

Attorney-Client Testimony.txt

ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE

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3 MR. IDE: Everybody, this is Sue Daly, who is our  
4 staff lead for the task force, and if you ever need any  
5 information, need to know our web site or where papers are,  
6 she runs the show. And why don't you tell them what you just  
7 told me?

8 MS. DALY: We have a copy of an issues paper. If  
9 you have not received it, it's out here on the table.  
10 Otherwise, I could bring some copies in, and then just make  
11 sure to sign in on this legal pad that's going around, if you  
12 would. Here, I'll pass that along.

13 MR. IDE: My name is Bill Ide, and I chair the ABA  
14 Task Force on Attorney-Client Privilege, which also includes  
15 work product and anything else related to what a lawyer does  
16 or trying to keep information for the client. The purpose  
17 this afternoon is to hear -- we call it a public hearing. We  
18 have scheduled some people to talk. Other people have been  
19 kind enough to give us written documentation, and we welcome  
20 for those that have not yet been able to submit anything in  
21 writing to please get it to us.

22 We're still moving along. We're still learning.  
23 This is the issue identification stage for us. As Sue Daly  
24 noted to you, we have a white paper which focuses on the  
25 public company issues in relationship to SEC, Department of

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1 Justice, the auditor world. We will broaden that paper out  
2 to cover the tax, and we're still learning what the issues  
3 are. So the paper could well start covering other areas  
4 also.

5 But this afternoon our purpose is to hear from  
6 those of you that have an interest. We have a schedule,  
7 which does not reflect the written documentations we have,  
8 but we also have papers that we received from the ABA Section  
9 of State and Local Government, from professors of law at  
10 American University and NSU Law Center, and we have the State  
11 Bar of California's papers and also an attendee for the State  
12 Bar of California and from an attorney in Portland, Oregon.  
13 All this will go on the record, so I'm just giving you an  
14 overview.

15 You have in front of you members of the task force  
16 that are here. Peter Moser and Hilarie Bass will join us in  
17 a little bit. Judy Perry Martinez will preside when I have  
18 to leave around 2:30 due to a conflict. We scheduled the  
19 American College of Trial Lawyers at one o'clock. David  
20 Brodsky was going to do that and then unfortunately could not  
21 be with us.

22 Is anyone hear from the college? We have a written  
23 paper from the college, and I'm not aware that David was able  
24 to obtain a substitute, so what we'll do is accelerate the  
25 scheduling, and if someone comes in from the college, we'll

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1 try and make time for that. So is Pam here yet? Pam Palmer?  
2 Well, when she does, we'll hear from the corporate -- okay.  
3 Pam, are you ready for us? We're ready for you.

4 MS. PALMER: My goodness.

5 MR. IDE: We've accelerated you.

6 MS. PALMER: I'm happy to be accelerated.

7 MR. IDE: We have a court reporter, Ladies and  
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8 gentlemen, so all of this will be available at our web site  
9 later on. And Pam, if you would be kind enough -- well, you  
10 know. You're a lawyer. For the record, let the court  
11 reporter get who you are and who you represent, and then we  
12 have an excellent paper from you all. I think it would be  
13 most enjoyable to hear an overview from you of that, and then  
14 we can talk about it a little bit.

15 MS. PALMER: Very good. Thank you very much for  
16 the opportunity to appear before you today on this matter of  
17 vital concern to the committee and to the public. Obviously,  
18 I am not David Brodsky, but I like to think that the  
19 differences between us on the issues that I'm about to talk  
20 about are really only skin deep.

21 Like David, I am a member of the law firm of Latham  
22 and Watkins. I am a securities litigation partner, and I am  
23 resident in our Los Angeles office. David and I represent  
24 the Corporate Counsel Consortium, which is an ad hoc group  
25 composed of interested general counsels of public companies

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1 in the United States. Originally the group met under the  
2 auspices of the Bar Association of New York but now has  
3 gathered additional constituencies across the country.

4 General counsels of public companies share a common  
5 concern about erosion of the protections of the attorney  
6 client and work product privilege, increasingly as a result  
7 of the public audit process. That's the particular focus of  
8 the consortium and of our work.

9 The issue for us and that we have addressed in our

10 paper submitted to the task force is really embodied in the  
11 title. It's "The Auditor's Need for the Client's Detailed  
12 Information Versus the Client's Need to Preserve the  
13 Attorney-Client Privilege and Work Product Protection, the  
14 Debate, the Problems and Proposed Solutions."

15 The paper is much more detailed than the remarks  
16 that I'm about to give you, and I refer you to the paper.  
17 I'd be happy to talk about any questions that you might have.  
18 In my brief remarks I want to focus on our proposed solutions  
19 to this particular problem and start first, however, by  
20 setting the stage for the problem and how it is that it's  
21 become such a big problem in 2005.

22 First, how did it really arise? In recent years,  
23 you know, as we all know, we have witnessed an astonishing  
24 parade of corporations collapsing and being restructured  
25 under the weight of alleged fraudulent accounting, actual

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1 fraudulent accounting. The corporate scandals of 2000 and  
2 2001 led to a firestorm of legislation and regulation, the  
3 Sarbanes-Oxley Act, rule making and enforcement initiatives  
4 by the SEC.

5 We now have standards setting and oversight over  
6 accounting firms by the public account -- Public Company  
7 Accounting Oversight Board. Even before the PCAOB started  
8 its role in oversight and establishing generally accepted  
9 accounting standards for public company audits, the AICPA was  
10 already moving on changing GAAS standards and strengthening  
11 the role of the auditors with respect to verifying company  
12 positions and presentations in order to strengthen their role

13 in detecting and deterring corporate wrongdoing.

14           So we now have a world in which GAAS has evolved.  
15 SAS 99 was implemented in 2002 and governs the auditor's  
16 responsibilities with respect to client -- detecting client  
17 fraud in an audit. We have increased government scrutiny of  
18 auditors' compliance with Section 10(a), which was enacted in  
19 1995 as part of the Private Securities Litigation Reform Act.  
20 It requires auditors to report up within public companies,  
21 and in some circumstances out to the SEC, when they become  
22 aware of potentially material client wrongdoing that could  
23 affect the financial reporting.

24           All of these developments in law and policy have  
25 clearly strengthened the role of auditors in detecting

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1 corporate fraud, and they have also brought about changes in  
2 how public companies themselves self-regulate. And public  
3 companies are now -- there are heightened expectations of  
4 them to implement internal controls to detect and deter  
5 fraudulent conduct, wrongdoing within the company and  
6 increased expectations that they will have stronger controls  
7 in place.

8           Companies, of course, have always relied on  
9 lawyers, inside and outside, to help them with legal  
10 compliance, to conduct internal investigations when there is  
11 evidence of wrongdoing, to help the company figure out what  
12 its legal obligations are in complex transactions, how to --  
13 what the tax implications are of complex transactions. In  
14 all kinds of ways companies use lawyers to give them advice

15 in matters that could conceivably have impact on the  
16 company's financial reporting and disclosures.

17 The problem we now face is that auditors are  
18 increasingly requesting access to that attorney work product  
19 and privileged communications in order to perform their audit  
20 work. Companies are faced with a Hobson's choice. If they  
21 turn the information over to the auditors, which they always  
22 do, they face the risk that corporate adversaries will claim  
23 waiver and will be entitled to access that same information.  
24 That puts the company's in harm's way for essentially doing  
25 nothing worse than engaging in good corporate governance and

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1 cooperating with their auditors.

2 If companies resist their auditors, that results in  
3 an even worse outcome. They may end up with a qualified  
4 audit opinion or no audit opinion at all, lose access to the  
5 capital markets and face all of those deleterious  
6 consequences.

7 It has long been established that companies do need  
8 to be able to involve their legal counsel in confidence in  
9 order to promote legal compliance and protect legitimate  
10 corporate interests. Some people have begun to question  
11 that. Why do companies need to have privileged  
12 communications with counsel? Why do companies need that?

13 Well, they need that in order to have the effective  
14 assistance of counsel in order to govern themselves and make  
15 good decisions. The effective assistance of counsel requires  
16 lawyers to learn the bad facts or the good facts, to analyze  
17 the weaknesses of client positions along with the strengths.

18           But what steward of a public company in his or her  
19 right mind would want to be candid with counsel about  
20 weaknesses and bad facts if they know that it's going to be  
21 tied up in a bow and handed in a silver platter to  
22 adversaries of the company or potential adversaries of the  
23 company, embroil the company in litigation and potential  
24 exposure that's bad for the company and its shareholders?

25           What we're perceiving is that these recent

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1 developments in law and policy have shifted two competing  
2 public policy concerns out of balance. While the public  
3 policy of protecting the confidentiality of attorney-client  
4 communication so that corporations will be encouraged to get  
5 the advice of counsel when they need it is being weakened,  
6 the public policy to deter corporate fraud is being  
7 strengthened, and this imbalance has resulted in a waiver  
8 problem.

9           In our work in connection with this issue we have  
10 proceeded from the proposition that both public policies are  
11 important and need to be protected. Auditors need to be  
12 provided with all the information necessary to perform their  
13 important public function in ensuring the accuracy of  
14 financial reporting, and at the same time, it's in the public  
15 interest to protect the ability of companies to maintain the  
16 confidentiality of attorney-client communications. We think  
17 these two concepts are not incompatible and that a proper  
18 balance can be struck.

19           As you all know, 30 years ago the legal and

20 accounting professions debated this same issue and reached an  
21 accord or a treaty regarding the waiver problem that arises  
22 when auditors ask their clients for privileged information  
23 regarding loss contingencies for litigation claims and  
24 assessments. The ABA's statement of policy, which was  
25 adopted and accepted by the AICPA, struck a balance between

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1 the two same public interests that are wrestling with each  
2 other today. One, to promote confidence in the capital  
3 markets by assuring reliable financial reporting of loss  
4 contingencies and disclosures, and on the other hand to  
5 encourage companies to consult freely with counsel by  
6 protecting the confidentiality of lawyer-client  
7 communications.

8 The ABA's statement of policy struck that balance,  
9 interestingly enough, by actually limiting auditors' access  
10 to privileged information. And it's almost surprising to go  
11 back and see that in 1977 the AICPA issued interpretive  
12 release affirming the treaty and posing specifically the  
13 following question. Under SAS 12, it states that auditors  
14 are to examine documents in the client's possession  
15 concerning litigation claims and assessments, including  
16 correspondence and invoices from lawyers.

17 Question: Would this include a review of documents  
18 at the client's location considered by the lawyer and client  
19 to be subject to the attorney-client privilege? The answer  
20 30 years ago was no. Although ordinarily an auditor would  
21 consider the inability to review information that could have  
22 a significant bearing on the audit as a scope restriction, in

23 recognition of the public interest in protecting the  
24 confidentiality of lawyer-to-client communications, SAS 12 is  
25 not intended to require an auditor to examine documents that

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1 the client identifies as subject to the lawyer-client  
2 privilege.

3 Well, that was 30 years ago, and while that  
4 interpretive guidance is still in effect, it's clear there's  
5 been a lot of water under that bridge. And today, you know,  
6 we have SAS 99. We have 10(a), PCAOB oversight and a lot of  
7 pressure and scrutiny on auditors to get behind company  
8 representations and get access to that privileged information  
9 to make sure they don't get in trouble for not digging deep  
10 enough.

11 MR. IDE: Pam, let me ask you this because we're  
12 going to have a time frame. Could you go to your  
13 recommendations?

14 MS. PALMER: Sure.

15 MR. IDE: And let's talk about those. We want to  
16 make sure we can get those, and if I'm cutting you off on  
17 something, make sure you fill that in.

18 MS. PALMER: Fair enough. I have to admit I have  
19 been struggling to cut down what was an even more lengthy  
20 presentation. We basically come down to five solutions, and  
21 the only one that's ironclad would be legislation modeled on  
22 H.R. 2179, which has been pending before congress for the  
23 last couple of years at the recommendation of the SEC.

24 That legislation, you know, as you know, would

25 provide, if it passed, that companies can share privileged

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1 information with the SEC without waiving privileges as to  
2 other litigation adversaries. That selective waiver concept  
3 was also adopted by congress already in the form of Section  
4 105 of the Sarbanes-Oxley Act allowing accounting firms to  
5 disclose information to the PCAOB without waiving this to  
6 others.

7           Even if this legislation passes, it's not going to  
8 protect companies who provide their information to the  
9 auditors, but it provides an excellent model that we can work  
10 toward. But it's languishing. Congress hasn't moved on it,  
11 so what are we going to do in the interim?

12           Our solutions propose sort of alternatives in two  
13 phases. One, let's limit the amount of confidential  
14 information that companies have to disclose to their auditors  
15 by having the PCAOB issue interpretive guidance saying --  
16 assuring auditors that they're not required to gather  
17 privileged and confidential information in all circumstances  
18 in order to perform their work.

19           Any such interpretive guidance would have to give  
20 some protection to the auditors, though, so that they  
21 wouldn't be second-guessed in hindsight as to where they draw  
22 the line. If they forego accessing information they know is  
23 there, they shouldn't be penalized for having made a judgment  
24 in good faith that turns out in hindsight to have been  
25 different than the PCAOB or some other regulator would have

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1 made that judgment.

2 We also think it would be very helpful if the PCAOB  
3 would issue interpretive guidance making clear that it  
4 doesn't -- it wouldn't violate the auditors' independent  
5 standards if they could actually enter into written  
6 confidentiality agreements with their public company clients  
7 providing that privileged information wouldn't be disclosed  
8 to third parties.

9 The way that would help is to shore up public  
10 companies' positions in court when they have to go argue that  
11 there has been no waiver, despite disclosure to the auditors,  
12 that they have maintained their expectation of  
13 confidentiality despite having made the disclosure.

14 Court decisions are all over the map on this. It  
15 hasn't worked very well when the government has entered into  
16 confidentiality agreements with companies, but there are at  
17 least some good cases out there, and it would help companies  
18 to make their case in court if they could have those kind of  
19 confidentiality agreements. We don't think it's inconsistent  
20 with the independence requirements under GAAS.

21 Similarly, we think it would be helpful if the  
22 PCAOB would expressly adopt an ethical provision for public  
23 company auditors providing that they're supposed to keep  
24 their client files confidential, which is what the AICPA  
25 already has under Ethics Rule 301.

1 Finally, the one solution that we can pursue  
2 without administrative help and without legislation is simply  
3 to all agree and start talking about the fact that auditors  
4 and their clients truly share a common interest in producing  
5 accurate financial reports and accurate public disclosures  
6 and start calling it a common interest because, again, that  
7 is something courts have historically recognized in other  
8 contexts as an exception to the waiver.

9 So you know, for example, in litigation coparties  
10 with common interests, even though potentially adverse in  
11 other circumstances, can share privileged information without  
12 it constituting a waiver. Relying on the courts is a  
13 haphazard proposition at best, but it's the best we can do  
14 until we get a legislation of -- legislative or  
15 administrative solution to the problem.

16 I can conclude there. If you have any questions --

17 MR. IDE: Well, let's go around. Stan.

18 MR. KELLER: Pam, I mean, I see the legislative  
19 solution, and your wonderful paper focuses on that. You then  
20 refer to these other steps as interim steps, and I guess my  
21 question is, are at least some of them really interim steps?  
22 And are there issues that legislation either would not  
23 resolve or indeed might even exacerbate?

24 So for example, legislation addresses the  
25 disclosure to third parties of the information but doesn't

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1 necessarily get at the internal investigation process. So,  
2 for example, if with legislation, auditors are then empowered  
3 to seek whatever, any privileged information without

4 restraint, when you couple that with their 10(a)  
5 reporting-out obligation, if we built in some issues;  
6 impediments, if you will, to the internal investigation  
7 process and the ability to freely collect information  
8 internally, and therefore, are some of these other steps that  
9 seek to make privileged information available only, if you  
10 will, as a last resort, still a necessary step?

11           Second, to the extent that more information is  
12 provided, and we know that, let's say, lawyer litigation  
13 assessments flow through to the auditors. Are they  
14 consistent with the treaty which carefully circumscribes what  
15 information the lawyer provides, opposed to the client  
16 provides to the auditors? And are we just indirectly -- do  
17 we need to think about the consequences of indirectly  
18 providing the lawyer's advice through the client to the  
19 auditor? Any comments?

20           MS. PALMER: Okay. I think you have raised two  
21 very important issues, and it is -- you know, the devil is in  
22 the details of the drafting of any legislation and  
23 administrative remedy. I think the point you're getting at  
24 with Section 10(a) is a very good one.

25           At some point companies need to have privacy to

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1 conduct internal investigations. They need to provide their  
2 auditors with sufficient information so that the auditors can  
3 comply with 10(a), but there is certainly attention there to  
4 the extent that auditors conclude that companies have not  
5 adequately remediated a problem. And the auditors then,

6 possessed with this confidential information, may have a  
7 reporting-out duty.

8           You know, I think professionals in companies would  
9 work that out, you know, with the responsibilities of  
10 companies and their audit committees to identify wrongful  
11 conduct and remediate it, that's what companies should be  
12 doing and are doing. And if they do that, the auditor  
13 doesn't have a reporting-out obligation.

14           And yet, the information gathered for the 10(a)  
15 process would still remain privileged from private litigation  
16 adversaries of the company. But it wouldn't -- but the  
17 auditor, if the auditor is satisfied that the company has  
18 adequately remediated, would not then have a reporting-out  
19 obligation. So I just think that would work out if there  
20 were legislation that allowed companies to share with the  
21 auditors and still protect the companies from waiver as to  
22 private litigation adversaries.

23           And I'm not sure what the second question was  
24 actually getting at on the administrative remedies.

25           MR. KELLER: Well, there I was really thinking the

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1 need to think through the implications, the consequences of  
2 lawyer work product and information being made available to  
3 the auditor and matching that up against where we are today  
4 with the treaty, and are there issues there that may need to  
5 be addressed?

6           MS. PALMER: Yeah. I think that where the treaty  
7 is starting to be under pressure is when auditors are feeling  
8 the need to understand more deeply what's really going on in

9 litigation and what the risks of losing are beyond what the  
10 lawyer's opinion is. And if that trend is going to continue  
11 and auditors are going to continue to need to go behind the  
12 opinion letters that are coming out of the treaty, there's  
13 got to be some way to protect companies from the consequences  
14 of disclosure to the auditors and waiver as to adversaries.

15 I mean, the treaty is -- you know, in effect it's  
16 alive and kicking. And that's the way the communications are  
17 being handled, but it's under pressure. You know, all of the  
18 solutions that are short of legislation ultimately are  
19 solutions that will have to be adjudicated on a case-by-case  
20 basis in the courts. So it makes them all less than perfect.

21 MR. IDE: I want to ask you, on your second  
22 recommendation, is that asking for the same, reaffirm the  
23 treaty?

24 MS. PALMER: The second -- reaffirm --

25 MR. IDE: You said the PCAOB should issue

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1 interpretive guidance advising basically the auditor should  
2 not seek information from a lawyer unless it's not available  
3 from any other source.

4 MS. PALMER: Well, yeah, that would reaffirm the  
5 treaty, but I think because the world has changed in the last  
6 30 years since the treaty, that auditors are at greater risk  
7 of being second-guessed if they don't go behind the opinions  
8 that lawyers are giving them. And PCAOB guidance that would  
9 give comfort to the auditors that they don't have to go  
10 behind those opinions would be very helpful, and that if they

11 don't go behind those opinions, they wouldn't be punished and  
12 second-guessed in hindsight for not having done so. So the  
13 second solution would be a reaffirmation and shoring up of  
14 the treaty.

15 MR. KELLER: Bill, can I just make a distinction  
16 there so the record is clear? I think what we're talking  
17 about, I'll refer to it as an outside interpretation of the  
18 treaty that goes into the need of lawyers to seek privileged  
19 information, and so that's really, if you will --

20 MR. IDE: You mean auditors?

21 MR. KELLER: The auditors. The auditors to seek  
22 privileged information, and so that would really go to, if  
23 you will, the communication between the company and its  
24 auditors. In terms of the structure, the basic premise of  
25 the treaty, which is the lawyers responding in a structured

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1 way to requests, if we think of that as the treaty, I think  
2 that has been reaffirmed. And the question is whether it  
3 will be revisited.

4 It's rather, this outside AICPA interpretation,  
5 which I can tell you, the author for the AICPA of that says  
6 what it means is, I think really what you were proposing that  
7 it be reaffirmed now, which is that you only seek out that --  
8 not that you're prohibited from getting that information.  
9 It's only if there's no other way and you -- it's clear that  
10 you need that information. You don't get that from the words  
11 of the interpretation, but that's what, with 30 years of  
12 hindsight, its author now says it means.

13 MR. IDE: Other questions from members of the task  
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14 force? Okay. Pam, thank you very much.

15 MS. PALMER: You're welcome.

16 MR. IDE: We appreciate it, and the paper is  
17 excellent.

18 MS. PALMER: Thank you very much.

19 MR. IDE: You bet. Is Ken Gideon here yet?

20 MR. GIDEON: Yes.

21 MR. IDE: Ken, welcome.

22 MR. GIDEON: Thank you. I'm Ken Gideon. I'm the  
23 chair of the ABA Section of Taxation. We have submitted a  
24 paper that I think you all have before you, and while I will  
25 speak loosely from that, I really would like to deal more

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1 with the questions that you may have. So I'm going to go  
2 really hitting the high points.

3 We are particularly interested in your fourth  
4 topic, the one that was just addressed. In specific, we call  
5 your attention to an AICPA recent interpretation with respect  
6 to tax accrual work papers that basically says, you may  
7 request material without regard to the privilege.

8 Our anecdotal experience of our membership now is  
9 that these requests are becoming frequent and widespread, and  
10 that essentially where under the old treaty we had a  
11 situation where there would be, through the audit letter  
12 process, advice to the client that they should make an  
13 appropriate disclosure of the like, but there would not be a  
14 seeking by the auditors of the actual opinions and  
15 advice-giving materials themselves, now we find exactly the

16 opposite is occurring.

17           And indeed, that these requests are being made with  
18 great frequency. In other words, basically close to the  
19 concluding stage of the audit there will be a request to the  
20 tax director that says, "If you have tax opinions, we would  
21 like to see them."

22           The concern of that, of course, is that ultimately  
23 we fear that, for exactly the reasons that were stated  
24 earlier, this cannot but undermine the privilege because if  
25 that leads to a broad form of subject matter waiver, then as

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1 a practical matter over time these communications will simply  
2 cease to occur. And if they cease to occur, it's hard to see  
3 how the interests in transparency of those who are seeking  
4 greater transparency in corporate financial statements will  
5 ultimately be advanced.

6           And so our first concern is that it seems to us  
7 that there is a fairly urgent need for the bar to reengage  
8 with the accounting authorities, PCAOB itself, the financial  
9 accounting standards board, perhaps the SEC simply to focus  
10 on the fact that just as there is a common interest in  
11 transparent financial statements, there should be an equally  
12 common interest in preserving the values that underlie free  
13 communication with attorneys and the providing of advice, and  
14 that the current practice, if rigorously pursued, is going to  
15 seriously undermine that.

16           And so that, you know, one doesn't know where that  
17 would go, but it seems to us that that dialogue cannot begin  
18 too soon.

19           The next part of the paper is where we go into a  
20 lot of detail, and again, it's really to ask, well, if you  
21 produce -- because in general, the pressures described by the  
22 prior witness really puts you in a box that you have got to  
23 have clean financials. And one would say that more times  
24 than not, the result is that, okay, you're delivering the tax  
25 opinions, as opposed to not delivering the tax opinions to

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1 the auditors.

2           What is the consequence of that action? When you  
3 look at the case law, you find really, I think, an almost  
4 impossible melange. You have situations in which, you know,  
5 it's one of those situations where I believe I can almost say  
6 that, tell me what position you had in mind, and I believe I  
7 can find a case that will support your point of view, which  
8 is to say that there is no clear point of view that emerges  
9 from the case law.

10           What we point out in this, though, is that,  
11 again -- well, and I would quickly say that if broader  
12 legislation that could pass can be adopted, that is clearly a  
13 preferable solution. But in the world of, we don't have  
14 legislation and how are we going to live? What are the  
15 things we can do with what we've got?

16           And one of the things that we think that could be  
17 done is that this body might produce an appropriate analysis  
18 of existing case law and point out what seems to us to be the  
19 compelling case for limiting waiver in the circumstance of  
20 opinions provided to auditors. Specifically, if you look at

21 some of the case law that we have cited, this is clearly an  
22 extrajudicial production of the opinion.

23 Many courts reach the conclusion that under those  
24 circumstances, the only thing that is waived is the opinion  
25 itself. In other words, this is not a subject matter waiver

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1 in those circumstances. That's far less than ideal because  
2 the tax opinion is often a road map to adversaries, and a  
3 solution that allowed the tax opinion to remain confidential  
4 would be preferable.

5 But if -- but it would be far better than having  
6 full subject matter waiver. You know, what does that mean?  
7 That means that all of counsel's files can be produced. It  
8 means that counsel can be examined on deposition about the  
9 matter, and it's hard to imagine that kind of waiver not  
10 having the most chilling sort of effects on these kind of  
11 communications in the future.

12 And so if there could be, through an appropriate  
13 interpretation of current waiver law, a restriction that says  
14 that if you provide the opinion, that's all you have  
15 provided; in other words, you have not made a subject matter  
16 waiver. Because as we point out in the paper, subject matter  
17 waiver raises a lot of questions. First of all, what's the  
18 subject? In other words, just how broad is a subject matter  
19 waiver? Next, what is its temporal dimension? And all of  
20 these issues would have to be addressed.

21 What we would ask you to do is to take a look at  
22 this, and if you are so moved to do so, we think that an  
23 authoritative kind of analysis and analysis of the underlying

24 policies behind the waiver or rules that have emerged might  
25 be very constructive in providing at least some limitation on

24

1 the potential scope of waiver until better solutions can be  
2 arrived at.

3           And so our -- the thrust of what we have said to  
4 you today is basically, we think that through this body or  
5 other appropriate ABA bodies, that consultation with the  
6 accounting bodies, it seems to us, should begin so that both  
7 sides are focussing on exactly what's at stake here and what  
8 could be done to ameliorate the current situation.

9           And then secondly, we would hope that you would  
10 analyze current case law with a view toward basically  
11 providing analysis that might be helpful to judges  
12 confronting these same difficult issues in the future that  
13 would be helpful in this area as well.

14           And then third, while we didn't make any specific  
15 endorsement of legislation or the like in our testimony, we  
16 did make reference to it, and I want to be understood here  
17 today that if a legislative solution could be enacted that  
18 would restrict -- in other words, would allow you to show  
19 this material to auditors but would not have the effect of  
20 basically acting as a waiver with respect to any of your  
21 adversaries, that strikes us as the most preferable solution.  
22 But on the other hand, you know, it's likely to be sometime  
23 before a solution like that can be arrived at.

24           And we thank you for the opportunity to appear  
25 here, and I'm happy to answer any questions that you may

1 have.

2 MR. IDE: Questions?

3 MR. KELLER: Any specificity as to what the results  
4 of a dialogue to ameliorate the current situation would  
5 encompass, recognizing the need for the integrity of the  
6 audit process, for the auditors to be able to satisfy  
7 themselves regarding tax positions that are taken, adequacy  
8 of tax reserves and the like?

9 MR. GIDEON: Well, I think that I have actually had  
10 informally some discussions with some of the people involved  
11 in the accounting process personally, and I -- I don't think  
12 that there was the realization of -- in other words, I don't  
13 think that there is a wide appreciation among those bodies of  
14 what the waiver potentials of their actions would be.

15 So I think that just as an educational matter, to  
16 understand what the stakes are here would be very useful. In  
17 other words, just saying, you know, if you continue on this  
18 course, this is what you may achieve and that that, at least  
19 in my judgment, would be a very counterproductive result to  
20 all concerned. And so I think that at a minimum, that could  
21 be achieved by this process.

22 I think that what that could induce on their part  
23 is really kind of reconsidering the treaty and asking, you  
24 know, what is it that we really need to know. In other  
25 words, do we really need the opinions themselves, or are

1 there alternative means of gaining the information that we  
2 need for financial statement disclosure short of requiring  
3 documents that would result in waiver?

4           And I actually think that that -- I wouldn't want  
5 to prejudge how that discussion would come out, but I think  
6 that there may be more flexibility than you would imagine on  
7 the other side of this because I do think there's been some  
8 genuine surprise when the ramifications of waiver are  
9 explained about exactly where this is going.

10           I'm not telling you that it would be ultimately  
11 fruitful, but it's hard to see how it would -- how it could  
12 do any harm. And it might do a great deal of good because  
13 particularly we might get to the kinds of protocols that we  
14 used to have, that would restrict kind of requesting  
15 materials that would directly result in waiver.

16           MR. KELLER: Surprise, is that the auditors? The  
17 regulators of the auditors? Both?

18           MR. GIDEON: I think it has to be the entire group  
19 because, as a practical matter, all of them will have to be  
20 in agreement on that for it to achieve success, but I think  
21 that the regulators might be more open to -- I mean, I could  
22 be very wrong. But I think that they might be more open to  
23 this than might be imagined, I think particularly when there  
24 is some realization of exactly where this train is headed if  
25 nobody heads it off at all.

27

1           MR. KELLER: And do you see the IRS as a player in

2 this, either invited or uninvited?

3 MR. GIDEON: I think that the IRS will have to be  
4 consulted at some point in this process. I think it can be  
5 counted on to have a view of its own. I wouldn't want to  
6 attempt to speak for them as to what that view would be. I  
7 think that they might have the view that they, like the SEC,  
8 should be entitled to see these things without waiver  
9 effects. And that actually -- that's a situation that within  
10 proper limits I think could be discussed.

11 But I wouldn't at this moment want to speculate on  
12 what their position would be so much as I think they have to  
13 be consulted, but I think the first round consultation has  
14 got to be with the accounting bodies so that there's just  
15 kind of mutual realization of kind of what's going on here  
16 and where might it lead.

17 MR. KELLER: Okay.

18 MS. MARTINEZ: Ken, I'm curious. In your paper, in  
19 your good paper it cites to a case where a court found that  
20 there was a waiver reached with communications with all  
21 counsel, not just the one in which there was a production of  
22 one particular paper. And I'm curious, anecdotally for your  
23 work in the section or in your practice if you have heard of  
24 other instances where those demands have been made for  
25 waivers with all communications with each and every counsel.

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1 MR. GIDEON: That we have done for various reasons,  
2 since this is not a hypothetical problem in our practice, a  
3 fair amount of research. I do believe that's confined to one  
4 particular geographical area. It has not kind of spread

5 beyond there, and I don't think that's in any sense the  
6 majority rule.

7           But we wanted to cite it for the simple fact that  
8 it shows the breadth of what a waiver might constitute, and  
9 that in particular it seems to me to kind of return to kind  
10 of the other thing I urge you to do, creating a body of  
11 analysis that would explain why, at least in my view that  
12 would be an incorrect result to reach, could be quite useful  
13 and would be one of the things that an authoritative body  
14 like this might do that would really be very worthwhile.

15           MR. IDE: Other questions or comments? Okay.  
16 Well, thank you very much.

17           MR. GIDEON: Thank you.

18           MR. IDE: We appreciate it. Very helpful. We're a  
19 little ahead of time. State Bar of California, Business Law  
20 Section.

21           MR. HAZEN: Mr. Chair, members of the task force,  
22 I'd like to thank you for this opportunity to appear. My  
23 name is Steve Hazen. I'm here on behalf of the corporations  
24 committee of the State Bar of California Business Law  
25 Section, of which I am a member. I also happen to be a

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1 partner in the law firm of Davis, Wright, Tremaine, resident  
2 in their Los Angeles office.

3           I am appearing here on behalf of the corporations  
4 committee. If the 23 other members of the committee are  
5 incorrect in their prediction that I will exceed my time  
6 limit, I will take a few moments at the end to speak in a

7 personal matter, and of course, if the chair so indulges me.

8 All lawyers need to be knowledgeable about the  
9 concept of attorney-client privilege because of what it  
10 covers, communications. Some lawyers, I am one of them, have  
11 little or no occasion to witness the actual application of  
12 the principle as it is a rule of evidence.

13 As a traditional corporate lawyer, I'm not even  
14 sure I could tell you where the courts in my location are,  
15 much less how they would apply the wealth of case law on this  
16 particular principle. In that context I have also very  
17 little to say here about the attorney work product  
18 considerations. But I can speak knowledgeably about the  
19 obligation of attorneys to maintain client confidentiality,  
20 and that at its root is what this hearing is all about.

21 The -- I apologize. I have my notes out of order  
22 here. The attorney client privilege is an evidentiary  
23 privilege that applies when a lawyer is legally compelled to  
24 speak, such as through subpoena. In contrast, the duty of  
25 confidentiality is a professional obligation that applies to

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1 lawyers at all times, not just when the lawyer is testifying  
2 in court or pursuant to a subpoena.

3 In that sense the duty of confidentiality is  
4 broader in its coverage, and one of the concerns that our  
5 committee has and the reason we're here is, we'd like to be  
6 sure that actions taken in this particular area as applicable  
7 to confidentiality don't have ripple effects in other areas  
8 as well.

9 I am going to be focussing on bullet point No. 2 of  
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10 the announcement for this hearing, specifically, similar  
11 policies and practices of the SEC and other federal agencies  
12 in considering favorable resolution of civil investigations  
13 and enforcement proceedings on the disclosure of privileged  
14 material.

15 I have already alerted the chair that I am going to  
16 perhaps appear to be taking a detour, but I am going to be  
17 hopefully tying this all together. The point, as I have  
18 mentioned, the point that we wish to make here and hope that  
19 the task force will take into consideration is that the task  
20 force really should complete its chores in the broader  
21 perspective. While we -- while some mechanistic tinkering  
22 with the rules of evidence might address specific problems  
23 which are currently arising out of administrative or auditing  
24 procedures, the implications of that on the larger issue of  
25 confidentiality could be seriously impacted.

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1 With that, let me launch into the topic which  
2 illustrates that concern, adoption by the SEC of its attorney  
3 client -- attorney conduct rules which appear at 17 CFR Part  
4 205 and are thus frequently referred to as the Parts 205  
5 rules.

6 The basic mandate of the Part 205 rules is set  
7 forth in Rule 205.3(B)(1) which reads, "If an attorney  
8 appearing and practicing before the commission in the  
9 representation of an issuer becomes aware of evidence of a  
10 material violation by the issuer or by any officer, director,  
11 employee or agent of the issuer, the attorney shall report

12 such evidence to the issuer's chief legal officer or the  
13 equivalent thereof or to both the chief legal officer and its  
14 chief executive officer or the equivalents thereof  
15 forthwith."

16 Part 205, as just recited to you, is deceptively  
17 simple. Even its advocates have a difficult time in parsing  
18 through what that actually means. There was in fact a Law  
19 Review article published in -- I believe it was in about  
20 August or September of this past year in 49 Villanova Law  
21 Review 725 where these advocates say, and I quote here, "It  
22 is barely possible to read the SEC's definition out loud  
23 without tripping over -- without tripping, or as we have  
24 discovered representing this deposition in various fora,  
25 chuckling over the words, let alone understanding them."

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1 MR. KELLER: Steve, I should tell you that there  
2 are a couple of people up here on this panel who may be the  
3 source of those words and believe they are just right, but go  
4 ahead.

5 MR. HAZEN: I understand that and --

6 MR. WANDER: They're better than they would have  
7 been.

8 MR. KELLER: Although Roger Trampton and I have  
9 reached an accommodation.

10 MR. HAZEN: And of course, I'm sure the task force  
11 will recognize that the points I'm making here are as to  
12 substance, not as to the people who wrote them or generated  
13 or even advocate them.

14 The portions of the Part 205 rules that I have just  
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15 read out to you are themselves troubling, but even more  
16 troubling in a way in terms of how it impacts on this is the  
17 so-called safe harbor or good faith that appears in Rule  
18 205.6(C), which states that an attorney who complies in good  
19 faith with the provisions of Part 205 shall not be subject to  
20 discipline or otherwise liable under any inconsistent  
21 standards imposed by any state where the attorney is admitted  
22 or practices.

23 As many of you know, in the summer of 2003 there  
24 was a bit of publicity surrounding the Washington State Bar  
25 Association ethics ruling as far as whether lawyers could in

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1 fact avail themselves of that so-called safe harbor. The SEC  
2 has taken a relatively aggressive position on what bar  
3 associations can or cannot do in the face of this.

4 The general counsel of it has stated -- in fact, I  
5 think it was for this section of the ABA, the business  
6 section, business law section of the ABA in 2004, "I would  
7 urge any lawyer who would like to make a disclosure under the  
8 commission's rules but who is concerned about the potential  
9 conflict of state bar rules to consult with us, either  
10 directly or through counsel."

11 Now, I can't help but notice the curiosity of  
12 suggesting that the protections afforded by acting through an  
13 attorney be utilized to undermine one of the same  
14 protections, confidentiality. The fundamental thrust of this  
15 is one that again is perhaps not critical to this task force.  
16 It may at some points become critical, and that's the

17 question of preemption.

18           The topic of preemption has generally been  
19 addressed at unfortunately great length in some of the  
20 materials presented to you. I am not going to delve into  
21 them here. But it's one that is significant because, of  
22 course, for state bars, we are very anxiously concerned about  
23 what the state applications of the state rules are.

24           And as you probably will not be surprised to know,  
25 the state -- the corporations committee of the state bar has

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1 taken a pretty firm stand on the question of preemption.

2           MR. IDE: Could I ask you about that? Now you're  
3 talking about 307 and 205?

4           MR. HAZEN: Correct.

5           MR. IDE: But have you looked at Department of  
6 Justice through the Thompson memorandum and SEC board that  
7 says we want you to waive corporations to get the -- do you  
8 have any preemption issues there in your mind?

9           MR. HAZEN: Well, I in fact am coming to that.

10           MR. IDE: We're on the detour and we're headed  
11 there. Okay. Got it.

12           MR. HAZEN: We're on the detour and heading to  
13 that.

14           MR. IDE: Okay.

15           MR. HAZEN: In fact, we may as well go directly to  
16 it. It ties into -- I'll just go ahead and pass by that  
17 part. It ties into this dialogue between the Washington  
18 State Bar Association and the SEC which I mentioned earlier.  
19 Basically, what the SEC stated in response to the Washington

20 State Bar is that the Supreme Court has consistently upheld  
21 the authority of federal agencies to implement rules of  
22 conduct that diverge from and supersede state laws that  
23 address the same conduct.

24 In particular, whereas here a conflict arises  
25 because a state rule prohibits an attorney from exercising

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1 discretion provided by a federal regulation, the federal  
2 regulation will take priority.

3 The State Bar of California Corporations Committee  
4 didn't have a dog in that fight except that it was radically  
5 inconsistent with our own state law provisions. Unlike some  
6 state bar matters, in California attorney conduct is actually  
7 governed by state law, and we address it. We came out with  
8 several points related to it.

9 But the bottom line is that we were trying to point  
10 out that the whole concept of impinging upon the  
11 attorney-client relationship, whether it's by waiver of the  
12 privilege or otherwise, is one which will have a chilling  
13 effect on that relationship. It will have a chilling effect  
14 on the advice that is given to the client in that context.

15 And we noted, for example, that there is a  
16 fundamental difference between attorneys and accountants in  
17 this respect. The SEC on various occasions, I think, would  
18 like to treat them as exactly the same. But it's important  
19 to remember -- and this will impact on one of the --  
20 testimony I have given earlier.

21 The Supreme Court itself has been pretty clear

22 about what it sees the role of the independent auditor. The  
23 independent public accountant performing this special  
24 function owes ultimate allegiance to the corporation's  
25 creditors and stockholders, as well as to the investing

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1 public. That happens to be in materials I submitted. I  
2 can't remember the cite right off the bat, but for the  
3 record, it's U.S. versus Arthur Young & Company.

4 But similarly, the United States Supreme Court has  
5 stated that an attorney is a confidential advisor, an  
6 advocate and a loyal representative of his or her client.  
7 Sarbanes-Oxley itself, I think, recognizes this distinction,  
8 noticing, for example, that the role that an auditor performs  
9 is so fundamentally different than what a lawyer does that  
10 they can't do that. Auditors can't provide legal services  
11 for the simple reason that in doing so, they are advocating a  
12 position. They are taking the position of a client, as  
13 opposed to examining the client.

14 Now, the SEC in a -- I mean, this has to be  
15 considered. And this goes right now to the point that the  
16 chair has raised with respect to the Thompson memorandum.  
17 The point here is that I believe the SEC, and perhaps some  
18 other regulatory agencies as well, are actually addressing  
19 the question you were addressing in a much bigger context.  
20 There is an attempt to try and equate this profession with  
21 that of a gatekeeper or some profession that has a public  
22 obligation.

23 There was a case recently decided in fact in  
24 Oakland against a former partner of one of the major

25 accounting firms in which the U.S. Attorney in that matter

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1 came out before the press and said, "Our financial markets  
2 depend on the integrity of auditors, lawyers and  
3 professionals to do their jobs ethically and fairly."

4 Well, I submit to you that that's true for the  
5 accountants. It's not necessarily true for the lawyers, and  
6 that's the real focus of what we're talking about here. What  
7 exactly is the role that the lawyer is performing, and what  
8 happens when the waiver is required or waiver is requested?

9 You'll be glad to know, Mr. Chair, that I've just  
10 now leafed to my last note. The corporations committee has  
11 emphasized in this exchange with the SEC that the concept of  
12 confidentiality does directly apply to the attorney-client  
13 privilege, and we have noted the impact of the Thompson  
14 memorandum. We have emphasized this undermines the public  
15 interest that underlies the protections of the  
16 attorney-client privilege, particularly when waivers are  
17 given at an early stage of the process.

18 One of the problems that you have is that  
19 allegations of possible misconduct arise. They can come up  
20 in a whole lot of different fora in a whole lot of different  
21 areas and under a whole lot of different theories of laws.  
22 At the federal level, in the securities law, it can be civil  
23 or criminal. The same alleged misconduct might be subject to  
24 administrative or civil enforcement as well, and the alleged  
25 misconduct may engender one or more civil lawsuits brought by

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1 shareholders, by outsiders or the like.

2 This is particularly a problem where the question  
3 comes up, when an investigation is being done against an  
4 entire industry, as has occurred, where there is an automatic  
5 prisoners' dilemma created. The question is, who is going to  
6 be the first one to waive the privilege? Who is going to  
7 be there and get there first to be sure that they're on the  
8 right side of that investigation?

9 The pressure on corporations to waive client  
10 confidentiality protections thus create additional risks of  
11 harm to investors and innocent targets, and even to the  
12 public itself. Our concern is that the waiver process will  
13 actually have a deleterious effect on what it's designed to  
14 protect, the people of the investing public and so forth.  
15 And if it is not an opportunity for the lawyers to be able to  
16 make the presentations and advice in complete  
17 confidentiality, that will be lost.

18 The question that comes up -- and then I will close  
19 these remarks and to the extent I have two seconds left, I  
20 will delve into something else, with two questions or  
21 actually one question, then two answers. What does a limited  
22 waiver do? Well, first off, it encourages people to use it.  
23 It encourages the administrative agencies to rely upon it, to  
24 require it. It encourages the auditing community to do  
25 exactly the same thing.

1           And secondly, it doesn't matter whether the waiver  
2 is limited. It doesn't matter whether the scope is limited.  
3 It still impacts confidentiality. It still impacts the  
4 relationship between the lawyer and the client, and with  
5 that, my formal remarks are completed. Mr. Chair, if I have  
6 two more minutes, I'd like to expand on a personal level,  
7 but --

8           MR. IDE: You can do that, but why don't we see if  
9 anybody has any question on your formal remarks before we  
10 question you on your personal remarks. Anybody have any  
11 comments or questions?

12           MR. WANDER: Yeah, so where are you going with  
13 this? I mean, what should we do?

14           MR. HAZEN: Those are my personal remarks, and the  
15 reason for that, I have to say to you, is that the State Bar  
16 of California is, technically speaking, an agency of the  
17 government. I speak on its behalf only pursuant to very  
18 clearly defined parameters. I am authorized to speak on its  
19 behalf with respect to the materials I have presented to you.

20           I'd like to speak in a personal context as a  
21 practitioner of law and as a former cochair of the  
22 corporations committee, one who is quite familiar with this  
23 role and views of this. I think -- and at this point I hope  
24 the record will show that I am now speaking as Steve Hazen  
25 and not on behalf the corporations committee.

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1           I think this task force has a choice. It's going  
2 to stake a stand against this kind activity, or it's going to

3 carve out some sort of protection for it. Now, I personally  
4 do not think that carving out small protections for conduct  
5 which I, personally, believe is improper gets you anywhere.

6 I think if you go back and take a look at the  
7 recent activities, for example, in the auditing community,  
8 what they're actually doing is simply misinterpreting what is  
9 out there. I think they could just as easily interpret it  
10 quite differently. I think that this task force can play a  
11 very significant role, both in the educative process and also  
12 in the context of making sure that this thing moves in the  
13 right direction.

14 I also have spent a fair amount of time recently  
15 speaking with one of the original negotiators of the treaty,  
16 Mr. Brad Clark, who was one of my mentors in the practice of  
17 law and continues to be my mentor in the state bar  
18 activities. And I was quite interested in the negotiations  
19 he was describing from back when I was just beginning the  
20 practice of law.

21 I don't rule out the possibility that the ABA needs  
22 to take a very clear stand on what that treaty says and what  
23 is and is not permitted by it, and some of the activity which  
24 I have heard described here today and which I have to admit  
25 was a little bit chagrined reading the materials that were

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1 circulated -- and by the way, are now in the hands of the  
2 corporations committee, so at some point perhaps they will  
3 speak -- is going.

4 And I think that's a question for this -- I believe  
5 in fact this task force is the ideal one to consider that.

6 What do we have to do with respect to the treaty? I will  
7 also say on a personal level that I find it difficult to  
8 support any notion of supporting AB 2179. There are, of  
9 course, a lot of provisions in that act that are unrelated to  
10 this matter, and those unrelated provisions are ones which I  
11 find most objectionable. And they have to do with personal  
12 privacy and the ability to force financial institutions to  
13 divulge information, all of which bothers me.

14 But I think in and of itself 2179 does exactly what  
15 I think this task force should resist. It allows there to be  
16 a death by a thousand cuts. You have the piranha nibbling  
17 little bit by little bit by little bit. And I started out by  
18 saying that the topic you are addressing, the topic of  
19 attorney-client privilege, is one that relates in a much  
20 broader sense to the question of confidentiality. And when  
21 you take the little bites out of the rules of evidence or  
22 make small changes here and there, it does impact on that.  
23 And I find it very difficult to be supportive of that, and  
24 the state bar itself might or might not, depending on  
25 wherever it is.

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1 But the bottom line is, I do think that this task  
2 force should resist any notion that there is a common  
3 interest between the auditors and the audited party. There  
4 is not a common interest. The Supreme Court has made it  
5 clear that the interests of the auditor is beyond that of the  
6 audited party.

7 There is a common interest between the audited

8 party and their lawyers. There must be, but I think in order  
9 for the auditor to perform their function and perform it to  
10 the standard that the Supreme Court itself articulates that  
11 would be very dangerous to begin to equate this process as  
12 being of common interest.

13 I hope, Mr. Chair, that that addresses the question  
14 as to what I would recommend, and you can, I hope, appreciate  
15 why in doing so I speak as a private citizen.

16 MR. IDE: Okay. Thank you very much.

17 MR. HAZEN: Thank you.

18 MR. IDE: The president elect of the American Bar,  
19 Mike Greco, has joined us. Mike, we're glad to have you  
20 here. If there is anything you would like to say, we would  
21 welcome your remarks.

22 MR. GRECO: Thank you, Bill. The only thing I want  
23 to say is, as you know, you and I have talked about this,  
24 that the work of this task force is of great significance to  
25 the public, to the profession, to our form of government. So

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1 your recommendations, which will be fully informed by the  
2 kind of presentation I just caught the tail end of -- you  
3 have a very important task before you. And I hope that when  
4 you have heard from everyone and considered everything that  
5 you will do everything you can to protect the American  
6 public.

7 And it's their privilege, the attorney-client  
8 privilege. It's for their protection. But it impacts the  
9 profession. It impacts the lawyer relationship with the  
10 client and people, and so I am glad that each of you is on

11 there because each of you, I know, is taking this very  
12 seriously, and you have good judgment. And so I commend you  
13 for your work.

14 And in time if you want me to speak, I know I have  
15 given a statement that I delivered in Boston several months  
16 ago. I believe we circulated that. Those remarks contain my  
17 strong feelings about the importance of maintaining the  
18 attorney-client privilege as close as we can keep it to where  
19 it is. But do your work, and thank you for taking this very  
20 important matter on.

21 MR. IDE: Thank you for being here with us and for  
22 all your support. Okay. We are now to James Conrad from the  
23 American Chemistry Council. Welcome.

24 MR. CONRAD: I am Jamie Conrad, and I'm an  
25 assistant general counsel with the American Chemistry Council

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1 in the Washington, D.C. area. Thank you and good afternoon,  
2 and thank you for having me and thank you for undertaking  
3 this project, which is one that's very near and dear -- the  
4 subject matter of which is very near and dear to my members'  
5 hearts, as you will see.

6 The American Chemistry Council is the trade  
7 association -- and by the way, I have prepared a written  
8 statement which I think you should all have. The American  
9 Chemistry Council is the trade association for the leaders in  
10 the business of chemistry in the United States. It's about  
11 135 companies that collectively account for about 90 percent  
12 of the productive capacity for chemicals in the United

13 States. And I think if my testimony has value today, it will  
14 be as much for who I represent, both as organizations and as  
15 individuals, rather than any particularly blinding insights  
16 that I may offer in my testimony.

17 And I suppose I should say that I'll be speaking  
18 really more to the Thompson memo and the recent amendments to  
19 the sentencing guidelines and less to issues of auditors and  
20 the SEC, although I think my members share those issues. The  
21 folks with whom I interact, that's really not their field,  
22 and I think in the grand scheme of things, the Thompson memo  
23 and the sentencing guidelines are the issues that are really  
24 painning them most.

25 The chemical industry is probably as deeply and

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1 widely regulated as any in this country. Our companies are  
2 subject to regulation for the environment, for occupational  
3 safety and health, hazardous materials, transportation, food  
4 and drug, chemical weapons, controlled substances, because  
5 people like to make drugs out of -- to steal the things we  
6 make and make drugs out of them. A tremendous variety of  
7 statutes principally focused on us, as well as the kinds of  
8 laws that apply to any large business, such as securities and  
9 anti-trust.

10 And the laws and regulations that apply to our  
11 members sort of rain down like snow. In 2002 alone congress  
12 enacted the Maritime Transportation Security Act which now --  
13 as a result of which the Coast Guard now regulates security  
14 at chemical facilities that have docks. And Sarbanes-Oxley  
15 also came out in that year, so it's a continuing growth in

16 regulatory challenges.

17           As well, we have more than our fair share of civil  
18 litigation because in addition to normal types of business  
19 litigation that companies can become involved in, our  
20 companies, by virtue of what they make -- it's scary, it's  
21 mysterious, people think it's bad for you -- there's a  
22 tremendous amount of litigation associated with tort claims.  
23 One of our members, for example, is sued for one reason or  
24 another somewhere in the world every day.

25           So there's a tremendous amount of legal compliance

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1 and management, and the only way to handle that, the only way  
2 that a large corporation can address all that and do it well  
3 is to have a compliance management system. And I would  
4 submit that our industry, along perhaps with defense and  
5 health care industries, have really the -- their compliance  
6 management systems define the state of the art.

7           And a compliance management system really is a  
8 process of identifying what your legal obligations are on a  
9 continuing rolling basis, determining what people need to do  
10 to comply with those obligations, getting that information to  
11 the right people, making sure that they tell you that they  
12 have been doing the things that they have been doing, and in  
13 particular, that they raise to you issues of concern so that  
14 those can be addressed and handled preemptively before they  
15 become problems.

16           And as you can imagine, lawyers are deeply involved  
17 in all of this, and it's quite complicated. Many of our

18 facilities have hundreds or even thousands, for example, of  
19 monitoring points that they have to sample. And they're  
20 subject to the RCRA of hazardous waste rules which rival the  
21 tax code in complexity and in the angels-on-pinehead nature of  
22 the interpretive issues that they face.

23 For these systems to work, the privilege is  
24 crucial, and the reason why is because the management systems  
25 really call upon people to do counterintuitive and unnatural

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1 things like call up management and lawyers and say, look, I  
2 think we have a problem. I may have done something wrong.  
3 We may have imported a chemical that wasn't on the cost  
4 inventory. How do we figure this out?

5 And it depends upon that kind of line employees  
6 identifying and surfacing issues to legal counsel. That sort  
7 of thing is crucial if companies are going to have a prayer  
8 of remaining on top of their compliance obligation. And  
9 privilege really is what makes that work. Without the  
10 privilege, employees essentially try to become their own  
11 lawyers because they're afraid to ask lawyers. They're  
12 afraid to put things in writing.

13 My members -- I said I represent 135 large  
14 companies. In the 11 years at the Chemistry Council, the one  
15 thing I have done consistently throughout that is represent a  
16 group of about 40 or 50 companies, in-house counsel from  
17 those companies who work on compliance and enforcement  
18 issues. And so that's been sort of a client group of mine  
19 for over a decade.

20 And they have complained routinely and in our

21 quarterly meetings about the tendency of the government under  
22 first the Holder memo, now the Thompson memo, to seek  
23 privileged materials as a condition of granting favorable  
24 treatment in civil and criminal investigations and  
25 particularly in the criminal area.

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1           And the concern that they have is really twofold.  
2 The coerced waiver problem, which they see and which they see  
3 growing increasingly, creates two problems. The first is an  
4 internal problem. When -- as the Supreme Court court said,  
5 an uncertain privilege is little better than none at all.  
6 When people can't be assured that their communications are  
7 protected, they stop writing things down.

8           It takes a tremendous amount of work to get people  
9 to put stuff in writing. As soon as they begin to think this  
10 stuff may have to be disclosed, it's not written. It is a  
11 problem for a management system, which, after all, is a  
12 system of documents and of documenting how to comply. You  
13 have instead sort of an oral telephone system where everybody  
14 tells everybody, kind of passes things down through the  
15 telephone.

16           People don't state problems clearly. Rather than  
17 saying, "I'm concerned that Tank No. 63 is out of compliance  
18 with NSPS standard YYY," which is one of the best-named  
19 standards of all time, instead they say, "I think there's an  
20 issue with Tank 63." Well, in the blizzard of e-mails that  
21 people get, "there's an issue" is not going to bump up to the  
22 top, as opposed to, "I think we may have a compliance issue."

23 So they don't write informative communications.  
24 They restrict the communications that they do do, and lawyers  
25 are compelled not only to give the corporate Miranda warning,

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1 which is, "I represent the company, not you." But they have  
2 to tell them, "And by the way, I probably can't protect  
3 anything you tell me," none which of is conducive to a good  
4 management system.

5 The second problem is the issue we have heard more  
6 about today, which is the waiver as to third parties and the  
7 waiver as to subject matter. And as between the two of those  
8 evils, the second is really more -- is of greater concern to  
9 our members. If worse comes to worse, they can kind of jury  
10 rig a compliance system, and maybe they can get along without  
11 the privilege. But if everything that they are coerced to  
12 give to the government becomes fodder for tort litigators  
13 across the country, there is nothing they can do about that.  
14 And that can create really serious liabilities.

15 A third problem is really a sense of injustice on  
16 their part, that the companies that are doing the best jobs  
17 of trying to stay in compliance are the ones that are digging  
18 themselves in deepest and creating the charts and maps of how  
19 to get after them. Companies that don't care about  
20 compliance and that don't manage it don't create documents.  
21 And when the prosecutors come, there's nothing to show them  
22 because they haven't created anything.

23 In terms of responses -- well, I basically will  
24 cover the three questions you asked. The first is, how  
25 serious is this? I think I have probably indicated, we think

1 this is a serious problem. We think that it's growing for  
2 the reason I think Mr. Hazen pointed out, which is, once  
3 prosecutors can start getting this stuff, well, let's get  
4 some more of it.

5           And there's not -- once you pass -- this is a  
6 slippery slope argument, I know, but once you pass the  
7 initial proscription against seeking privileged information,  
8 there really aren't any self-limiting factors within the  
9 institutional dynamics of a governmental office as to why you  
10 shouldn't just keep going and asking for more and asking for  
11 it sooner. So we think that -- we think it is a problem and  
12 a serious one.

13           In terms of when and what sorts of information  
14 should be sought, I think our members really are rather  
15 absolutist or purist about it in some of the same ways  
16 Mr. Hazen was pointing out, that a privilege that's uncertain  
17 is really of not much value. And for the privilege to really  
18 do its job, it needs to be essentially very reliable.

19           Now, the challenge, of course, vis-à-vis the  
20 Justice Department and U.S. attorneys is, well, how do you  
21 operationalize that? How do you get the federal government  
22 or state governments or the SEC to stop seeking documents in  
23 the way they have? And that's obviously quite a challenging  
24 one.

25           So we have laid out here in a series of bullets

1 what in good lawyer fashion is sort of our fallback  
2 arguments, which is, if the government is going to continue,  
3 as it probably is, to seek privileged information, we at  
4 least try to suggest the framework under which that could be  
5 done in a more disciplined and supervised process where a  
6 deputy assistant attorney general or an assistant attorney  
7 general has to approve the waiver so there's somebody that  
8 you know who has to make that decision. It's a fairly  
9 influential person. You can talk to that person.

10           And then we list a series of standards as to when  
11 it shouldn't -- should or shouldn't be sought. And you -- I  
12 won't run over all of them. I mean, limited to factual  
13 information, not done at really the conclusion of settlement  
14 and declination negotiations, plea agreements, which is  
15 commonly where it comes up as a kind of, well, okay, we're  
16 really all done, but just show us all your privileged  
17 documents just to make sure we didn't miss anything.

18           That's, again, not a satisfactory outcome but  
19 better than the current state and probably necessary if we  
20 take the third step, which is, what should be done about  
21 waiver as to third parties? And in that case, we think the  
22 model of H.R. 2179 and of Sarbanes-Oxley 105(B)(5) is a very  
23 good one. And the fact that Sarbanes-Oxley provision has  
24 been enacted and that 2179 was reported by a house committee  
25 without dissent as to that issue suggested that it's actually

2 get that through congress than it would be to negotiate with  
3 the government about how it should or shouldn't seek  
4 materials.

5 So we think that sort of legislation would be an  
6 excellent step for the bar association to support. If you do  
7 support it, as some folks have noted, that's going to feed --  
8 that's going to push a desire on the part of the government  
9 to seek privileged information because they now know, well,  
10 it's not going to be released to anybody else. So you  
11 shouldn't mind sharing it with us.

12 And I think in those circumstances the compromise  
13 approach I discussed earlier, where things are overseen by  
14 fairly high level management, is crucial to mitigate that  
15 tendency which would otherwise be promoted.

16 MR. IDE: Okay. That's outstanding. I'll start  
17 off, and then there are others. So your basic premise is  
18 that self-regulation by corporations is the best way to  
19 assure integrity. But you must allow for compliance systems,  
20 and the lawyers can play a role where they will be approached  
21 by the clients.

22 MR. CONRAD: There will never be enough  
23 government -- I mean, the interorum effect gets things  
24 started, but compliance -- just as the fear of Superfund got  
25 private companies to clean up all their own properties. So I

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1 think the internal compliance function is really what  
2 produces compliance with the law.

3 MR. IDE: So some have raised, well, the privilege

4 doesn't belong to the employees. It belongs to the  
5 shareholders, but you are saying shareholder value is  
6 benefitted by allowing the privilege to pertain in this  
7 situation.

8 MR. CONRAD: That's right, and I guess the only  
9 issue really where this comes up are derivative actions or  
10 securities law format. I mean, you can have issues where the  
11 management and the shareholders are averse. But I think in  
12 the context of federal state regulation, really the  
13 shareholders' interests are consistent with the company's.

14 MR. IDE: I think some of the commentators say,  
15 well, the federal agency is acting on behalf of the  
16 shareholders. So therefore, they should be able to look at  
17 all of the information on behalf of the shareholders. That's  
18 the argument

19 MR. CONRAD: Right. I think maybe they're after --  
20 hopefully they're acting on behalf of the public, which I  
21 think is a good reason why the 2179 type of legislation is  
22 fair because the government, after all, speaks for the  
23 public. And we shouldn't be too concerned about the fact  
24 that nobody else gets to see this information.

25 MR. IDE: I'll ask one other question and then turn

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1 it over. One of the things we're looking for is data as much  
2 as possible so that we can sort of, this is what is really  
3 happening. Now, you mentioned a lot of your members have  
4 concerns. Have you done any kind of survey, or could you do  
5 some kind of survey?

6 MR. CONRAD: You know, I have thought about how you  
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7 would do it and how you -- you know, whether it would ever be  
8 more than anecdotal. I think it's something we'll take back  
9 because it's obviously difficult to get folks to, for one  
10 thing, to own up to what happened in their negotiations with  
11 government. But we'll see what we can do.

12 MR. IDE: Okay. Peter?

13 MR. MOSER: I wanted to follow up on that. That's  
14 specifically where -- what we could use, if you could come up  
15 with any examples or coerced waiver situation by a government  
16 agency, where it was unfair, catastrophic to the company,  
17 something that is a matter of public record or some examples.  
18 Because, you know, we're faced with the comments when we talk  
19 with the regulators, well, it really doesn't happen, and so  
20 examples are what we need, at least on that aspect of your  
21 testimony if you can help us.

22 MR. CONRAD: Sure.

23 MR. KELLER: Let me just, first, on that, it could  
24 even be on an anonymous basis. And it occurs to me we could  
25 share with you the kind of survey that we come up with that

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1 might kind of help you in doing it.

2 MR. CONRAD: Okay.

3 MR. KELLER: Let me put the tough question to you,  
4 because juxtaposing what you have said with what Steve Hazen  
5 said, the two approaches are mutually exclusive. It's either  
6 A, we stand up for the principle and there is no compromise,  
7 in the face of the trend we see, and if you will, the changed  
8 environment, including congressional action, as evidenced by

9 Sarbanes-Oxley, both as it applies to lawyers and as it  
10 applies to particularly the accounting industry and the  
11 importance of the reliability of financial statements, on the  
12 one hand, or as the second part of your testimony addresses,  
13 seeking to reach a kind of accommodation that, if you will,  
14 recognizes the importance of the privilege, protects it, but  
15 if you will, recognizes that it's not absolute in its nature.

16 As I have said, I think those two choices, once you  
17 get into the discussion, are in fact mutually exclusive.  
18 Given that choice, which route would you follow?

19 MR. CONRAD: Well, maybe this is a Washington  
20 perspective, but the choice is only meaningful in terms of  
21 what outcome it ultimately produces.

22 MR. KELLER: Well, you and I are on the same page  
23 in terms of alternatives and approaches. I wrote a paper  
24 similar to yours without the benefit of it. Assume that  
25 everything you set out here, including the legislation and

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1 the protocols with the regulatory agencies were in fact what  
2 you could achieve on the one hand, versus no, we think it's  
3 sacrosanct. There shouldn't be any accommodation because by  
4 opening it up, you are encouraging seeking privileged  
5 information. No matter what you do, you will be impairing  
6 the internal compliance function somewhat. Which course  
7 would you follow?

8 MR. CONRAD: Well, clearly the latter as a matter  
9 of -- I mean, that's where our members' hearts are. I mean,  
10 to them it really is an absolute and ought not to be  
11 compromised. The problem, of course, is it already has been,

12 and it's not obvious to me how one puts it back, you know.  
13 But if -- but perhaps if the ABA were to speak  
14 authoritatively about the clear sacrosanct nature of the  
15 privilege, that would have some effect that might lead the  
16 government to behave in more tractable ways, but I am  
17 somewhat skeptical I guess.

18 MR. IDE: That's what the data support. Because, I  
19 mean, if the case can be made that lawyers every day advising  
20 corporations are the best deterrent to violations of law, as  
21 you said, there are limited resources on the enforcement  
22 side. And if the privilege were a critical component of  
23 that, then the question we get from the regulators is, well,  
24 show me that the chilling effect would be a big problem and  
25 that the Holder memo and Seaboard and all that are chilling

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1 the ability on your side. So that's why we're seeking help,  
2 to try and get more and more of the facts.

3 MR. CONRAD: Okay. Well, and we will be happy --

4 MR. IDE: And one other thing. We can get it to  
5 you, but we're working with ACCA. They're going to do for  
6 their members a polling or, you know, a survey, and we would  
7 be glad to share that with you, so for your members maybe you  
8 could tailor it.

9 MR. WANDER: From time to time people have  
10 suggested the adoption of another privilege, a sort of  
11 self-evaluation privilege, critical analysis. How do you  
12 differentiate that from sort of a compliance program you  
13 have? Because I find it very difficult to know what's

14 privileged in your compliance program that you safeguard  
15 against disclosing. I would have thought it's all  
16 self-evaluation.

17 MR. CONRAD: Well, the self-evaluative -- we  
18 actually have some scars on our back for that one. There was  
19 a tremendous effort in the mid nineties, as you may know, in  
20 the area of environment self-audit privilege. Whole bunch of  
21 states passed laws and essentially the federal government  
22 coerced into appealing them. And there was federal  
23 legislation that was entertained and didn't pass.

24 The principal difference, I think, theoretically  
25 between the two is, the self-evaluative privilege is a reason

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1 not to give information to the -- to anybody else basically.  
2 The -- at least the H.R. 2179 notion is actually one -- is  
3 one under which you do give it to the government, but nobody  
4 else gets it. So I guess that's the difference.

5 But I mean, the kinds of -- in a compliance  
6 program, I should think the attorney-client privilege  
7 certainly applies, I mean, if you have got in-house counsel  
8 talking with their clients about the corporation's legal  
9 application. I am interested if you think --

10 MR. WANDER: It seems to me the underlying facts  
11 are not privileged. It's asking for the advice that's  
12 privileged, and you know, if you have to report a spill  
13 someplace, you are not going to be able to say that that  
14 reporting is privileged.

15 MR. CONRAD: Sure. Well, and we had to be at pains  
16 really to emphasize even in the context of this

17 self-evaluative privilege, nobody was really seeking to be  
18 able to hide facts. I mean, if information is reportable,  
19 it's reportable. And clearly our goal is not to promote  
20 polluter secrecy, but it is to be able to protect the ability  
21 of our members and lawyers and their colleagues to at least  
22 talk about the legal ramifications of activities, and I think  
23 that sort of thing should be protected.

24 MR. IDE: I could be a witness for you because I  
25 was general counsel of Monsanto, the situation where there is

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1 so much uncertainty you don't know what the facts are. But  
2 if the media would be -- you know, they would take the worst  
3 allegation which may not be true at all, so you want the  
4 ability to go investigate and then approach the regulators.  
5 But it's that ability to do the investigation, I think. Put  
6 me down as a witness on that. Thank you very much.

7 MR. CONRAD: Thank you.

8 MR. IDE: We appreciate it, and Judy Martinez is  
9 now going to take the chair.

10 MS. MARTINEZ: Is Paul --

11 MR. ROSENZWEIG: That's me. My name is Paul  
12 Rosenzweig, and I'm a senior fellow at the Heritage  
13 Foundation. That's not on your -- that fact is not on your  
14 agenda because when your staff asked me if I was testifying  
15 on behalf of anybody, I reminded her, as I am required to,  
16 that as a 501(c)(3), we endorse nothing. We are merely in  
17 the educational business, and I testify on my own behalf, not  
18 on behalf of any institution.

19 I am also adjunct professor of law at George Mason  
20 University where I teach courses in white collar and  
21 corporate crime, and as a particular relevance to some of the  
22 testimony I will be giving today, I am a member of the  
23 District of Columbia legal ethics committee that provides  
24 advice to attorneys as they consider the professional  
25 responsibility attending their various actions.

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1 I have several comments I want to make, but before  
2 I do, I did want to actually just pick up on something that  
3 Mr. Keller was asking Mr. Conrad about, which was whether or  
4 not the structure of oversight within the Department of  
5 Justice and the provision for high level review would be an  
6 effective means of constraining the discretion with which the  
7 prosecutorial agencies seek to coerce waivers of the  
8 privilege.

9 I believe that they would initially be effective,  
10 but my experience as a prosecutor in the Department of  
11 Justice, which is where I was before I came to Heritage, is  
12 that at times the oversight process gets infected with  
13 political considerations. And so though one can repose some  
14 degree of confidence in the existence of responsible,  
15 accountable officials who are obliged by a series of  
16 guidelines to limit the degree to which our prosecutorial  
17 authorities seek this sort of information, I am reasonably  
18 confident in making the predictive judgment that if we went  
19 down that path formally, it wouldn't be too long before some  
20 congressional committee called up that accountable official  
21 and asked him how he could possibly have not sought, you

22 know, the privileged materials from XYZ Corporation when it  
23 was manifestly the right thing for him to have done so.

24           So while I share Mr. Conrad's view that that may be  
25 the best of the current possible worlds, I am a little more

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1 skeptical of its long-term efficacy than I understood from  
2 your question.

3           My comments, my main comments today differ from  
4 Mr. Conrad's in one respect. He has been focussing on before  
5 the penny drops; that is, the effect of coerced privilege  
6 waivers on corporate compliance that occurs before the  
7 government gets involved. I wanted to focus more on the  
8 nature of privilege waivers and its effect on what happens  
9 after the penny drops; that is, after a corporation has been  
10 made aware of some perhaps very serious wrongdoing or  
11 misconduct.

12           And its natural instinct and motivation is to  
13 conduct an internal investigation, find out what happened, if  
14 necessary punish the wrongdoers, if they have been  
15 deliberately malfeasant, at a minimum learn enough so that it  
16 can counsel them and advise them of where they have avoided  
17 corporate policy, whatever that policy may be.

18           And for that purpose, they often hire outside  
19 counsel whose investigations they hope or seek to cloak in  
20 the attorney-client privilege for the very reason that not  
21 only is that after-the-penny-drops investigation important to  
22 correcting the wrongdoing such as it may be, but if it's  
23 effective, it will provide a virtual road map to the

24 government of what has gone wrong.

25 There are at least three trends going on in

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1 prosecutorial circles today that are reducing, if not  
2 eliminating, the viability of this kind of salutary internal  
3 investigative mechanism. The first is the one that you have  
4 been hearing most about, which is the direct effect on  
5 corporations who, knowing that their internal investigations  
6 are potential meat for the prosecutor, are increasingly  
7 reluctant to authorize those in the first instance.

8 I have been in meetings with corporate counsel,  
9 white collar -- outside, white collar corporate counsel, who  
10 have said that they're now of the view that it's basically  
11 malpractice to conduct an internal investigation. I think  
12 they were speaking hyperbolically, but that is the instinct  
13 that is coming into play.

14 There are two other trends, however, that are even  
15 more disturbing from my perspective. One is exemplified in  
16 the recent Computer Associates case out of New York where the  
17 Department of Justice accepted a guilty plea from a corporate  
18 executive for the crime of obstruction of justice for the  
19 crime of having lied to the internal corporate investigators;  
20 not to the Department of Justice and its prosecutors, not to  
21 the FBI agents or the SEC civil investigators, but to the  
22 private counsel hired, retained by Computer Associates for  
23 the purpose of determining whether or not various SEC rules  
24 had been violated.

25 If that type of prosecution becomes predominant and

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1 a trend, the effects will be immensely chilling on the  
2 efficacy of internal investigations, to the detriment, I  
3 think, of social good generally. You -- under current  
4 ethical rules, rules of professional conduct at least in the  
5 District of Columbia, you have to clarify during an internal  
6 investigation that you are not representing the constituent,  
7 the employee. You are representing the corporation.

8 If you are really cautious, you sometimes say  
9 something like, "And the corporation may in its own judgment  
10 need to waive the privilege and disclose what you have told  
11 us." Not every lawyer does that, but many do.

12 Imagine the effect if you now have to also say,  
13 "Oh, and by the way, if you lie to me, that's not just  
14 grounds for firing, that's viewed by the Department of  
15 Justice as a crime." That would have an immensely chilling  
16 effect and I, in my ethics hat capacity, have begun to wonder  
17 whether or not, as the pattern of practice in the Department  
18 of Justice prosecutions grows, attorneys, private attorneys,  
19 are getting -- are unknowingly coming into enhanced ethical  
20 obligations.

21 Indeed, one of the things I would put on this task  
22 force's plate is, I would suggest some interaction with the  
23 ABA standing committee on ethics and professional  
24 responsibility. That's a question that I think needs to be  
25 asked.

1           But it goes further because, of course, many  
2 corporations, at least with lower-level employees, tell the  
3 employees that they're obliged upon pain of adverse  
4 employment action to cooperate with the internal  
5 investigation. You can be fired. That begins to make the  
6 internal investigator, who is acting with the authority to  
7 terminate, into a compulsory agent.

8           And there's a case from the Supreme Court about 30  
9 years ago called Garriety that involved a similar set of  
10 situations involving police internal investigative boards.  
11 Granted, it was a public institution, not a private company.  
12 And the Supreme Court said, well, then that brings in 5th  
13 Amendment privileges. That brings in obligations of warning,  
14 kind of baby Miranda rights, if you will.

15           So that whole conger of legal issues hasn't been  
16 fully examined yet, and then the third area, which is also a  
17 very new one, which is equally troubling, occurred also in  
18 New York. It seems many of these innovations occur in New  
19 York, involving the government's investigation of KPMG.  
20 Right?

21           And KPMG had an employee, Mr. Jeffrey Eischeid, to  
22 whom they were contractually obliged -- he was a senior  
23 executive -- contractually obliged to provide the fees for  
24 his defense so that he could hire counsel in the context of  
25 an ongoing investigation. KPMG in its corporate capacity

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1 wanted to resolve its liability with the Department of  
2 Justice, wanted to cooperate and was willing to make the

3 first step of giving over the contents of its internal  
4 investigations.

5           The department said that it would not acknowledge  
6 KPMG's activities as cooperative if it didn't also withdraw  
7 any funding for any corporate executives who were not also  
8 cooperating with the Department of Justice's investigation.  
9 And that seems to me to come perilously close to the  
10 department using one private party, the corporation, to  
11 trench upon the constitutionally protected right to counsel  
12 of the second party.

13           Now, to be sure, the right to counsel is the right  
14 to a counsel, not the right to the counsel that you can  
15 afford to pay. But we're getting very close to that kind of  
16 line.

17           So what I think is happening here is that we are  
18 becoming shortsighted. We are looking to the immediate  
19 benefits of the waiver of the privilege, the immediate  
20 benefits of being able to coerce information from the  
21 corporation and ultimately, if some of these other trends  
22 become more common, of the individual and not recognizing the  
23 long-term historic benefits of the privilege. And for me,  
24 that is turning history on its ear.

25           We have had a privilege of one form or another for

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1 more than 500 years, and we recognize its value, not because  
2 it helps us get the truth in a particular case. In fact,  
3 it's an obstruction to getting the truth in any one  
4 particular case, but because in the long-term, over the long

5 run of time, it helps us get the truth because we think that  
6 the adversarial system with fully informed counsel on both  
7 sides is a better engine for seeking the truth more  
8 generally.

9 And I think we are at risk of slipping, perhaps  
10 unknowingly, into a shortsighted focus on the immediate  
11 effects of privilege waiver, which will, granted, often  
12 redound to the government's immediate benefit in a particular  
13 case, without recognizing the corrosive effects on compliance  
14 programs, on post-crime, post-wrongdoing internal  
15 investigations, that that kind of trend will have. Thank  
16 you, and I would be happy to answer your questions.

17 MS. MARTINEZ: Thank you. Let me just for the  
18 record note for you, Mr. Rosenzweig, that we have both a  
19 liaison from the Center for Professional Responsibility of  
20 the ABA as well as the Standing Committee on Professional  
21 Responsibility and Ethics, so we're in good shape in that  
22 regard. Peter?

23 MR. MOSER: Let me just clarify something. You  
24 took sort of an intermediate example where the government's  
25 found out about it, gets into it. Let's say it's been

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1 referred for consideration of whether criminal charges ought  
2 to be filed or maybe civil. It's right at that point.

3 I guess what you were saying -- well, what would  
4 you do? Would your arguments also apply to that situation  
5 where it's sort of in limbo, as a way to -- let's say, the  
6 corporation to avoid being named a defendant? There are  
7 people there who have done bad things, and the people in the

8 corporation know about it through things that their  
9 counsel -- let's forget about an internal investigation,  
10 particularly, except sort of one that was conducted by  
11 in-house counsel.

12           Would you distinguish that from what you were  
13 talking about? And take it one step further. Charges are  
14 filed against the corporation. Let's say DOJ's prosecuting.  
15 Is it improper for the prosecutor, in return for leniency, to  
16 require a full disclosure, regardless of whether it's  
17 privileged or not?

18           MR. ROSENZWEIG: Well, just to back up, it's not in  
19 any way improper in the sense of violating some ethical duty  
20 on the part of the prosecutor. I think it is exceedingly  
21 unwise, and I would say that at all of the stages.

22           To my mind, the only truly legitimate ground on  
23 which the prosecutor would seek a waiver of the  
24 attorney-client privilege is when the corporation is seeking  
25 leniency on the grounds it had complied with counsel's advice

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1 and thus put the advice itself directly at issue. And then  
2 the government is legitimately there saying, "Well, show me  
3 that advice. Show me what they have done so that I can  
4 assess the truth or not."

5           MR. MOSER: Let's say it's just work product. I  
6 mean, you know, it's not even opinion work product. Somebody  
7 has conducted an investigation, and they know all this stuff.  
8 What happens then? The DOJ wants to know about it in either  
9 of these two stages. I mean, what is it -- is it wrong,

10 quote, wrong from a societal standpoint for the prosecutor to  
11 demand that full information? Or do they have to go around  
12 trying to get the information from individuals or whatever?

13 MR. ROSENZWEIG: Well, I would make two responses  
14 to that. The first is that at least in my own experience,  
15 the bright line between fact work product and opinion work  
16 product is not so bright. It is often an attorney's opinion  
17 that results in the picking of certain facts to put into the  
18 memo, the conduct of the investigation itself. Even,  
19 however, granting that one can make that broad distinction --

20 MR. MOSER: Well, a verbatim transcript.

21 MR. ROSENZWEIG: A verbatim transcript would be  
22 such an instance. You actually have highlighted what is  
23 another, even more perplexing conundrum of the existence of  
24 corporate law, not something that this committee is going to  
25 solve, which is that corporations have no 5th Amendment

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1 privilege yet may be prosecuted.

2 I think that's basically a historical accident.  
3 The absence of the privilege came first, and the ability to  
4 be prosecuted came afterwards. So if the corporation were an  
5 individual, our conceptions of what the 5th Amendment  
6 requires would never allow the government to compel the  
7 individual to give over his own self-incriminating  
8 statements.

9 Given that the Supreme Court has held, and I see no  
10 prospect of it being reversed, that corporations do not have  
11 a privilege, there is nothing in that instance wrong in that  
12 sense. It is, however, in my judgment socially

13 counterproductive in the sense that whether it's the fact  
14 work product or the opinion work product, if the  
15 constituents, the employees, the executives, have any  
16 knowledge or inkling that this is going to be or is  
17 potentially disclosable, and I think that increasingly  
18 lawyers have to make that increasingly clear to them, the  
19 utility of that verbatim transcript is going down the tubes  
20 as well.

21           MR. MOSER: Do you have any specific examples of  
22 investigations that have been conducted this way, in this new  
23 environment, where, let's say, the investigating counsel  
24 representing a corporation has interviewed employees and  
25 said, "You should be represented. I don't represent you.

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1 You should have your own counsel in this matter." What  
2 happens next?

3           MR. ROSENZWEIG: Anecdotally? I mean --

4           MR. MOSER: Have you heard of specific instances  
5 where that's happened, and what has transpired from that  
6 point on?

7           MR. ROSENZWEIG: Well, one of my other little hats  
8 is that I continue to represent people in white collar  
9 corporate crimes. I have a little practice, and I have in at  
10 least two instances in the last three years been retained to  
11 represent those individuals with the corporation footing the  
12 bill.

13           And at that point, my counsel to those clients --  
14 they are -- in both instances I would characterize them as

15 relatively low level workers with some theoretical liability  
16 but not the presumptive targets of the investigation. I have  
17 told them that they shouldn't cooperate with the internal  
18 investigation either unless they get assurances from the  
19 corporation that it will not provide the information to the  
20 government.

21 And that has -- that is the advice I give them, and  
22 that has put us at loggerheads with the corporation's  
23 instincts. I suspect I am going to start getting fewer  
24 referrals like that.

25 MR. KELLER: Let me pick up on that theme and then

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1 maybe ask a more general question. I mean, there are  
2 circumstances in which the corporation in fact uses the  
3 internal investigation as a technique to defer regulatory  
4 action. And I think that's a legitimate mechanism. Doesn't it  
5 that have within it the same problems?

6 They even say, it may be known up front that the  
7 internal investigation is being conducted on the  
8 understanding that the results, at least the factual results,  
9 will be shared with the regulatory authority. But doesn't it  
10 affect the ability to conduct an effective internal  
11 investigation? Isn't that just a price we have to pay?

12 And maybe it is the right result for the  
13 individuals to know that they need their own representation.  
14 They need to think about their own interests, and their  
15 communications to the company are not protected by the  
16 company's privilege.

17 MR. ROSENZWEIG: It may well be in the company's

18 best interests to conduct the internal investigation as a way  
19 of attempting to defer or defeat government inquiry. Another  
20 case that I participated in, it's public knowledge, the most  
21 noteworthy of those was the Laborers International Union of  
22 North America, which set up a complete internal investigative  
23 process, complete with baby judges and baby appellate courts,  
24 as a way of forestalling the government's civil RICO action.

25 So yes, that may very well be the corporation's

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1 best interests or in that case the union's best interests.  
2 My experience there is consistent with what I predict will be  
3 the very rapid spiral down to the bottom, which is that as  
4 soon as the individuals who are the subjects of the  
5 investigation realize that the internal investigation process  
6 was real and had teeth and was really a substitute for  
7 government, they all got other lawyers and they all bailed  
8 out of the process.

9 It strikes me that that's really inconsistent with  
10 what we fundamentally want to have businesses do, which is be  
11 corrective, be, you know, not combative. We can solve many  
12 things through adversarial processes, but there just aren't  
13 enough resources to solve all of them. And you know, I  
14 commend to you -- I think it was Mr. Ide who was saying you  
15 want data. And I certainly commend that because we're all  
16 trying to guess what the likely effects are, but in the few  
17 instances where we've seen it, that's been my experience.

18 MR. KELLER: Let me ask you the question that Herb  
19 Wander asked before, or I hear you now. What is it that a

20 bar association should do? And we can -- we have heard two  
21 alternatives, which is stand up and say this is wrong and it  
22 should not happen. We can seek to have a more workable  
23 system that recognizes and seeks to protect the privilege,  
24 recognizing competing forces.

25 Or I suppose one could reach a conclusion that

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1 we're living in one of those times in history where we have a  
2 counterreaction to extraordinary events, and this too shall  
3 pass. And maybe the best approach is to keep the head down  
4 and let it pass without making a larger thing of it than it  
5 is. What would you do?

6 MR. ROSENZWEIG: Well, that may -- that last may  
7 well be the right answer, though I am not good enough. I  
8 will offer you three thoughts on positions I think that the  
9 bar should take. The first is, I think that the recent  
10 actions of the U.S. Sentencing Commission which make a waiver  
11 of the privilege an explicit consideration in determining  
12 whether or not a corporation should receive leniency in terms  
13 of its fine are wrongheaded because they just immediately  
14 drive us to the point where that now becomes a de facto  
15 requirement and that corporations who want to reduce their  
16 fines, they're rational human beings, will -- it creates the  
17 wrong fiscal incentive.

18 So this task force and the bar should suggest the  
19 revision of the guidelines, which even after the recent  
20 decisions in Booker and Fanfan, will continue to be consulted  
21 by the courts. That's the first thing.

22 I think acknowledging the reality that the

23 department is not going to give up on this tool, even though  
24 it pains me to say so, the ABA should advocate for the  
25 department to adopt some of the internal mechanisms and

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1 standards of the form that you and Mr. Conrad were talking  
2 about earlier.

3 I would actually go further and think about whether  
4 or not those should be codified, or if not codified, at least  
5 advocate that they be the subject of continual oversight on  
6 the upside. I mean, my fear is that, you know, it will be,  
7 how could you possibly not have sought waiver? I would urge  
8 you to try and generate corporate interest on, why are you  
9 seeking so many waivers?

10 And third thing that I alluded to briefly is, I do  
11 believe that the increasing use of coerced waivers is  
12 beginning to trench upon the professional obligations of  
13 attorneys.

14 MR. KELLER: Or more importantly the constitutional  
15 rights of the individuals.

16 MR. ROSENZWEIG: And because of their indirect  
17 effect on the constitutional rights of the individuals. If  
18 the standing committee were to consider this issue and concur  
19 in my view that enhanced mini-Miranda-type waivers are an  
20 ethical necessity, and if bar associations around the country  
21 were to follow that so that the rules actually became  
22 enforceable rules within the various bar jurisdictions around  
23 the country, then that would have the effect of bringing home  
24 very clearly the costs associated with too great a

25 prescriptive set of waivers from the department, and I would

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1 hope would have the second-order effect of reducing the  
2 insistence upon them.

3 If it didn't have that effect, it would at least  
4 have the effect of putting us -- putting lawyers where they  
5 should be, which is, as Rule 4.3 says of the rules of ethics,  
6 you know, ensuring that when dealing with unrepresented  
7 persons, they are under no misconception as to the nature of  
8 your interaction with them. I'm not quoting it exactly.

9 When the lawyer knows or reasonably should know  
10 that the unrepresented person misunderstands the lawyer's  
11 role, and I think that increasingly employees have no  
12 understanding that they may be subject to criminal  
13 prosecution for what they are saying.

14 MR. MOSER: May I ask a question?

15 MS. MARTINEZ: Yes, please.

16 MR. MOSER: You said a couple of things. In the  
17 first place, is there a case that's overruled the authority  
18 that I have always gone -- I can't even remember the Supreme  
19 Court case. Was it Spevak? Where there was an  
20 investigation of a police officer who claimed privilege, and  
21 there is no privilege, of course.

22 MR. ROSENZWEIG: That's right.

23 MR. MOSER: Yeah. Well, I mean, that still seems  
24 to me is the constitutional law in that area, is it not?

25 MR. ROSENZWEIG: No, that is the law. The case I

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1 was referring to was Garrity. And Garrity involved an  
2 internal investigation which the police officer -- there's no  
3 privilege. But the police officer was told, "If you do not  
4 cooperate with our internal investigation, you will be  
5 fired."

6 And it was then -- the question then, when the  
7 internal investigation was presented in the criminal  
8 prosecution of that same police officer, was whether or not  
9 that was compulsion. And the holding was twofold. Yes, it's  
10 compulsion. Being threatened with termination is compulsion,  
11 and the internal investigative board, because it has that  
12 termination authority, becomes a kind of junior varsity  
13 government inquiry.

14 And so it's tantamount to a governmental  
15 compulsion, and the officer was protected by the 5th  
16 Amendment privilege. Having been compelled without Miranda,  
17 he was permitted -- the statement was excluded from the  
18 trial.

19 MR. MOSER: It was another policeman. It was a  
20 policeman conducting the interview.

21 MR. ROSENZWEIG: Yes.

22 MR. KELLER: It would be obstruction of justice.  
23 It kind of backs you around to Computer Associates, which one  
24 would hope is an aberration.

25 MR. ROSENZWEIG: Well, that's exactly right. If

1 Computer Associates is not an aberration, then internal  
2 corporate investigations become a junior varsity for the FBI.

3 MR. GREEN: Computer Associates was a guilty plea,  
4 so it really never was adjudicated.

5 MR. ROSENZWEIG: That's correct.

6 MR. MOSER: Yeah. I just want to ask the question.  
7 Have you conducted investigations yourself, and when you do  
8 come upon an employee who is clueless about the situation, do  
9 you advise them that they have a right to counsel? Don't you  
10 advise them that they have a right to counsel?

11 MR. ROSENZWEIG: Yes.

12 MR. MOSER: Or do you try to get the information  
13 from them simply saying, "Well, I represent the company"?

14 MR. ROSENZWEIG: I think that every counsel who is  
15 conducting an internal investigation on behalf of a  
16 corporation has deeply conflicting obligations because he  
17 represents the corporation, and it is in the corporation's  
18 best interest to find out what has happened.

19 He has obligations to the unrepresented person not  
20 to mislead him, and every corporate counsel who conducts  
21 internal investigations that I know tries to accommodate both  
22 of those by providing warnings, but at the same time in his  
23 best and most winning manner seeking to reassure the client  
24 that, you know, you got these rights, but it's okay.

25 You know, I mean, that's the reality on the ground.

1 No corporate counsel, internal investigative counsel worth  
2 his salt goes in and says, "You have a right to separate  
3 counsel, and by the way, I would strongly recommend that you

4 go talk to him before you talk to me." I mean, I have never  
5 seen that happen.

6 MS. MARTINEZ: Bruce?

7 MR. GREEN: Your recommendation, among other  
8 things, was that we should try to persuade the Justice  
9 Department to adopt some internal self-restraint. And since  
10 you were recently in the Justice Department you might be able  
11 to answer this question. It's easy for them to see the  
12 short-term value in obtaining the privileged information. It  
13 has value in the particular case.

14 The counterargument, I take it, has to do with the  
15 long-term effect, not on the particular corporation before  
16 them but on other corporations that might do internal  
17 investigations but won't or won't do them as effectively  
18 because of the knowledge that what they're going to get may  
19 have to be turned over or will likely be turned over.

20 But aren't a lot of companies doing internal  
21 investigations now with the knowledge that in the end game  
22 it's going to have to be turned over? And aren't there  
23 enough incentives for the lawyers to do an effective job,  
24 even knowing that the work product is going to be turned  
25 over, that there really isn't a chill? I mean, that's, I

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1 assume, what the -- not my argument, what the Justice  
2 Department argument would be. And I guess my question to you  
3 is, what the answer to that would be.

4 MR. ROSENZWEIG: I can only give you the anecdotal  
5 answers. I have appeared in front of groups that comprise

6 corporate counsel, both the ACCA and some of the others, and  
7 they tell me that they are more reluctant to engage outside  
8 counsel for internal investigations, especially when  
9 something is immediate and they have got a particular item on  
10 their plate because they're scared. They know that it's  
11 coming.

12 MR. GREEN: So if they open the Wall Street Journal  
13 and they see some kind of accusation or rumor or whatever,  
14 they are not going to hire a lawyer and do internal  
15 investigation because they're worried that the work product  
16 is going to have to be turned over? I don't see what the  
17 alternative is.

18 MR. ROSENZWEIG: I don't see the alternative as  
19 well. But they are more reluctant. They're hesitant, and I  
20 think uniformly they would tell you that they're getting  
21 worse information coming back. I mean, it's not just the  
22 initiation. It's the end product in the end, and you know, I  
23 guess, as with any social dynamic, I don't think that it  
24 happens like a light bulb overnight. It's an increasing  
25 awareness.

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1 I think, as I said earlier, that there's more of it  
2 in New York, and I think people are more sensitized to it  
3 there and are sort of fighting back a little more. I think  
4 there's more hesitancy there than in Omaha. But again, you  
5 can't judge this -- I read one report from the department  
6 that only 19 plea agreements, you know, in the last ten years  
7 or last five years have required waivers.

8 But that's not the measure because so much of it

9 happens under your radar screen and my radar screen. We can  
10 only infer what the likely effects are from our reason, and  
11 it doesn't seem to me that there's any way of this not having  
12 some effect even at the margins. I tend to think from  
13 talking to corporate counsel that the effects are larger.

14 I go to, I guess, some of the same meetings that  
15 Mr. Conrad goes to or different meetings with some of the  
16 same people. Everybody's talking about it every day. I  
17 mean, you have got a task force. I mean, the ABA didn't set  
18 up the task force just because nobody was paying any  
19 attention to this.

20 MS. MARTINEZ: Anything else?

21 MR. POWELL: Just one follow-up, and by the way, my  
22 name is not Hilarie Bass. It's Burnele Powell.

23 MR. ROSENZWEIG: Pleasure to meet you, Mr. Powell.

24 MR. POWELL: Dean at the University of South  
25 Carolina School of Law. But with respect to the three

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1 deteriorating defense scenarios that you spoke of, if I could  
2 give them a heading, the last one was with respect to the  
3 KPMG situation. I am simply wondering there, if in fact the  
4 employee lied to somebody who was in the process of  
5 undertaking an investigation, wouldn't you see that as  
6 obstruction of justice under any scenario? I mean, even  
7 outside of this context? I mean, the reason they're lying is  
8 because they don't want information to come out, is it not?

9 MR. ROSENZWEIG: That's correct, but I wouldn't see  
10 that as an obstruction of justice. My thinking about

11 obstruction of justice has always been that it's lying to  
12 somebody who is a governmental official in some governmental  
13 capacity. If I tell you that my name is Joe Smith, I'm lying  
14 to you right now. And I'm not under oath and, you know, I'm  
15 morally reprehensible perhaps, but I have committed no crime.

16 MR. POWELL: But if you lie to me because you know  
17 that I'm going to talk to the government official, I mean,  
18 what's the purpose --

19 MR. ROSENZWEIG: That's the government's theory,  
20 and the idea is that waivers are becoming so prevalent that  
21 where I used to be talking to the attorney not knowing if you  
22 were going to be talking to the government official, the  
23 government is now saying it is such commonplace that I have  
24 to assume that. And then I would turn it around and say, "If  
25 that's the case, aren't you obliged to tell me that"?

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1 MR. POWELL: So your real concern here is over the  
2 question of when the assumption is a valid assumption that an  
3 investigation is underway or likely to happen?

4 MR. ROSENZWEIG: Right. If it is an infrequent  
5 occurrence, then the obstruction of justice charge rests on  
6 an incorrect factual premise, that I have knowledge that  
7 you're going to convey it to the government. If it is an  
8 extremely frequent occurrence, then it lies on the  
9 invidiousness of you compelling me to discuss it with you as  
10 a junior government agent without giving me the option that  
11 I, as an individual, have when I'm talking to the real ones,  
12 which is not talking to you.

13 MR. POWELL: But there's also a third scenario,  
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14 isn't there? Infrequent situation, but one in which all the  
15 circumstances suggest that I am about to talk to the  
16 government.

17 MR. ROSENZWEIG: In fact that's true. If I  
18 actually have -- that's actually a case called Aguilar. If I  
19 actually have actual knowledge that you are going to convey  
20 what I say to the government, the obstruction of justice  
21 charge is much more concrete. As I understand in Computer  
22 Associates, that wasn't that case, but I rely on the publicly  
23 reported information.

24 MR. KELLER: Can I say one thing on that? It kind  
25 of answers the question when you say, if someone lies because

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1 the way these questions really come up in real life isn't  
2 that someone, quote, lies. And the reason people do not talk  
3 to prosecutors or may not on the advise of counsel is because  
4 the prosecutor has gathered information from a lot of  
5 sources, which the person may not be aware of. The person  
6 may be thinking that they're telling a perfectly consistent  
7 story, but when the pieces are put together, it can fit in  
8 with the other information, result in charges of obstruction  
9 of justice.

10 And when you back that into the, if you will,  
11 private internal investigation context, the same sensitivity  
12 doesn't exist. And I think what you're saying is, to the  
13 extent it's made known and you build up that consciousness,  
14 and the same motivation not to talk to the prosecutor then  
15 carries over not to talk to the internal investigation, even

16 though you may be pure of heart.

17 MR. ROSENZWEIG: I think that's right. If I could  
18 add just one point. It's particularly poignant in the  
19 complex regulatory areas where the nature of what the offense  
20 is is itself often indefinite. It's one thing to lie about  
21 whether or not I shot John, but if I am a manager of a  
22 chemical facility dealing with NPS YYY, I may not even know  
23 that what I'm talking about is potentially criminalizable.  
24 And I may not therefore be on notice of the necessity to  
25 guard my words carefully and, you know, such.

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1 MS. MARTINEZ: Thank you, Mr. Rosenzweig, very  
2 much.

3 MR. ROSENZWEIG: Thank you.

4 (Discussion off the record and recess, 3:11 to 3:20  
5 p.m.)

6 MS. MARTINEZ: Our court reporter is back. A few  
7 housekeeping announcements as people grab their seats and  
8 grab their coffee and turn off their cell phones, please.  
9 No. 1, Sue Daly, our wonderful staff director standing in the  
10 back, tells me she has the attendance note pad. So if you  
11 haven't signed it, please do so. We appreciate that.

12 Secondly, all of the written testimony which we  
13 have received and any we receive posthearing will be posted  
14 on the web site of the task force, which is accessible by  
15 going to the ABA web site and then hooking on to business law  
16 and then to the task force.

17 We are working on hopefully having up in the near  
18 future a direct link to the ABA site once you go on, but for

19 the time being we have been housed in the good home of the  
20 business law section. And it is quite easy to get there, so  
21 if you would like copies of the various submissions, they are  
22 there.

23 Next we have John Gami no from Dallas, Texas. John,  
24 wel come.

25 MR. GAMI NO: Thank you. Good afternoon. We're

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1 runni ng about 20 mi nutes overtime. I'll do my part to try to  
2 get us back on schedul e.

3 MS. MARTINEZ: Thank you.

4 MR. GAMI NO: My name is John Gami no. I'm seni or  
5 tax counsel for the TXU Corp in Dallas. I wanted to be here  
6 because I feel strongly about the issues that the task force  
7 is confronting. I probably shoul d say that, like the  
8 gentleman before me, I'm speaki ng for mysel f today. My views  
9 do not necessari ly represent TXU's.

10 I'd like to speak briefl y from the standpoi nt of a  
11 corporat e insi der, corporat e tax practiti oner. I'd like the  
12 tax force to hear what's real ly happeni ng as we speak, what's  
13 happeni ng in real time in the corporat e trenches. I am an  
14 active member of the tax secti on. I'm thrill ed that Ken  
15 Gideon was here and gave the perspecti ve of the tax secti on.  
16 He speak s for the secti on. I don't. Our perspecti ves are  
17 very simi lar. They're not complet ely identi cal.

18 Large publ ic compani es are heavil y, heavil y  
19 depend ent on legal advi ce for the purpose of determini ng  
20 their tax liabi lity. Tax advi ce is not a luxur y. It's a

21 necessity. In my role as inside tax counsel for a large  
22 public company, I both write tax opinions and receive tax  
23 opinions.

24 I spend a good deal of my time as well sitting  
25 across the table from the Internal Revenue Service, providing

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1 IRS field agents or appeals officers with support for various  
2 positions that we have taken on our company's tax return.  
3 That support almost never, almost never includes handing over  
4 our tax opinions, which is not to suggest that the Internal  
5 Revenue Service doesn't want them or doesn't ask for them.  
6 It does. We have had to become skilled in crafting privilege  
7 logs.

8 Of course, the other third party at the corporate  
9 tax table is our independent auditor. I have heard more than  
10 one member of the task force make the remark that you would  
11 like to have more data and more examples. So I'll offer  
12 this. On December 27th, six weeks ago, my colleagues and I  
13 received this document from our independent auditor, Deloitte  
14 and Touche. It's captioned Tax Reserve Analysis Request  
15 List. It asks for quite a bit of material, documentation,  
16 most of which is not germane to the privilege issue.

17 But also this. "A copy of all internal and/or  
18 external tax memorandums and/or opinions that were prepared  
19 during the year with respect to significant tax items  
20 addressed during the current year." No limitations, no  
21 qualifiers to speak of. All memoranda and opinions, internal  
22 as well as external.

23 In my written submission I tried to paint the

24 picture of where this is coming from, some of the factors  
25 over the last 12 months, some of the pressure points, the

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1 statements by the SEC staff, the PCAOB audits, inspections, I  
2 should say. In terms of formal auditing guidance, however,  
3 it's become quite apparent where it's coming from, and you  
4 have already heard it today. It's coming from AU Section  
5 9326, and in particular Section 9326.22. Ken Gideon quotes  
6 it on page 1 of his statement. I excerpted it on page 3 of  
7 my statement.

8           It's quite clear that that's where Deloitte &  
9 Touche believes that it gets its authority, indeed its  
10 mandate, to ask us for all of our tax opinions. An excerpt  
11 from Deloitte's own audit manual, paragraph 52.27 in  
12 pertinent part, "It is mandatory that we obtain copies of  
13 opinions or advice provided by our clients' outside tax  
14 advisors. In terms of documentation, the best practice is to  
15 include a copy of tax opinions in our work papers.  
16 Alternatives, such as including abstracts, may be considered,  
17 but it would need to be a detailed discussion of the opinion  
18 contents. These requirements are consistent with AU Section  
19 9326."

20           Needless to say it makes no difference from the  
21 perspective of the privilege whether an auditor keeps a copy  
22 of a tax opinion in their work papers or makes a synopsis of  
23 it and hands it back. Either way, we would no longer be in a  
24 position to list that tax opinion on a privilege log. As an  
25 ethical matter, when the IRS asked for it, we would have to

1 produce it.

2 I think there are two points that need to be made  
3 here. First, Section 9326 is being misread plain and simple  
4 in my view. Look at the lead-in premise. If the client's  
5 support for the tax accrual or matters affecting it is based  
6 upon an opinion issued by an outside advisor, then the  
7 auditor must have a copy of the opinion in the work papers or  
8 a mildly redacted version or a summary.

9 That's no more or less than a straight analogy to  
10 the advice of counsel defense. I mean, if a litigant chooses  
11 to justify its action or, as the case may be, its inaction,  
12 on the advice of counsel, then that advice and the lawyers  
13 that gave it become fair game for discovery and for trial.  
14 We all understand that.

15 That's what Section 9326 is saying, that if an  
16 audit client chooses to use a tax opinion that it's received  
17 to support a tax accrual, then the work papers should include  
18 a copy of it. I have absolutely no problem with that  
19 conclusion.

20 MR. KELLER: It also says with respect to a  
21 potentially material matter.

22 MR. GAMINO: Yes.

23 MR. KELLER: But I didn't hear that in the Deloitte  
24 request.

25 MR. GAMINO: Right. I'm excerpting.

1 Unfortunately, Section 9326 is being read, though, as if it  
2 said, "If the client has a tax opinion, the auditor must get  
3 it." That's overreaching in my view.

4           The second point that needs to be made, I think,  
5 was perhaps answered a little bit earlier, Mr. Keller,  
6 although if you have actually spoken to someone who  
7 understands and was present at the creation of the treaty,  
8 you're probably one of the very few people. Everyone that I  
9 know and everyone that I speak for doesn't have the benefit  
10 of that 30 years of hindsight.

11           People do not understand whether the AICPA intended  
12 the reading that accounting firms adopted; in other words,  
13 intended to say that auditors are obligated to get tax  
14 opinions in all cases or didn't. One of the recommendations  
15 that I make is that the AICPA ought to clarify its  
16 intentions.

17           We hear a great deal today about the need for  
18 better financial reporting, that auditors ought to be more  
19 aggressive in their role as gatekeepers. Those are laudable  
20 goals, but they hardly amount to support for a conclusion  
21 that corporations ought to be stripped of the attorney-client  
22 privilege with respect to tax advice. There's simply no  
23 justification for that kind of notion.

24           The issue before the task force, at least from the  
25 tax perspective, is not whether we need more transparency in

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1 financial reporting. And it's not whether auditors ought to

2 be tougher across the board. The issue before the task force  
3 is that the AICPA has issued an auditing standard or  
4 technically an interpretation of an auditing standard that  
5 directly contradicts the explicit honoring of privilege  
6 elsewhere in the auditing standards, and it's being read by  
7 the accounting firms as overriding it.

8 The issue before the task force is that under  
9 pressure from the SEC and apparently from PCAOB inspection  
10 teams, the accounting firms have adopted audit policies that  
11 clearly are more geared to self-preservation than they are  
12 preservation of the privilege.

13 The issue before the task force is that the  
14 accounting firms seem to have forgotten about the treaty. I  
15 mentioned earlier that I spend a good deal of my time  
16 explaining our return positions to the Internal Revenue  
17 Service. We make our affirmative case. Then we defend it.  
18 We have to because we always have the burden of proof.

19 That's long been how we have worked with our  
20 internal -- our independent auditors. They come in. They  
21 take a look at our tax reserves, our tax accruals. They ask  
22 us any question they want to. In response we explain our  
23 case. If they have more questions, we dig deeper. It's just  
24 a dress rehearsal for what we have to do for the IRS in the  
25 future anyway.

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1 That's the way the process should work. That's the  
2 way it always has worked or always had worked until quite  
3 recently. I think that the tax force should recommend to the  
4 American Bar Association that it, as Ken Gideon said,

5 reengage the accounting profession as a whole through its  
6 institutions, remind accountants of the treaty and its  
7 importance, and encourage them to reaffirm it.

8 I think that the American Bar Association should  
9 encourage the SEC and particularly the SEC staff to temper  
10 its rhetoric, to encourage the AICPA and the PCAOB, who is  
11 now issuing auditing standards, to be clear on those auditing  
12 standards and in particular to clarify the confusion caused  
13 by AU Section 9326.

14 I think the PCAOB ought to be encouraged to  
15 instruct their inspection teams that in general there's no  
16 reason to take auditors to task because they don't have a  
17 client's tax opinions in their work papers. They ought to be  
18 taking auditors to task for having work papers that don't  
19 reflect that the client made its affirmative case or that  
20 don't reflect that the auditor exercised independent  
21 judgment.

22 It's one of the ultimate ironies here. The  
23 standards are quite clear, quite clear, that auditors must  
24 reach with respect to tax matters an independent judgment of  
25 their own. They cannot, they cannot rely on an outside tax

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1 opinion that the audit client may have received, AU Section  
2 9326.21. It begs the question as to why auditors have  
3 adopted the stance that they have and why the SEC and the  
4 PCAOB have encouraged them.

5 I appreciate the opportunity to give you input, and  
6 I want to thank each of you for your time and energy in this

7 important work.

8 MS. MARTINEZ: Thank you, Mr. Gami no. I know we  
9 have some questions to you. One question is, you refer to  
10 the Deloitte Touche memorandum and letter sent out stating it  
11 was mandatory to obtain copies of the opinions and memoranda,  
12 and I don't know if you know the answer to this question. I  
13 know Mr. Heaton's in the back of the room from the national  
14 conference, if that's standard language for the other three  
15 in terms of requiring mandatory obtainment of copies of tax  
16 opinions within the work papers.

17 MR. GAMINO: To the extent that I speak to my peers  
18 in other companies, it certainly is. It certainly is. I  
19 think I have spoken, you know, through various organizations,  
20 Tax Executive Institute, various industry and trade  
21 associations -- I talk to quite a few of my peers in other  
22 companies. The story is completely consistent.

23 MR. CANNON: I was going to say, John, I'm assuming  
24 that probably came out of the national office of Deloitte.  
25 I'm sure it didn't come out of a local office, the memo that

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1 you're talking about?

2 MR. GAMINO: The memo asking us for the documents  
3 came from the local office.

4 MR. CANNON: Yeah.

5 MR. GAMINO: The Deloitte audit manual, obviously,  
6 is a nationwide product. The Deloitte audit manual was from  
7 what I was quoting that says it is mandatory that we -- that  
8 was the Deloitte audit manual.

9 MR. CANNON: I just know that sometimes a lot of  
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10 times when you're dealing with your local auditors, they will  
11 always refer to the national office, so that's where I'm  
12 assuming that came from.

13 MR. GAMINO: I have just by happenstance worked  
14 with Deloitte auditors for almost as long as the treaty has  
15 been in existence, and so I know them pretty well. And you  
16 know, even though we have disagreed sharply across the table  
17 just in the last several weeks, and I must say that it's been  
18 far from a pleasant experience for all concerned, I'm happy  
19 that I was given this excerpt from the Deloitte audit manual  
20 by one of the Deloitte partners.

21 MR. KELLER: Just first, your request is that the  
22 AICPA should clarify the meaning of this. I suppose one  
23 would have to say that since it's now an interim auditing  
24 standard of the PCAOB that, at least as far as public  
25 companies go, it would have to be the PCAOB that addressed

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1 the meaning of this. AICPA is out of the business of setting  
2 standards for public companies. That's just an observation.  
3 If you have a different view, please, but --

4 MR. GAMINO: You know, I'm a little bit confused,  
5 and I don't think I'm unique in that respect. The AICPA just  
6 came out last month with a new auditing statement. It's  
7 still issuing auditing standards, and those auditing  
8 standards generally apply to issuers of publicly traded  
9 securities. So I too am confused as to where the line is  
10 drawn.

11 MR. KELLER: Let me just think through the dynamic.

12 I mean, what you had was a blanket request which is, okay,  
13 give us all opinions. But clearly, I take it the auditors  
14 are entitled, indeed charged to look at the material tax  
15 positions, tax positions that could have a material effect  
16 upon the financial statements. And as you said, the burden  
17 is on you to demonstrate that that is a sound position.

18 What would the dynamic be in taking a particular  
19 tax position and your going ahead and demonstrating to the  
20 auditor that that's the right position? And to what extent  
21 does the opinion that is rendered -- and let's assume it's  
22 external counsel for the moment, tax counsel that gave advice  
23 in writing on that tax position. Does that become part of  
24 the mix in that dynamic, and in that case is the auditor  
25 entitled to ask for that?

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1 MR. GAMINO: It never becomes part of the mix. The  
2 way it works typically in my experience is that I or one of  
3 my colleagues would prepare a position paper, essentially the  
4 same thing we would do for the IRS. Now, you know, it would  
5 be common for the logic or the authority that's in the  
6 position paper to also be reflected in the tax opinion if we  
7 received one, but you know, we get a lot of tax positions.  
8 And I think this is a fairly general reaction.

9 We don't take them slavishly. I mean, we often  
10 feel that our law firm has been too conservative. Sometimes  
11 we feel that our law firm has not been conservative enough.  
12 We often differ -- we form our own independent judgment, too,  
13 as to positions, particularly when it comes time to determine  
14 our tax reserves. You know, if you have a more likely than

15 not opinion, theoretically you ought to have a reserve of 49  
16 percent.

17 That's not the case because, you know, the  
18 corporate client performs its own due diligence as well, and  
19 that's part of the process. That fallout from that process  
20 is what happens between us and the independent auditor. The  
21 opinion never comes into it.

22 MR. KELLER: But your position paper is prepared by  
23 a tax lawyer internally and shared. I take it that position  
24 paper then is not privileged?

25 MR. GAMINO: Correct.

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1 MR. KELLER: And it very well could, I suppose,  
2 raise the question whether there has been a waiver of  
3 privilege, subject matter waiver.

4 MR. GAMINO: I am not as concerned about subject  
5 matter waiver as Ken Gideon is. My concern is that if I  
6 handed over an opinion to the independent auditors, even  
7 under a selective waiver rule, that opinion would lose its  
8 privilege. That's what I'm concerned about, far more than  
9 subject matter waiver, frankly.

10 MR. GREEN: Your comments haven't really addressed  
11 in your paper, I don't think -- what you submitted to us  
12 didn't really address either the question of legislation,  
13 which a lot of other speakers touched on. If there were  
14 legislation that provided that material that was privileged  
15 that were turned over to auditors would remain privileged  
16 vis-a-vis, you know, regulators, third parties, etc., is that

17 something you would endorse? And if you had that, would you  
18 have the same concerns you now have about the auditors'  
19 demands for the tax opinions?

20 MR. GAMINO: I have been lukewarm about a  
21 legislative solution since I first read it in the corporate  
22 council consortium white paper honestly, partly for the  
23 reasons that Ken Gideon expressed and some of the other  
24 speakers have expressed that, you know, maybe we would  
25 actually get it, maybe in three, four or five years.

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1 The problem -- you know, we have lived with the  
2 treaty since the late seventies. This hasn't been a problem  
3 until this year, so logically if it wasn't a problem all this  
4 time, it shouldn't need legislation to fix it. I am somewhat  
5 pessimistic about legislation as a solution to this problem.  
6 I think, in a phrase, the accounting firms just need to back  
7 off. And I think -- but that won't happen until they get the  
8 imprimatur from the PCAOB or AICPA.

9 MR. CANNON: One other question. In your earlier  
10 remarks you referenced saying that you had almost never  
11 turned over any privileged material. Then you made reference  
12 to a privilege log. Was that because of litigation the  
13 privilege hasn't been sustained, or what's happened there  
14 to --

15 MR. GAMINO: The IRS always wants the moon. They  
16 always ask for our opinions. We always respond with a  
17 privilege log. And obviously, the privilege log contains  
18 much more than just the single opinion. I mean, they  
19 typically contain hundreds of items. We have never had to

20 litigate one, thankfully. If we did, I think we would win.

21 MR. CANNON: So you are saying you have turned some  
22 over or you --

23 MR. GAMINO: There have been -- I remember one case  
24 in which we went ahead and brought our lawyers in, the same  
25 lawyers who had written the opinion, to talk to our auditors

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1 and eventually to talk to the IRS.

2 MR. CANNON: And that's because you were relying on  
3 their opinion?

4 MR. GAMINO: (Nods) but that's extremely rare.

5 MR. CANNON: I gotcha.

6 MS. MARTINEZ: Thank you, Mr. Gami no, appreciate  
7 your written testimony and your comments today. We note the  
8 president of the ABA, Robert Grey, walked into the room  
9 earlier. Robert, welcome, and you certainly have the  
10 opportunity now if you would like to say anything to the task  
11 force in the public hearing.

12 MR. GREY: Well, it's nice to be in this position  
13 at this meeting at this particular moment that I can just sit  
14 back and observe the good work and not be the focus of it.  
15 No. I wanted to come by because I have been encouraged by  
16 lawyers and corporate CEOs around the country to really take  
17 a good hard look at this and to make sure that we are giving  
18 a careful examination to the evolution of privilege under the  
19 new guidelines that have been issued by the various federal  
20 agencies and indeed by the consideration of congress.

21 And so I think what you're doing is going to be an

22 important part of the discussion by prosecutors and by our  
23 Justice Department, and we have a new attorney general. And  
24 I think that these are important ways in which to bring this  
25 issue into focus and to provide different sides of the

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1 perspective with clarity on the discussion.

2           It is -- this is one of these issues that there's  
3 not a magic silver bullet out there that's just going to  
4 render everything okay. This is going to take some very  
5 thoughtful analysis, some debate, and some very thoughtful  
6 consideration by those who are going to have the opportunity  
7 to react to this.

8           But I am convinced that with the panel that we have  
9 here, that we will come up with a very thoughtful analysis  
10 and have sound recommendations to offer our legal community  
11 on how to address this issue. But I just wanted to come by  
12 and encourage you to keep doing your good work because there  
13 are a number of people who are dependent on you doing that.  
14 So thank you very much.

15           MS. MARTINEZ: Thank you. Ursula Weigold. Is it  
16 Weigold?

17           MS. WEIGOLD: Yes, it is. Thank you. Good  
18 afternoon. I realize, of course, that the focus of this  
19 hearing has been on the attorney-client privilege rules  
20 within the specific context of corporate and regulatory law,  
21 but I understand your charge or the charge of this task force  
22 to be somewhat broader than that, so I do appreciate the  
23 opportunity to distract you from the specific subject for a  
24 short time and to bring to your attention an unfortunate

25 intersection of the attorney-client privilege rules in legal

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1 education; more specifically, the impact that the third party  
2 waiver rules has on the opportunities for law students to  
3 have low-cost experiential learning opportunities.

4           As you know, of course, for the attorney-client  
5 privilege to apply in all jurisdictions, the client has to  
6 have intended the communication to be confidential.  
7 Confidentiality is not presumed but, of course, a court will  
8 look at all the circumstances surrounding that communication.

9           If a third party is present, and again, this is of  
10 course in all jurisdictions, if a third party is present who  
11 is not strictly necessary to the confidential communication  
12 between lawyer and client, the privilege is deemed to be  
13 waived. And that is where the possibilities for experiential  
14 learning of law students during their law school years gets  
15 into trouble.

16           Law students are not exempted from the third party  
17 waiver rule, even though that makes no sense, and because, of  
18 course, the attorney-client privilege suppresses potentially  
19 discoverable information that would otherwise be disclosed,  
20 just about all courts read the rules very strictly. This  
21 strict construction of that waiver rule creates at the very  
22 least uncertainty about whether a law student may  
23 legitimately be present during client meetings, during client  
24 interviews, etc., and other experiential learning  
25 opportunities in an authentic setting.

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1           There are some exceptions to the waiver rule that  
2 apply to law students, but they're pretty narrow. First of  
3 all, the student practice rules in all jurisdictions do allow  
4 the attorney-client privilege to cover certain law students  
5 in certain situations. Second, there is an exception to the  
6 waiver rule for employees or agents of the attorney who are  
7 necessary to the representation.

8           Overall, however, as a practical matter, even  
9 construing both of those classes of exceptions liberally,  
10 which courts do not do, those exceptions leave a very large  
11 number of law students who can potentially waive the  
12 privilege. Why this becomes important goes back to, of  
13 course, the nature of legal education at most law schools in  
14 the country.

15           There are -- even though experiential learning is  
16 considered to be vital and the most effective way to  
17 certainly learn skills, as opposed to analysis or doctrinal  
18 rules, providing experiential learning opportunities for law  
19 students is very expensive. It, of course, occurs chiefly in  
20 the clinical law context at law schools.

21           And although the ABA accreditation standards  
22 encourage law schools to -- encourage, and I think even  
23 require law schools to provide some opportunities for  
24 clinical experience, that is certainly not true for all law  
25 students. And in fact, the standards specifically say a law

1 school is not required to give experiential learning  
2 opportunities to all law students.

3           The typical -- just to kind of give you a little  
4 bit more concrete context about the expensive clinical  
5 education, which is pretty much the only opportunity for  
6 experiential education that law students have at present, the  
7 typical student/faculty ratio in law clinics in most American  
8 law schools is, I think, between 8 and 10 students per law  
9 professor.

10           And so, of course, comparing that to a doctrinal  
11 classroom where you can put 60 or 70 or 80 students in a  
12 classroom and have one professor teach those students, the  
13 cost difference is pretty dramatic. There are a handful of  
14 law schools that require clinical education of all their  
15 students but only a handful. And so it's increasingly urgent  
16 and of interest to law schools to find lower cost  
17 opportunities to provide law students with hands-on learning  
18 experience.

19           As you know, about 10 years ago, the McRate report  
20 encouraged partnerships between the practicing bar and law  
21 schools to help law schools fulfill their obligation to  
22 prepare law students for practice, and there are some  
23 innovative and potentially really valuable possibilities in  
24 those partnerships between the practicing bar and law schools  
25 that are being stifled by this waiver rule to the

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1 attorney-client privilege.

2           And to just give you a quick example, at my law

3 school, the University of St. Thomas in Minnesota, students  
4 are required to complete an academic mentorship program  
5 during each of their three years of law school in which they  
6 are paired with a local attorney and spend at least 20 hours  
7 per school year going to various types of lawyering events,  
8 attending a deposition, attending a trial strategy meeting,  
9 etc., etc.

10 So these attorneys that we've recruited -- we've  
11 recruited 450 attorneys from the Twin Cities area -- arrange  
12 these experiences and then talk to students, reflect on the  
13 experience, answer students' questions, etc. But what we  
14 found is that a significant number of these attorneys are  
15 concerned that they cannot expose students to client meetings  
16 because of their worries about waiving their client's rights,  
17 of course, under the attorney-client privilege.

18 For at least 50 years, over 50 years actually, of  
19 course, legal educators have recognized the importance of  
20 experiential education for learning skills specifically, and  
21 the ones, of course, that are vital for a new attorney  
22 include communication skills, client interviewing skills,  
23 fact investigation skills, client counseling skills, problem  
24 solving and so on. And although simulation -- many law  
25 schools use simulations to try and teach some of those

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1 skills, there's a general consensus that the best way to  
2 learn them, of course, is to at the very least observe an  
3 experienced lawyer in the process of exercising those skills  
4 in a real client context.

5 I appreciate your considering this subject and  
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6 think that the ABA specifically is the appropriate body to  
7 consider the subject and perhaps make a recommendation to  
8 states because, of course, of the ABA's role in the  
9 regulation and accreditation of law schools and role in legal  
10 education.

11 One of the narrow exceptions that I mentioned a  
12 couple of minutes ago to the waiver rule of the  
13 attorney-client privilege is found in state student practice  
14 rules, and most of those state student practice rules are  
15 based on the ABA model student practice rule of decades ago.  
16 So in terms of suggesting or hopefully proposing a remedy, I  
17 think that the best potential for changing this unfortunate  
18 intersection of the privilege rules and education is for  
19 states to amend their student practice rules to specifically  
20 exempt the law students from the third party waiver rule.

21 MR. KELLER: Should the ABA amend its student  
22 practice rule, its model rule, as the way of encouraging the  
23 states?

24 MS. WEIGOLD: I think that would go a long way  
25 towards encouraging the states, and there have been no

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1 changes to the model rule since it was promulgated decades  
2 ago. So I think that would provide a wonderful impetus for  
3 states to reexamine its own rules.

4 MR. GREEN: Was that the work product or section of  
5 legal education?

6 MS. WEIGOLD: I believe it was partly legal  
7 education, and I'm sorry. There was another section that

8 also was involved and, of course, the impetus was basically  
9 the growing importance of the clinical law movement and to  
10 provide both better legal education and experiential  
11 education for law schools and also, of course, to serve  
12 indigent clients.

13 MR. GREEN: So maybe we should request that they  
14 look at this issue.

15 MS. WEIGOLD: That would be terrific.

16 MR. KELLER: If you have a specific amendment you  
17 would suggest.

18 MS. WEIGOLD: I would love to submit one. I have  
19 just finished a paper on this and have, of course, all the  
20 supporting research that I hope to submit to the task force  
21 as well.

22 MR. GREEN: Could we get your paper?

23 MS. WEIGOLD: Yes, absolutely.

24 MS. MARTINEZ: Anything else?

25 MS. WEIGOLD: Thank you.

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1 MR. KELLER: Could I ask just one question out of  
2 curiosity?

3 MS. MARTINEZ: Yes.

4 MR. KELLER: If I have a student observer at a  
5 client interview and I hand that student a yellow pad and  
6 say, "Here, please help me by taking notes of this meeting  
7 because I can't think and take notes at the same time," have  
8 I solved the problem?

9 MS. WEIGOLD: Yes and no. It is true that an agent  
10 or a necessary assistant to the attorney would be exempt, so

11 if you contrive to find something that seems necessary, I  
12 suppose that arguably would fall under the exception. But  
13 the point is, the uncertainty about the whole area deters  
14 attorneys from volunteering for wonderful mentorship  
15 opportunities that they otherwise would be willing to  
16 undertake.

17 MS. MARTINEZ: Well, it sounds like your law school  
18 is giving lots of wonderful mentoring opportunities to  
19 students.

20 MS. WEIGOLD: Thank you very much. We hope to do  
21 more.

22 MS. MARTINEZ: Thank you. Our next participant,  
23 Brad Brian, is the chair-elect of the ABA Section of  
24 Litigation.

25 MR. BRIAN: I think I'm here to offer our services

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1 to work with you and maybe even take a little bit of a load  
2 away from you. By way of background, I'm a former assistant  
3 U.S. attorney, now practicing in Los Angeles at Munger,  
4 Tolles, Olson, and a coeditor of the book we published at the  
5 ABA on internal corporate investigations.

6 As part of my job as the incoming chair of the  
7 litigation section, I was intending to take a look at an  
8 appointed task force and take a look at one of the issues  
9 that may be of interest to your group, and that is the  
10 growing tendency of government regulatory agencies and law  
11 enforcement agencies to request, even demand, that  
12 corporations subject to investigations waive the

13 attorney-client privilege, something that was mentioned in  
14 Larry Thompson's now famous memo several years ago as one of  
15 the measures in appropriate circumstances for assessing a  
16 company's level of cooperation.

17 In any event, we were intending to appoint a group  
18 to take a look at that in practice, what the effects have  
19 been, what the actual practice is in corporations, the  
20 tendency to waive and what the consequences of waiver can be  
21 and then to go further and try to formulate some proposed  
22 standards as to circumstances in which waiver is appropriate  
23 and some circumstances in which it may not be appropriate.

24 So the question I was raising and the reason I  
25 asked to speak today was to tell you about that intended

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1 project and see whether or not that fits at all with what  
2 you're doing and then discuss whether we could be of some  
3 assistance to you and also to discuss the timing of that,  
4 because I don't take over as chair until August.

5 But of course, we could accelerate our work and  
6 begin that sooner if that's of interest to your group. And  
7 I'm not sure whether our work product will take the form of a  
8 report, something more formal we would take to the House.  
9 I'm not sure yet, but the ultimate goal was to try to develop  
10 some evidence as to the actual practice in this area, the  
11 consequences of this practice, and to develop some proposed  
12 standards.

13 MS. MARTINEZ: Well, I think I can say without  
14 dissent that the offer of help and assistance is unanimously  
15 accepted by the task force, and I think importantly, Brad,

16 before you were able to be here with us, what we have heard  
17 repeatedly today and what we have asked is the various  
18 sources that are available from our vantage point for  
19 anecdotal information from various sections or outside groups  
20 of counsel. And certainly we would, you know, welcome the  
21 litigation section's participation in the task force surveys  
22 and any other type of gathering of information and data that  
23 we have been called upon by the various governmental agencies  
24 to supply them so that they can continue the dialogue with  
25 us.

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1 MR. BRIAN: I guess the question I have is really  
2 one of timing then and whether or not this is something that  
3 we should try to accelerate or whether it's something that  
4 could wait until I, you know, literally take office in  
5 August. If not, I'm happy to -- and I'm sure Dennis Drasco,  
6 the current chair, would support our setting up the task  
7 force sooner and beginning this process earlier and try to  
8 conduct that type of survey, which we intend to do.

9 MR. GREEN: Well, I guess I would ask how long you  
10 think it would take from when you start to when you finish  
11 because our -- we are in existence for a year. I think in  
12 all likelihood that would be extended. But even if that were  
13 the case, if you didn't begin until August and we, you know,  
14 only had one more year, our work would have to be essentially  
15 done for it to go the following August to the House by, you  
16 know, May or whatever. I mean, you could do the math.

17 MR. BRIAN: Yeah, I would think -- I mean, I would

18 think that certainly we would complete our work within a  
19 year, and I'm hoping that we would complete it within six to  
20 nine months. That would be my goal.

21 MR. GREEN: But if you only complete it within nine  
22 months, we would be out of existence by the time you complete  
23 it, so my thought would be that we would be much better  
24 served, our task force, if you started now rather than  
25 August.

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1 MR. BRIAN: I'm happy to raise that with Dennis and  
2 the executive committee meeting Sunday, Sunday morning. I'm  
3 happy to raise that.

4 MR. MOSER: I was going to say, the two of us will  
5 be meeting with your executive committee, and we can talk  
6 about that on Sunday.

7 MS. MARTINEZ: Yeah, and I think with Bill's good  
8 input too.

9 MR. MOSER: What we need do is, with all the other  
10 things that are going on, just because there are probably  
11 five different activities going on at one time.

12 MR. KELLER: And I think the other reason to  
13 accelerate is because the dialogue with the regulatory  
14 agencies and Department of Justice has essentially started.

15 MR. BRIAN: Right.

16 MR. KELLER: And while we have that momentum and  
17 their attention, you know, taking advantage of whatever  
18 sources of information we have will contribute, as opposed to  
19 waiting and letting it all dissipate.

20 MR. BRIAN: Well, that makes sense to me, so why  
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21 don't we take it up with our executive committee meeting on  
22 Sunday morning and then report back, but with the hope that  
23 we would begin the process now and provide whatever  
24 assistance we can provide you with. It's an area that's of  
25 much interest to me and I think to a number of people within

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1 the section who have looked at this issue and feel strongly  
2 about it, and I think we could be of some assistance and  
3 provide some resources to help.

4 MR. POWELL: I don't know if you were present  
5 before the break when we heard a witness who pointed out  
6 that, at least anecdotally, the view was emerging that  
7 basically it would be malpractice to undertake an internal  
8 investigation. But in light of your book, Internal Corporate  
9 Investigations, I was just wondering whether you could shed  
10 any light on what the attitude presently is with respect to  
11 internal investigations.

12 MR. BRIAN: I was not here for the testimony. I  
13 was on a very small plane and a long flight from Houston  
14 where I had a court appearance this morning, but I have  
15 participated in literally hundreds of internal  
16 investigations. And I actually start with the premise that  
17 the interest of the corporation and the interest of the  
18 government agency who is investigating are the same, that  
19 both of them are interested in finding out whether or not  
20 misconduct took place, and if so, what remedial steps should  
21 be taken.

22 Given that premise, which you could argue about, I

23 suppose, but if you accept that premise, then you have to  
24 come to the conclusion in my judgment that internal  
25 investigations are critical to the overall compliance program

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1 in companies, and that companies, to run themselves  
2 effectively now, need to do full investigations and get ahead  
3 of the curve, both to determine whether there's been  
4 wrongdoing and, as I say, to take whatever corrective action  
5 is appropriate.

6 So I strongly advocate that, and there are  
7 circumstances where I believe it's in the company's best  
8 interests to turn over all of the results of that, including  
9 the privileged materials. But there are other cases and  
10 situations in which it's very detrimental to the company to  
11 have to expose its privileged materials to scrutiny, given  
12 the peril of civil litigation and other things that can come  
13 up.

14 So I think there is a need for a dialogue on this.  
15 I think that Larry Thompson's memo, which talks about a  
16 waiver of privilege in appropriate circumstances, candidly  
17 has sometimes been misread and misapplied by some fine  
18 lawyers in the government agencies. It's not a memo that  
19 says that companies have to waive privilege in all cases, and  
20 I think what's in need is both a dialogue and maybe some  
21 appropriate standards. Obviously, you can't legislate every  
22 circumstance, but I think you can set forth some appropriate  
23 standards for people to try to comply.

24 MR. POWELL: Just a slight follow-up.  
25 Notwithstanding what you view as the better rule, the better

1 approach, that the disclosure would be -- or any cooperation  
2 would be warranted, do you have any sense as to what's  
3 happening in actuality, or is there a growing skepticism  
4 about whether cooperation should be there?

5 MR. BRIAN: That's one of the things I want to find  
6 out. I think implicit in your question is whether or not the  
7 risk of waiver is going to discourage companies from doing  
8 investigation. That is one of the things we want to survey.

9 I will tell you this from my own practice. I think  
10 it has already had the impact at least of affecting how the  
11 investigations are done and how they're documented. Where I  
12 think you do see some business people and in-house counsel,  
13 even outside lawyers, who are advocating not memorializing,  
14 let's say, the investigations with quite the thoroughness  
15 that I would believe in a perfect world would be appropriate.  
16 And that's a bad thing if the effect is to discourage people  
17 from conducting the kind of full-scale investigation they  
18 should be conducting.

19 MR. KELLER: Let me say, I think that distinction  
20 was drawn before. I find it hard to believe, when you put a  
21 corporate governance overlay to the question, buttressed by  
22 the SEC's Part 205 rules and Section 10(a) on the auditors'  
23 duties, that you can help when necessary avoiding an internal  
24 investigation. I suppose the key focus is on the methodology  
25 of it, and has that been eroded, and is it as effective as it

1 could be?

2 MR. BRIAN: And I don't want to suggest that  
3 there's a lot of data out there to suggest that companies are  
4 shirking from their responsibility because I agree with you,  
5 Mr. Keller, that I think it's -- the climate has, I think,  
6 encouraged investigations more than discouraged them. And I  
7 think that's all a good thing, but I think it is worth  
8 looking at, the consequences of requested waivers that are  
9 coming up more and more.

10 MS. MARTINEZ: Anything else for Mr. Brian? Thank  
11 you, Brad.

12 MR. BRIAN: Thank you very much.

13 MS. MARTINEZ: Does anyone else desire to be heard  
14 at the hearings today? As we -- yes.

15 MS. WRIGHT: If you don't mind, and I'm not  
16 scheduled to speak.

17 MS. MARTINEZ: Please come up. We welcome your  
18 comments.

19 MS. WRIGHT: My name's Vicki Wright, and I'm really  
20 here as the chair of the Environment, Energy and Resources  
21 Section Committee, and we have just begun the process of kind  
22 of communicating amongst ourselves on some of these issues.

23 Last Sunday I was at the Indiana State Bar Ethics  
24 Committee Meeting, which is a quarterly process. And it's my  
25 observation, and I have to say this. What all of you are

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1 doing is commendable, and I can only imagine how much time it  
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2 is taking. And so my next request may make some of you  
3 cringe, but I think one year is not enough.

4 The amount of time it takes, I think, for your work  
5 to trickle down to state bars and to local attorneys is long  
6 enough that perhaps just now you have really gotten the  
7 attention of a lot of lawyers throughout the country, and you  
8 know, we're looking at -- this is February, very little time,  
9 and your year will be up.

10 So I would ask that the task force, through  
11 whatever mechanism you have in place, consider both expanding  
12 the outcry or outreach to attorneys throughout this country,  
13 as well as perhaps providing longer time to comment and to  
14 become involved. I can't say that everyone will because I  
15 don't know. I'm concerned that perhaps there has not been  
16 enough time for different bodies, especially the state and  
17 local bars, who are not always meeting as often as perhaps  
18 you folks are, to gather their resources and make their  
19 decision as to whether or not they want to provide comments  
20 to you. So that's really the extent of what I wanted to  
21 bring forth to this task force.

22 MS. MARTINEZ: Well, thanks for the observation.  
23 So you know, we are trying our best to reach out.

24 MS. WRIGHT: Oh, I know.

25 MS. MARTINEZ: We actually are working tomorrow,

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1 Saturday. Bill Ide is making a presentation to the National  
2 Conference of Bar Presidents, which will certainly be another  
3 group that we think needs to be not only informed but tapped

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in terms of resources.

MS. WRIGHT: Right, right.

MS. MARTINEZ: Because of the great, you know, wealth of knowledge out there at the state and local bar level. Could you please just clarify your current position for us? You are chair of the Environment, Energy and Resources --

MS. WRIGHT: Section Ethics Committee.

MS. MARTINEZ: Ethics Committee, thank you very, very much. Thank you.

MS. WRIGHT: Thank you.

MS. MARTINEZ: Well, seeing no further participants, unless somebody on the task force has some further comments for the record, this session has ended. And we hope to meet again. Thank you.

(The proceedings in this matter concluded.)

C E R T I F I C A T E

STATE OF UTAH )  
COUNTY OF SALT LAKE )

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