steve Morrison brought up, and that is, what can we suggest with respect to changes in the Civil Rules that might energize, or at least publicize, the use of Rule 502. I'm going to go to Judge Rosenthal first, and then I'll follow up with the Civil Rules reporter, Professor Marcus.

JUDGE ROSENTHAL: I think there are a number of things. One of them would be to take up the suggestion that several have already made that the Civil Rules ought to, either in the discussion about the meet and confer, or in Rule 16, which raises another question—Rule 16 is already quite lengthy—or in Rule 26, similar concern—there is a lot in Rule 26—whether there should be a reference to Rule 502.

PROF. CAPRA: Maybe we should just take some stuff out of those rules and put 502 in.

JUDGE ROSENTHAL: Well, there is a larger project looming out there to step back and look at Rule 16 and Rule 26 and try to make it less exhausting to go through what was meant to be close to exhaustive in anticipating and addressing problems. And that's a larger project.

But the smaller project would be to put in the Civil Rules governing communications at the beginning of the case in the first conversations with the judge, to bring Rule 502 into the discussion. Now, there is a reference already in the meet and confer obligations to talk about avoiding waiver. That would be a logical place to put an explicit reference to 502. That's low-hanging fruit. But I think there is more fruit there to be hung that ought to be explored.

PROF. MARCUS: To be specific, Rule 26(f)(3)(D) says, "A discovery plan must state the parties' views and proposals on: Any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order." And then there is a parallel provision in Rule 16.

JUDGE ROSENTHAL: And the reason that we limited it to agreement at the time was in part that we were worried about our inability to guarantee the protection could be enforced against third parties and in subsequent cases.

PROF. MARCUS: And that gets back to corporate counsel's concern. The sequence of events here has a good deal to do with why 502 is not mentioned there. It didn't exist. When I came before the Evidence Committee, I said, "Thank you for doing what we could not do."

PROF. CAPRA: Now you need to connect it up.

PROF. MARCUS: Well, if we connect it up, one possibility is the small cross-reference. That's probably low-hanging fruit. But there is the question of whether you also were—and I am certainly not saying this is anything that I've thought through, that—

PROF. CAPRA: You're not speaking for the Advisory Committee or anybody else.

PROF. MARCUS: —or anybody else—do you also cross out the “if the parties agree” portion of that? If 502(d) doesn’t turn on that, should Rule 26 say 16 does?

PROF. CAPRA: I think it’s something the judge would want to know, whether they agreed or not.

PROF. MARCUS: Well, okay, “if” the parties agree.

JUDGE ROSENTHAL: It should be “whether.”

PROF. CAPRA: Whether, yeah.

PROF. MARCUS: So maybe 502 can be worked in.

PROF. CAPRA: Judge Brown.

JUDGE BROWN: Actually, I was just going to make that same reference, Rule 26 is the logical place. But also in Form 52 is another place to put it. We need to get this on the agenda for the discovery plan. Although I have to say, even in our court, the implementation and the requirements of this usage of 26(f) and Form 52 vary from judge to judge. Not every judge requires it. Some judges have modified it, and some judges have eliminated it. So it’s an uneven application even among the judiciary.

MR. MORRISON: Are there any great local rules dealing with 502?

PROF. CAPRA: I was just going to say, the possibility of local rules and standing orders, let’s talk about that. Let’s start with you, Judge Grimm, the standing order.

JUDGE GRIMM: Our court has a liaison committee of lawyers who we involve whenever we’re undertaking to consider a guideline or a protocol or a local rule, on the notion that we don’t have to live by our own rules; and if we’re going to make them, then we should have some input from people who have to deal with them. It’s been a helpful committee. Currently, we have a standard confidentiality agreement which has a paragraph that deals with what is now 502. And what we now are doing is we’re separating that out, and we have a separate agreement that’s being looked at in order to try to deal with it.

I think I’m the only judge in our court that does this, but I solve the problem by not letting it occur. I give a 502(d) order in every case as part of a whole series of things I do to narrow the scope and focus on what’s admissible to prove the claims and a number of other things.

But I don’t give them the choice. I just say, “Unless you intended under 502(a) to waive the privilege,” because sometimes you do. You’ve got a letter for someone that says it’s legal for you to do this, and now there is a claim that it wasn’t legal, and you’re going to show good faith. But unless you intended to waive it under 502(a), then any production of any information in this case does not waive the attorney-client privilege or work-product protection. Reasonableness under 502(b)(2) is irrelevant to what that is. But if you assert that there is a privilege, you must do it promptly once you’ve disclosed it, because I don’t want someone being ambushed at trial.

So the notion is I solve it by not letting it happen. I give it to them, and I say, “If you want to look at all the documents for privilege review, knock yourself out. That’s between you and your client. But remember how much is at stake in this case, and let’s focus on what you really need to prove your claims or your defenses.”

But what we hope to have within the next couple of months is a pretty well-thought-out 502(d) order that is a comprehensive standalone order that will then become part of the appendices to our local rules so that the lawyers will be able to go to it. Then we have an education requirement for our own judges to say, “You’ve got to do this. You’ve got to talk about that. You have to have it at the conference. You’ve got to consider it. You’ve got to involve the lawyers at that point.”

PROF. CAPRA: So there is some judicial education involved here too.

JUDGE ROSENTHAL: Some? Edit the word “some.”

PROF. CAPRA: Judge Brown.

JUDGE BROWN: I want to talk about our experience in the Northern District, because we have just got a confidentiality order through, with some controversy. We have thirty district judges, and they have different views on these issues. We finally got that through. But we did not include a 502(d) aspect of it, because it just required too much education to go along with that. But I asked our E-discovery Committee, which we have for the Seventh Circuit Pilot Program to put 502(d) on their agenda for their meeting this past week, and they did. And according to the secretary for that committee, they kicked it down the road because there was some discussion among the lawyers—it’s a lawyer as well as judge committee—about some of the concerns that have been expressed today, and they’re trying to get their minds around it.

Now, our patent bar, our patent bar went ahead with its own e-discovery rules. I see that looking at your suggestion, Judge Grimm, about your order I might go back to them and suggest that they adopt some of your thoughts that are in here and maybe—

PROF. CAPRA: Because that order that you’re referring to for patent cases was spare; right?

JUDGE BROWN: Yes.

PROF. CAPRA: Good, but spare.

JUDGE BROWN: Spare.

PROF. CAPRA: And the question is how much detail you really need or want.

JUDGE BROWN: But Judge Grimm’s point about “inadvertent” was something they didn’t really focus on. And Judge Grimm’s knowledge of the case law enlightens that discussion about the use of the word “inadvertent” in these orders.

PROF. CAPRA: I wonder if there’s something that the Evidence Rules Committee can do here outside of the rulemaking process, such as writing or calling chief judges and suggesting the inclusion of Rule 502 in local

rules. Of course, that kind of effort might play against the standing committee's position that local rulemaking should be minimized.

JUDGE GRIMM: The Federal Judicial Center is including a discussion of Rule 502 in a lot of their judge education programs.

PROF. CAPRA: They are. That is a good development. Judge Facciola, what's going on in your district, in terms of 502, percolating ideas, standing orders and the like?

JUDGE FACCIOLA: Not much going on in the District of Columbia. But in terms of the judiciary, I can't emphasize how much Paul and I have done. 502 is all we really talk about in talks to judges. So there seems to be a growing perception of the issue by judges. But in terms of the bar, I don't understand it. I'd like to ask the professors, why is it that the youngest associates who come into my court don't know about Rule 502?

PROF. CAPRA: That leads right to Allyson Stuart.

PROF. STUART: They're not my students, Judge Facciola.

PROF. MARCUS: Nor mine.

PROF. CAPRA: Allyson is going to talk about law schools and what they're doing and can do to educate students about the role of Rule 502 in discovery.

PROF. STUART: When Dan first asked me this question, I thought about the fact that I teach Electronic Discovery, and obviously we talk about 502 in Electronic Discovery. And the biggest problem there that I see is trying to get young students to have a practical perspective on these problems that they've never experienced before.

But the more I thought about it, I also teach Civil Procedure and Evidence. And so I think that part of what you guys are talking about with adding references to Rule 502 in the Rules of Civil Procedure, we as Civil Procedure professors can at least help and go ahead and talk about Rule 502 when we talk about Rule 26 and privilege for the first time. We can at least start telling students at that point that there is this way in which Rule 502 can help. And, again, I keep coming back to it's not whether you should use it, it's whether you should rely upon it, and it is a tool that will help you.

So as professors, I think we're dealing with a lot of different problems because of practical inexperience of our students and because they don't yet understand necessarily the culture that is ingrained in the law firm structure. Yes, when they go there, they're going to be thinking about whether they're making partner as opposed to necessarily taking effective shortcuts. And so I think that it's got to filter up. We've got to take the long-game view of it.

In addition to those substantive courses, I think we, and most law schools around the country, are looking more at a practical kind of teaching, role play exercises, and that's what I've been doing in e-discovery, for example trying to do a 26(f) conference. And, again, it's difficult. It's difficult to give enough context to students that they can actually do it. But they really enjoy it when they try, and I think they get a lot out of that.

One other thing is that I believe in the bar that they're trying to learn more about electronic discovery and its costs. I've been asked increasingly to speak to CLEs about ethics and e-discovery. So, it's starting to happen.

PROF. CAPRA: So I tell my students when I introduce this rule, "You need to know this rule. Otherwise, you're going to be in a room clicking a computer looking at an email every day, forty hours a week." And what we tried to do when we wrote this rule is to limit that tedious and expensive eyes-on review. Students seem to listen. Most of my Evidence students are third-year, and they spent their summer clicking and reviewing emails for privilege, and they don't want to do that anymore. Ken.

PROF. BROUN: I say something very similar to my Evidence students. The problem in law schools is that the teachers of the various topics don't talk to each other, ever. I mean, we have very, very good Civil Procedure teachers. I have no idea what they're teaching. I have no clue. They're teaching the rules of civil procedure, and I talk to them, and I love them dearly, but I have no idea. I know what I say about Rule 502 in Evidence. Whether they're understanding it, I have no idea. They understand it better than they do hearsay.

PROF. CAPRA: Ken, procedure professors also don't think we're scholars. So they look down at us.

MR. BARKETT: Most procedure professors don't even teach discovery.

PROF. CAPRA: Ann.

PROF. MURPHY: Well, it's interesting. At our school, I teach Evidence, and then I taught Litigation Skills, which was a new course to give practical skills to first-year students. The students loved this, absolutely loved it, because they can understand it when you talk about all the Facebook messages and emails and Twitter. But I've asked my colleagues who teach Civil Procedure and the other professor who teaches Evidence, about what they do with Rule 502, and they say—I don't want to deal with that. You know, "I'm retiring in a couple of years." But how could you not teach it?

PROF. BROUN: I think my next technique would be to say to the students as they're tweeting and twittering in their class—see, Rule 502 can help you protect that.

JUDGE ROSENTHAL: Just to go back for a moment to judicial education, because they are part and parcel, educating the bar and the judges, what we have now is lots of provisions in the rules that are simply not being implemented or not being implemented effectively. Judges have a large role to play in assuring better implementation. The in-person Rule 16 conference is a good way to do that.

One of the things that we rely on to educate judges is the Benchbook. And the Benchbook has not, up until now, ever had a section on pretrial case management from civil cases, ever. It's like the sex education manual that started—years ago—that says, "So now you are pregnant." So we're fixing that.

PROF. CAPRA: So are you going to include Rule 502 in it?

JUDGE ROSENTHAL: The FJC is putting out a new Benchbook that is going to have a large section on pretrial civil case management, and it has a separate paragraph that says, “Evidence Rule 502 Non-Waiver Order.” And it tells district judges and magistrate judges doing the initial pretrial conferences: talk about it; consider whether to enter an order; it doesn’t require a party agreement; it avoids the need to litigate whether an inadvertent production was reasonable; it reduces the risk of waiver. I mean, in one paragraph it summarizes four years of legislative history and says, “Many parties still aren’t aware of this opportunity.”

PROF. CAPRA: I would request bold-face type for that section.

JUDGE ROSENTHAL: I was thinking red.

PROF. CAPRA: Okay, that’s good.

JUDGE FACCIOLA: It’s also electronic. We now have the Benchbook on our iBooks.

JUDGE ROSENTHAL: Right. And my next question to the law professors, is Rule 502 on the bar exam?

PROF. CAPRA: Oh, okay, I’ve got that one. You’re talking to the right person, as I chair the committee on multistate evidence questions. We have prepared questions that deal with Rule 502. The people who write the questions don’t determine which get used. But, yes, such questions have been prepared.

Liesa, what’s your experience with Rule 502 education in the law schools.

PROF. RICHTER: I was just going to echo what Professor Broun said about curricular gaps. I think, as we can see here from the people assembled, there are lots of different disciplines that need to come together to illustrate the points that 502 makes. And when you’re teaching Civil Procedure, you might think, oh, that’s an evidence rule; or you’re teaching Evidence, you might think this is a discovery issue. Our Professional Responsibility professors say, you know, I don’t have time to get into all that complex litigation. And so Rule 502 can fall through the gaps. And I think it takes some professor discipline to come together and say, where are we hitting this in the curriculum, and that’s a whole other faculty politics issue.

PROF. CAPRA: Good point. Rick.

PROF. MARCUS: I want to say something in defense of rulemakers again and flay a couple of other constituencies. Constituency number one: law students. I regularly encounter in the second year students who deny any knowledge of things I know I covered in the first year. In that way, they may be like lawyers who deny any knowledge of what’s been in the rules for fifteen or twenty years.

Second, I think we are powerless—and this is flaying some law professors—powerless to change the folks who disdain dealing with these “plumber issues.” I have a colleague who teaches some of the same subjects I teach, and I work in a city where the Orrick firm has been around

for 100 years, but my colleague told me he never heard of the Orrick firm. I'm sure he's not unique among law professors in terms of focusing on the practicing bar. And so I think he probably is unfocused about some other things that are important in today's lawyering world. I don't think those who are here can solve that.

PROF. CAPRA: No, but it's a grass roots effort; right?

PROF. MARCUS: The grass roots are the folks who haven't been paying attention to what we were doing before.

PROF. CAPRA: But we're fertilizing the grass roots.

PROF. MARCUS: I won't pursue what you do that with.

PROF. CAPRA: So, yes, it's a process. This wasn't a conference that was called in panic. Right?

JUDGE ROSENTHAL: No.

PROF. CAPRA: More like in mild discouragement.

JUDGE ROSENTHAL: That's right.

PROF. CAPRA: And I think we all have our marching orders in this talented panel to do some more grass roots work.

MR. BUFFMIRE: On Professor Marcus's point about law students forgetting things and not remembering learning about Rule 502, I think law students and lawyers typically remember things that are going to benefit them directly. And so telling law students that, hey, this is one of the first things you should tell your partner—who is basically your client when you're a first-year attorney—"Let's throw in a Rule 502(d) order in our protective order that we're submitting."

And partners appreciate that, because malpractice is a concern. Side—how is that partner ever going to justify a judge finding waiver for mistakenly disclosed information when 502(d) was sitting there and could have eliminated that possibility? So partners should really appreciate that insight.

PROF. CAPRA: Do you have personal experience about that?

MR. BUFFMIRE: They do.

PROF. CAPRA: Ken.

PROF. BROUN: I want to go back to Judge Grimm and the local rules or a standing order. Does your local rule or standing order provide that anything can be turned over, or does it simply deal with inadvertence?

JUDGE GRIMM: No, it doesn't just deal with inadvertence. It is absolutely uncoercive about what they turn over or what they don't.

PROFESSOR CAPRA: Because a quick peek is not inadvertent and the order contemplates quick peek as a possibility.

PROF. BROUN: Can I raise a scenario? I was talking at the break with folks about the diabolical government lawyer and private lawyer, knowing that there is no such thing as selective waiver; and they say, okay—and the government lawyer says, "Don't worry. Turn over all of your privileged documents to me. There is a standing order that says that nobody else can use that."

PROF. CAPRA: I have an answer for that, but I'm going to turn to Maura first on that, because that's one of your concerns. Right?

MS. GROSSMAN: Government investigators run the gamut from those who understand Rule 502(b) and give you the document back, to those who don't. So there is more protection in a 502(d) order. But you need to have a judicial proceeding. Most of the time, your investigation comes in the form of a voluntary request. You certainly don't want to escalate it to a formal subpoena. You also don't want to refuse to cooperate so that they can bring a Motion to Compel or for contempt or something like that, because then it's public, and maybe you have to disclose it. And then Ariana learns about it, and then she comes with her private suit. So there is an area where Rule 502(d) won't apply, and it's a real challenge.

PROF. CAPRA: I'm telling you, that plan of colluding with the government thing doesn't work. Selective waiver is not possible under Rule 502(d). The idea of selective waiver is that one party can use the information, but no other party can. What 502(d) says is, when you turn it over, it's not a waiver in this action, nor is it a waiver in any other court. It doesn't say that the recipient can use the document in this action; in fact it says just the opposite. The rule does not provide for selective waiver in which the recipient is allowed to use the document and nobody else can. I admit there are a couple of courts that have entered essentially selective waiver orders, but I submit they're outside the authority of Rule 502. Maybe this is another one of the education things we need to do. Allyson, do you want to go back to the education issue for a minute?

PROF. STUART: Yes. I was just going to follow up on a couple of things with what Edwin was talking about with respect to incentivizing students about these issues, and one of the incentives that I use with respect to e-discovery in general is it's a really tough job market out there right now. I've had students who actually add to their cover letter something about e-discovery. They end up getting more interviews. So, yes, putting the fear of God in them often helps. I trot out Judge Grimm's opinions to scare them about things that happen to you if you don't understand electronic discovery.

JUDGE GRIMM: I replaced the boogiemer.

PROF. STUART: Exactly. So that often helps a lot. And then the other issue about professors talking to each other, we do a lot of that here. But we're a very new school, and we still have the ABA looking at us a lot, and that can be a good thing.

PROF. CAPRA: It will be good when the ABA review is finished and you don't have to talk to other professors anymore.

PROF. STUART: Right. I also want to note the use of listservs. Those are very important places where I think law professors are talking to each other and sharing good ideas and new developments more and more. But, of course, we're open to suggestions.

PROF. CAPRA: Right. A dialogue is important. Steve.

MR. MORRISON: If you're just going to go for one question that you'd like to be asked by a judge or you'd like to be asked by one of your younger lawyers, it would be: "Is this case proportionally an appropriate case for quick peek?"

Because if we keep asking ourselves that question, then it comes up with the client at the level of most dissatisfaction. And you say, "Look, in this case, let's do a quick peek." And then you build a body of experience with Rule 502(d) that might come up.

Every time Judge Grimm talks, he always speaks of proportionality, which is the key to this whole move in discovery—it should be what's appropriate for the case.

PROF. CAPRA: So that is a good opening to the work of the Sedona Conference on issues of proportionality and cooperation, and how that might fit into energizing Rule 502. Who wants to start, Maura or Ariana?

MS. TADLER: Why don't you start, and I'll—

MS. GROSSMAN: No, you start. You were on the agenda for this topic.

PROF. CAPRA: That's cooperation right there on the record. Let's start with Maura.

MS. GROSSMAN: It's been a hard sell. It's very unpalatable to most attorneys, because they're trained to be zealous, especially the older attorneys; and it's very hard to convince them that actually they'll get more by being more transparent and cooperative up front.

I actually don't see that as a particular issue with 502. Getting a 502(d) order is just a no-brainer, and I don't think it requires a heck of a lot of thinking about cooperation. But we've been working on promoting cooperation in electronic discovery since 2009, and there is still a lot of skepticism.

PROF. CAPRA: Part of the cooperation—the way I see it as related to 502—is there is this concern of how the protected information is going by the receiving party if it's disclosed and clawed back.

MS. TADLER: Part of the real issue, though, about the concept of cooperation is, again, just like your rule, what does it mean? Cooperation does not mean that Maura has to open the closet and show me everything; or somebody at one point used the phrase, open the kimono. That's not what cooperation means.

It's about having a dialogue, having a discussion and seeing where cost efficiencies can be achieved by virtue of, in essence, compromise. Don't we do that every day?

For those of us who deal with complex litigation, we often encounter the same adversaries. It might not be the same lawyer, but we're often encountering the same firms. And even if it's not the same firms, we run in certain circles where this, too, is business. We're trying to just get to the end goal. And how do we get there without wasting too much time?

And with the change in the legal market, it's become that much more crucial. Money is not hanging from trees here. And that's true on both sides. So I think, again, cooperation, just like Rule 502, is a concept that continues to require serious education, understanding. To the extent that we can get the law schools to drill that into young lawyers' heads early, that makes a difference, because one of the biggest challenges is that for some of the more seasoned lawyers, cooperation makes them bristle. "That's not zealous advocacy. That's not what I was taught. That's not what I've done for 25, 35, 45 years. I'm not changing now. I'm successful having done it the way I did it."

PROF. CAPRA: Judge Facciola.

JUDGE FACCIOLA: Most significantly, at the most recent Sedona Committee, we—the Steering Committee—we agreed to start a working group on Rule 502. I'm going to be on it, and the other Rosenthal, John Rosenthal, is going to be on it. And our central theme is just the theme of this Symposium: Why isn't this working? What can we do?

PROF. CAPRA: We're glad we invited you then. You can bring all our messages to that working group.

JUDGE FACCIOLA: I was so proud, because I thought I was the only privilege log nut. So we got to talking about it, and the lawyers were running up to the front and saying, "We hate the damn things, and how do we get rid of them?" So I don't know what we're going to do, but we're going to specifically talk about 502.

I'm not as down on the cooperation efforts as Maura and Adriana are. The Sedona Cooperation Proclamation now has 100 judicial endorsements, and I think Sedona gave birth to the Seventh Circuit protocol because it explicitly requires cooperation. The Sedona Proclamation certainly has given birth to some other things. There are now employment protocols in the Southern District of New York, a protocol with reference to complicated cases. You cannot look at these things and not find the words "cooperation" and "transparency" in the first, the second, and the third sentence.

So I don't know where the bar is. But I can tell you, I know where we judges are, particularly when we are staring, as we are, at budgetary constraints when we're talking about how we're going to have a civil trial. So to have two lawyers come in and expect to be given devoted attention to a fifty-page Motion to Compel where they never talk to each other, that's not going to happen anymore. That's gone.

PROF. CAPRA: Yes. John. And then I'm going to move it to Dan Smith. Go ahead.

MR. BARKETT: Two points. In the rubric of cooperation, I think it's almost a matter of case management when you think about it, and the case that comes to mind is the DuPont fire case³⁰ where there was going to be 2,000 depositions in the case, and the district court judge ordered all

30. *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220 (1st Cir. 1997).

lawyers to produce or to identify the exhibits they were going to use in any deposition five days before the deposition. And the Court of Appeals affirmed the order, calling this fact work product—not opinion work product—and basically saying, you’ve got to manage this in a smart way. Give up the information.

And I view some of the discussion in the case law on cooperation as really a surrogate for the concept of case management. The judge is, in effect, saying, “I don’t want to have the sanction motion later and deal with all the time that will take, so get together now.”

The second point I wanted to make is on the intersection of ethics and Rule 502(b)—

PROF. CAPRA: Ann Murphy is going to be talking about that in just one minute. But go ahead.

MR. BARKETT: I’m just going to make a point that relates to cooperation as well. The Model Rule 4.4(b) says that if you receive a document that you realize is privileged and was produced inadvertently, you have a duty to notify the sender. Now, some states, like New Jersey, also say “and return the document.” New Hampshire adds: “And follow the instructions of the person that holds the privilege.” And yet when you look at the case law, there are cases where courts have said, yes, there was a violation of Rule 4.4 here by the receiving party, but the producing party’s conduct was so sloppy that I’m going to find a waiver under Rule 502(b). An example is *D’Onofrio v. Borough of Seaside Park*.³¹

And then there is a case from 2009, *Rodriguez-Monguio v. The Ohio State University*,³² where a lawyer receives a letter, and attached to it is the privileged document. The lawyer doesn’t really study it very carefully because he needed more information and asked for it. And the court said to the receiving party, you should have explicitly told the lawyer that this was a privileged document and not buried it within an attachment, and ended up giving the producing party relief.

So cooperation and ethics are intersecting here.

PROF. CAPRA: So I’ll go to Ann then because ethical issues have been raised. Ann is going to talk about Rule 502 and ethics for a minute, and then we’ll conclude with government lawyers and Rule 502. Go ahead, Ann.

PROF. MURPHY: I was looking particularly at competence and confidentiality. I’ve given talks on Rule 502 in Montana and Oregon and Washington. And it’s so different from anything we’ve been used to. And I say to the attorneys, “Can you imagine in your old office when you were a young attorney, and you’ve got this file cabinet. And you say to the other side, you know, ‘Come on in. Have at it. Let’s do a quick peek.’” And I always say, quick peek is so cute, isn’t it? Just give a quick peek. “And, you know, you want a drink? Oh, heck, let’s get hammered.”

31. No. 09-6220 (AET), 2012 WL 1949854 (D.N.J. May 30, 2012).

32. No. 2:08-cv-00139, 2009 U.S. Dist. LEXIS 51955 (S.D. Ohio June 3, 2009).

It's just so different from anything we've ever seen. But it's absolutely necessary. And so the problem is, I think that we've got ethical rules that of course vary from state to state, and they are not on board with this kind of cooperation. Just take inadvertence, and we define it as mistake. You have made a mistake. That, by its very nature, is a problem in representing a client with competence. And so what I would love to see is some communication with the bar associations about Rule 502 to address the fact that we are in a different world now. And part of being competent is also saving your client money.

PROF. CAPRA: That's right. The way I see it is Rule 1.6, the duty to preserve confidences, requires a dialogue with the client that Steve was talking about today—that you have to basically say, look, we've got a lot of electronic information to produce in this litigation and some of it is privileged. You could spend a billion dollars and look at we will look at each and every single document, and we'll be 27—we'll say, 97 percent correct—

MR. MORRISON: Yeah, yeah.

PROF. CAPRA: —but we still need a 502(d) order, right, because that's a given. Actually, I would say it's probably an ethical violation not to have one. It's a violation of Rule 1.6 because getting the order is separate from how you review the information and the order protects you from inevitable mistakes.

PROF. MURPHY: Yes, I think 502(d) protects you from malpractice issues and from ethical issues, because it's a judge's order.

PROF. CAPRA: And then the dialogue should cover the whole spectrum of alternatives for the client—the balance of money and mistaken disclosure of privileged information. Steve, do you want to take us through that, or should I?

MR. MORRISON: An example was a client—we've got nineteen servers that we asked for, and, God forbid, we got them. So there are nineteen servers, and we're looking at it. Now we find out how much information is on there. And the client says to us, "What's the budget for that?" And they're always asking, "What's the budget for that?" And so I go to my e-discovery guys, and I say, "What's the budget for this?" You know, I don't have a clue. And so they go into it, and they say, "Well, the budget is about \$800,000 to look at all of these documents." And I said, "Well, you know, geez, I can probably settle the case for \$1 million." And so where do we go with that?

And so we did have a conversation, Dan, with the client. And I said, you know, "This is what our guys are giving me. We might be able to do this for a half a million instead. But it looks like the case value—it's a commercial case—is about worth \$1 million. We do have this other option that we can just give these servers to those guys and let them look, and they have to kick back to us what they think we ought to look at."

PROF. CAPRA: And you got a number for that.

MR. MORRISON: And we get a number for that. And then we can talk on that process. That's a very good conversation to have with the client when the cost of the discovery is exceeding the cost of the settlement value of the case.

Now, I'm not saying the plaintiff's lawyer would have taken a million. That's my evaluation of it. But if it gets up around your evaluation of it, this opportunity to do this quick peek will really work.

And in this case, we actually did. We just said, "Okay, you look at the nineteen servers." And my colleague on the other side looked at the nineteen servers and said, "I just want to search these words." They put together their search terms, searched it, got the material back, and sent it over to me and said, "This is what we think might be relevant, and we're not going to go any further with it. You can have the servers back." And so we looked at it, and we said, "Fine." That's it.

PROF. CAPRA: So it works in some situations. And then there is a midpoint, too, I would assume, with a middling kind of review for a middling fee, with a middling amount of privileged documents disclosed and clawed back.

MR. MORRISON: Yes.

PROF. CAPRA: You could say, "We'll use search terms for smoking gun," and we'll take those out, and this is how much it will cost you, and then we'll let them see the rest, because you probably don't care much about what they get anyway.

MR. MORRISON: Right, right.

PROF. CAPRA: It's case by case.

MR. MORRISON: You take out the general counsel's name. There are certain people that you would pull out, like you say, that you know is privileged, or you take out a particular internal investigation.

PROF. CAPRA: Which doesn't cost you \$800,000.

MR. MORRISON: It doesn't cost you 800,000 to search for those. And your colleague, if there is a piece of it that's left out there inadvertently or that you didn't catch with the search terms, which—what's that, 65 percent reliable? So if you hit the 35 percent piece, your opponent is supposed to tell you. And then you claw it back.

You know, in certain cases, I think it works perfectly. And I think in your one-at-a-time kind of cases that you're not going to have repetition, you're not going to have an impact on your whole product line or on your whole course of conduct in your business, then you can avoid this document-by-document review. But if you do have those big stakes, you're probably going to do the document-by-document review and protect it with a 502(d) order on top of it.

PROF. CAPRA: Exactly. Thanks Steve. One of the things we haven't talked about is government lawyers, and that's why Dan Smith is here. Tell us how 502 works when the government is litigating, and what your concerns are.

MR. SMITH: Rule 502, particularly Rule 502(d), really has tremendous potential for the government. We have a lot of reason to be interested in terms of relief from privilege review, both because we have these enormous cases where there might be a billion pages of material that are being exchanged in discovery, and there is just no possibility of putting eyes on every single page. But also because of the aggregate. The federal government has so much litigation going on that being able to limit privilege review in thousands of cases could end up also saving tremendous amounts of money. And when you're talking about the government, money is also its ability to do things.

I'm reminded of the *In Re Fannie Mae* case in the District of Columbia,³³ where an agency felt that it needed to do a page-by-page privilege review. They ended up spending 9 percent of their annual budget in privilege review on one case. So if that's what a privilege review costs, at that level, it's not only money to the federal government, but it's actually impacting the ability of agencies to carry out their mission, to be able to help the public.

But, that said, Rule 502, to some extent, falls short for the federal government, because we have claims of privileges that are not within the scope of the rule. The introductory sentence clearly lays out that it only applies to the attorney-client privilege and attorney work product. The federal government often has claims of deliberative process. There may be claims of presidential communications and a number of privileges that uniquely apply to the government. If we disclose those materials pursuant to a 502(d) order, we are not necessarily protected, and we might not get those materials back.

PROF. CAPRA: Wouldn't a court say it's the spirit of 502 or something like that?

JUDGE GRIMM: Not when it comes to national security, unless you want the CIA living in your home.

MR. SMITH: I hope that the bench would be receptive to that understanding, and perhaps following the reasoning of Judge Grimm's pre-502 opinion in *Hopson* the court would find grounds for extending a 502(d)-like protection to other privileges.

PROF. CAPRA: Maybe a court could write an order covering all the other privileges, right? And then the question would be how enforceable it is—

MR. SMITH: —against third parties. And the government also has statutory duties to protect certain categories of information, such as trade secrets, and personally identifiable information in government computer systems. And there are exceptions in most of those statutes that allow the government to disclose that information when it is compelled to do so, but not voluntarily. And so there is a question, if we are doing a quick peek and voluntarily handing over huge volumes of records without a relevance

33. *In re Fannie Mae Sec. Litig.*, 552 F.3d 814 (D.C. Cir. 2009).

review or without a page-by-page review, what are our obligations under those statutes.

JUDGE FACCIOLA: Bear in mind, the moment that disclosure is made, all of those documents become available under FOIA.

The second thing you ought to be aware of, and it's important on the question of dealing with the government—two weeks ago, it was announced that the Federal Trade Commission has now adopted a new set of regulations which deal with cooperation and transparency in governmental investigations by the FTC. And they have a 502(d) provision. We anticipate a similar set of regulations from the SEC later this year. So that is happening on the administrative level. And I am getting the wink-wink cases, where the government is investigating, and there is not a subpoena. So there is a little winking going on, which says, give us a subpoena, and we'll go to court, and it will be assigned to a magistrate judge. And, "wink-wink," we'll get a 502(d) order.

PROF. CAPRA: Yes, but what's the purpose of that? Who wants the information?

JUDGE FACCIOLA: Because if Maura is going to cooperate with the government, what she doesn't want is Ariana waiting outside—

MS. GROSSMAN: To get my inadvertently produced documents.

PROF. CAPRA: Inadvertently produced. So there would be no waiver and no use of the documents anywhere.

MS. GROSSMAN: Right. My privileged documents.

JUDGE DIAMOND: Very common government litigation is under the False Claims Act where the government chooses to intervene, in theory, it's supposed to be good after sixty days, but usually more like five years. And, interestingly, the False Claims Act has the following provision: they will serve on the company a civil investigative demand where potentially millions of pages of documents will be turned over before any claim is filed. And the False Claims Act says: "Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials,"³⁴ which is, I guess, why you didn't want Congress writing your rule 502. But the spirit of it is there, although it's slightly incomprehensible.

PROF. CAPRA: We tried our best, and we're still relying on the spirit. So we're concluding our time here. There was a whole section of what language should go into a Rule 502(d) order. I put that at the end, because I was afraid that we'd start drafting on the floor, and I didn't want to do that. But what we are going to do is develop a model Rule 502(d) order and it will be appended to the transcript of these proceedings that will be published in the *Fordham Law Review*. It will be the work product of this conference. So I'd like to turn to Judge Rosenthal, who we started with, for closing remarks, and then to Judge Fitzwater.

34. 31 U.S.C. § 3733 (2006).

JUDGE ROSENTHAL: The talent in this room and the commitment in this room is among the many reasons to be optimistic going forward. Even though we start from the premise that there is a well intentioned and good rule that, like other well intentioned and good rules, we all know that it could be much more effective in the way it is used, and in the frequency of its use, and the thoughts expressed here have been most helpful in getting to that better use.

There is a wonderful quote by Charles Clark, the Dean of all rulemakers. You know, if I'm the mother, what is he? He's divine. But it's to the effect that, if these problems are real—and they are—we should not expect that a rule will solve them once and forever. Our obligation is simply to continue to work on them.

And that's really what we've been talking about. We do have a rule that can help. It will not by itself solve all the problems. But there is a lot that can be done to take this very good product and make it more useful and more frequently used. And the people in this room are precisely the right people to do it, whether it's making clarifying and supportive changes to other sets of rules, whether it is in including this information in educational materials and presentations that cover the waterfront, or any other effort to promote the rule.

Judges at all levels can get involved in this venture, government, public, as well as private lawyers at all levels of the practice, in-house lawyers, corporate counsel. There is room here for a lot of missionary work, in essence. And it's worth doing. It's worth doing in honor of Charles Clark. It's worth doing in honor of Dan Capra.

PROF. CAPRA: And it's worth doing in honor of Judge Rosenthal. So I'd like to personally thank all the panelists for being here. It was excellent. And I want to turn it over to Judge Fitzwater for concluding remarks.

JUDGE FITZWATER: And I want to thank our moderator, Professor Dan Capra, and all of our participants for this truly outstanding symposium. It exceeded my expectations, Dan. I also want to thank, once again, our host, Charleston School of Law.

The insights shared today will become part of the legal literature when these proceedings are published in the *Fordham Law Review*, and the expertise of our panelists will certainly assist the Advisory Committee on Evidence Rules as it considers how best to promote the use of Rule 502 so that it can become better known and understood and fulfill its original promise to reduce the cost of pre-production privilege review. That concludes the Symposium, and I thank all of you for participating.