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AMERICAN BAR ASSOCIATION
TASK FORCE ON
ATTORNEY-CLIENT PRIVILEGE

PUBLIC HEARING
Waldorf-Astoria Hotel
Park Avenue Suite North
New York, New York
Thursday, April 21, 2005

Reported by:
Maria Esther Rivera, RPR
JOB NO. 172503

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PUBLIC HEARING SCHEDULE

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SUSAN HACKETT
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JOHN A. BECCIA, III
The Financial Services Roundtable

JONATHAN BACH
Kronish Lieb Weiner & Hellman LLP
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ELIZABETH J. CABRASER
Lief, Cabraser, Heimann & Bernstein, LLP

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MS. BASS: Thank you for joining us
for the public hearing of the American
Bar Association Task Force on
Attorney-Client Privilege.

For those of you who don't know the
background of the Task Force, President
Robert Grey appointed the Task Force at
the beginning of this year for the
purpose of investigating and reporting to
the rest of the organization about what

12 ABA Task Force.txt
many of our members are concerned is the
13 significant erosion of the
14 attorney-client privilege. And so we've
15 had a series, this being the second, for
16 the purpose of giving people the
17 opportunity to come before us and express
18 their concerns.

19 We have filed written testimony with
20 the Task Force. Some members of the Task
21 Force have not had an opportunity to read
22 them because some of them have just
23 recently been filed, but we will do our
24 best to follow along.

25 First on the agenda is Stephen

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2 Saltzburg, who is here representing ABA
3 Section of Criminal Justice.

4 MR. SALTZBURG: Thank you. It's a
5 pleasure for me to be here. I have
6 submitted a written statement. In fact,
7 it's a statement by Jan Handzlik and
8 myself. Jan said he intended to be here
9 to grill me on that statement. I expect,
10 if he comes -- you know, he may.

11 MR. KELLER: In only his part.

12 MR. SALTZBURG: Well, one of the
13 things I would say is, maybe I should
14 have brought extra copies for people who
15 are sitting out here who haven't had a
16 chance to see it, but I suppose either

17 you or I could e-mail them copies to
18 anybody who's interested.

19 MR. KELLER: It will be on the
20 website, so people can access it easily.

21 MR. SALTZBURG: I think it's a fair
22 summary. I wasn't going to read that
23 statement because you could read the
24 written version faster, and it's boring
25 as can be. I hope you will have

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2 questions for me, so that we can have a
3 conversation.

4 I can summarize this very quickly.
5 The concerns of the Criminal Justice
6 Section are that the attorney-client
7 privilege may be weakened more than it
8 should be by various government agencies
9 to do what they regard as the right thing
10 in the public interest. We know from
11 Enron and other corporate scandals, that
12 just as accounting firms can be called to
13 answer for their failure, to blow the
14 whistle on certain practices that they
15 saw or should have seen, it may also be
16 true of the lawyers who were
17 participating, advising inside the
18 company and outside counsel, may very
19 well have failed the shareholders, failed
20 the public by not paying sufficient

21 ABA Task Force.txt
22 attention, or at least exercising
23 sufficient independent judgment on behalf
24 of shareholders and the public.

25 The Criminal Justice Section is
 fully aware, as I know this panel is, of

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2 the heated debate that the ABA House of
3 Delegates had when changing the Model
4 Rules, the rules on attorney-client
5 confidentiality, Rule 1.6 and 1.13. I
6 don't know that there has been a more
7 vigorous debate. I'm with very good, I
8 think, on both sides. The concern about
9 Larry Fox being one of the principal
10 spokespersons against expanding the
11 optional or compulsory disclosure
12 requirements and others speaking just as
13 eloquently in favor.

14 And the ABA is now on record,
15 basically, in support of giving lawyers
16 the freedom, and to some extent, the
17 obligation to take responsibility when
18 they see, in the corporate setting or in
19 the individual setting, when they see
20 clients who are about to commit crimes or
21 frauds that can cause serious public
22 harm. And whatever one's own personal
23 views are, I think there is much to be
24 said for what the ABA has done. I think
25 the ABA recognized that in a world in

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which lawyers play many different roles, the public basically was demanding that in certain circumstances lawyers step up to the plate.

There is a concern that the Justice Department for one, the SEC for another, may be too quick to assume that because lawyers now are entitled or required to step forward in certain circumstances, that any intrusion into the attorney-client privilege is okay, as long as it's part of a government investigation, or a part of a settlement with the government. I think the expression in our written statement is that we need to have a balance here. We need to recognize the role that lawyers can play in serving the public interest, but also consider the historic importance of the attorney-client privilege, and of the attorney-client relationship, and what can happen to that relationship if we are too quick to adopt a very broad view of waiver.

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I'll give you a couple of examples

3 that are not on the paper that are just
4 my own.

5 If we look at Sarbanes-Oxley, and
6 the requirement in Sarbanes-Oxley that
7 lawyers report corporate misdeeds up the
8 chain of the corporation, there's much to
9 commend that. Basically lawyers in this
10 corporate context, in Sarbanes-Oxley
11 recognizes that publicly held companies
12 have the shareholders, the shareholders
13 expect that the officers and the
14 directors of the corporation are acting
15 in their best interest, and they expect
16 that of the lawyer as well. And,
17 therefore, if somebody is not acting in
18 their best interest, and the lawyer knows
19 it, that kind of important requirement is
20 one that it is the law, and I think
21 there's a lot to be said in favor of it.

22 But let's take a slightly different
23 example that comes up fairly common, and
24 that is closely related to
25 Sarbanes-Oxley. And that is, a

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2 corporation decides to investigate
3 itself, and it does, as Upjohn did, the
4 case where the Supreme Court expanded its
5 notion of corporate attorney-client
6 privilege. A corporation like Upjohn
7 does an internal investigation. Upjohn,

8 it was into possible violations of the
9 Foreign Corrupt Practices Act, but it
10 could be into violations of almost any
11 aspect of law, environmental law, pick
12 your statute -- pick your provision.

13 One of the things that every entity
14 wants is, it wants to have its officers,
15 its employees feel as though that their
16 statements, that the statements that are
17 being made, are being made as candidly as
18 possible. It is true that in the
19 corporate context it is the corporation
20 that has the privilege. And the
21 individuals basically come to understand
22 that the corporation may choose to waive
23 the privilege or not waive the privilege.
24 There's a lot of candid statements that
25 people may make to lawyers, if they

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2 believe that the corporation will have
3 the good sense, basically, to realize
4 that a broad waiver may not be in
5 anybody's interest.

6 For example, a lawyer may say to
7 someone who is fairly high up in the
8 corporation, what's the worst case
9 scenario? Lay it out. What's the worst
10 case? If you work in the Department of
11 Justice, what's the worst you could do

12 here? It may be wrong, but tell me how
13 you, you know, put this together and make
14 us look as bad as possible. And somebody
15 may do that.

16 Now, that's something that a
17 corporation doesn't need to turn over to
18 the Department of Justice as part of a
19 settlement. Basically it's strategy.
20 It's brainstorming.

21 Just as the government itself claims
22 a privilege for predecisional discussions
23 and doesn't want to chill discussions,
24 it's really important in the course of
25 representing an entity, I think, that

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2 attorneys can have candid discussions
3 with employees. And that the assumption
4 ought not to be that when companies want
5 to retain the attorney-client privilege,
6 it's because they're hiding something
7 that the government has the need to know.
8 It may be because they want to promote in
9 the future candid exchanges. And if the
10 word goes out that every word that's said
11 is probably at some point going to be
12 released because the government will
13 insist upon it, either as a condition of
14 dropping an investigation, or settling a
15 case, people will behave strategically.
16 They won't be as candid, and they may not

17 talk at all. That's not in the
18 corporation's interest. It's not in the
19 government's interest.

20 So the question that I think is a
21 difficult one, but needs to be asked is,
22 when the government says, we want you to
23 waive privilege, and the sentencing
24 guidelines put waiver of privilege in as
25 factor for -- in that you have to be

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2 willing to consider in terms of
3 acceptance or responsibility. The
4 question is, do we need this? Do we have
5 to have a broad waiver in all cases? If
6 the government is satisfied that a
7 corporation has, in fact, disclosed the
8 facts, why does it need to get into every
9 one of these exchanges?

10 Another concern that arises in the
11 same context is, the lawyer becomes a
12 witness against his former clients on
13 this. Every time the lawyer makes notes,
14 the lawyer has to ask herself, should I
15 make notes here? If I do, the government
16 may end up seeing the notes. They may
17 want me to say what these notes meant.
18 I'll come in and testify. Somebody else
19 is going to say, that's not what I said.
20 And now you have clash, and the lawyer

21 and the former client -- they're not the
22 current clients now -- wherein the former
23 client ends up at odds with each other,
24 and that can't promote a healthy
25 attorney-client relationship.

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It hasn't come to this yet, but if we're not carefully, the slippery slope that we all understand too well, we'll likely apply in individual cases. I mean --

MR. HANDZLIK: May I interrupt you?

MR. SALTZBURG: Yes. I said that you probably would before you got here.

MR. HANDZLIK: In fact, I think it has come to that because in a number of matters that I'm involved with, the DOJ and SEC are requesting, not only the interview memos, but the notes, and those are notes taken by the lawyer during the course of the internal investigation. Of course, you can redact the conclusions and things that are there that causes suspicion. But, nevertheless, they're seeking the work product of the lawyers themselves, so that puts the lawyer in the position of eventually having to be a witness.

MR. SALTZBURG: It's a serious matter. By the way, psychiatrists tell

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2 me now that they in some instances did
3 not often take notes. Some psychiatrists
4 tell me they don't take notes at their
5 own counseling sessions with their
6 patients, because if they do, and they
7 are seeking reimbursement from the
8 government for the medical, for their
9 charges, some of the agencies want to see
10 the underlying things, including their
11 notes. And they said they won't turn
12 them over, so they basically are now
13 saying, we're not going to have notes.

14 MR. HANDZLIK: I'll give you an
15 example that I think is as apt as that.
16 You take a witness in to be interviewed
17 pretrial or maybe during an investigation
18 by an Assistant U.S. Attorney, he or she
19 does not take notes. Why? Because they
20 know it will be discoverable by the
21 defense. So it's the same principle, I
22 think, is what we have here.

23 MR. SALTZBURG: What I was talking
24 about was not just the notes. I know
25 that that exists. Let's look at the

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2 ordinary individual client. Forget the

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3 corporation for a moment. Ordinary
4 client who wants to enter into a plea
5 bargain with a government agency,
6 particularly the Department of Justice,
7 or settle a dispute with the SEC, and now
8 the question is, what does it mean to
9 waive attorney and client privilege?

10 It's not just notes. Does that mean
11 that the government can depose the lawyer
12 as to every conversation? Suppose you
13 didn't take notes. Is it the lawyer's
14 recollection of everything the client
15 said a fair game? The question is, why
16 do we need this? I mean, no one is going
17 to want his or her lawyer being deposed
18 about all these conversations,
19 particularly if what we hope that happens
20 is -- we all know this. We interview
21 people. They start out. They remember
22 an event one way. You press them on
23 details, and suddenly they realize they
24 got it wrong. We finally work it out.
25 We get to the point where we're

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2 confident, or as confident as we can be,
3 that we understand what happened. But
4 along the way there are steps and
5 missteps.

6 If an attorney has to testify about
7 each one of those things, clients begin

8 to look like they're not telling the
9 truth when they may be. The attorney
10 becomes the greatest impeachment device
11 ever imagined for attacking a client, and
12 they become advisories. And it's easy,
13 by the way, after a matter -- or I should
14 say, when a matter is about to conclude,
15 it's very easy for someone to say, well,
16 this matter is over. What's the harm
17 that will come from disclosure? And the
18 answer is, it's the next time there needs
19 to be representation, and that's why we
20 uphold privileges, and that's why we
21 allow people, when they're ordered to
22 talk to appeal, before they have to
23 disclose, we don't want the -- we don't
24 want the message to go out that, in fact,
25 you can't ever rest confidently or rest

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2 with the confident belief that what you
3 really are saying is a privilege that
4 will hold.
5 So the written statement, and if you
6 ask me where the line is, I can't draw
7 that line. But I think that what the
8 commission, I hope, is maybe able to do
9 as it does its work, is identify
10 situations in which you can say, you know
11 there doesn't appear to be a need here.

12 Maybe that's the first question. What's
13 the need?

14 I mean, maybe the agency who is
15 asking for a waiver should say why you
16 needed it, if it's even to make sure that
17 there's some, you know, additional fact
18 that it didn't learn along the way, that
19 might not be good enough. It may not be
20 necessary to do that, given the cost of
21 the privilege.

22 I think that you can distinguish, as
23 I do. I think there is a
24 distinguishing -- there's a distinction,
25 I should say, between a Sarbanes-Oxley

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2 right to disclose, where the attorney may
3 feel that he or she is in a position of
4 having to protect someone and waiving a
5 forced waiver of the privilege as a
6 condition for the government to give you
7 either a benefit, or to excuse you from a
8 harm in different situations.

9 MR. KELLER: Can I ask -- maybe to
10 help draw the lines here to differentiate
11 a few examples.

12 Some of the examples related to
13 advice and information gathering in
14 connection with, let's call it the
15 original substance of the charges or
16 potential charges. The second was the

17 internal investigation that then looks
18 into what happened before. That internal
19 investigation may or may not be
20 contemporaneous with a governmental
21 proceeding, and it can be followed, if
22 you will, by a governmental proceeding,
23 which then in and of itself, prompts with
24 the defense. In each of those cases, you
25 can have legal advice, and you can have

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fact gathering.

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Now, kind of, if you will, thinking
about a matrix, that way it will be more
sensitive to some of the situations than
others in terms of what may be observed
heightened protection and what may be
subject to the balancing.

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MR. SALTZBURG: That's a real good
question. The courts have long drawn a
distinction between the protection of the
privileged communications and protection
of facts known to individuals. I mean,
you can call anybody you want before a
grand jury, and they have to say, unless
they have a privilege against
self-incrimination, they have to say what
they know. What you can't ask them is
what you tell your lawyer. Clearly I
think most people would agree that the

21 advice that a lawyer is given, given the
22 strategies they want to pursue, the legal
23 advice about what should or shouldn't be
24 done, those probably deserve the greatest
25 protection.

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2 I mean, in Upjohn, itself the
3 Supreme Court raised the possibility that
4 even if some of this was just work
5 product and not attorney-client
6 privilege, that there is certain work
7 product that might be almost absolutely
8 protected. But it may be a little bit
9 simplistic to sort of say advice is here
10 and facts are here because in order to
11 get the facts, you need cooperation, you
12 need people to trust that the lawyer
13 actually has the best interest of this
14 corporation at heart.

15 And along the way, as the lawyer
16 gathers information, the lawyer may
17 gather a lot of things that the
18 government doesn't need to know. They're
19 facts, but they aren't really directly
20 relevant to what it is that they're
21 dealing with. I mean, if the government
22 knew it, they might find it of interest.

23 But we already have in
24 Sarbanes-Oxley and in our Model Rules, we
25 have the lawyer's right to disclose

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2 certain information, which is not really
3 for me the subject here. It is whether
4 we're going to go further and say -- once
5 the information is disclosed and the
6 government has it, can it say, okay,
7 that's great of you to share it with us,
8 now give us everything else that you
9 gathered along the way. And this is a
10 little ironic that the individuals and
11 companies that are actually most law
12 abiding and quickest to report their own
13 wrongdoings are asked, okay, now waive
14 the privilege. You've walked in the
15 door. It's not enough that you turned
16 yourself in. Now you've got to give up
17 your attorney-client privilege. That
18 seems a little bit strange, and as I say,
19 it may be a little bit overbroad.

20 MR. GREEN: Steve, you were on the
21 other side, and so you can channel, I'm
22 sure, the federal prosecutor's side.
23 When I talk to federal prosecutors, they
24 seem amicably reasonable. They say that
25 they are very limited in what they seek.

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2 They're looking to get, typically,

3 evidence to use in proceedings against
4 individuals in cases where they're giving
5 the corporation lenient treatment.
6 They're not looking for mental
7 impressions. They're not looking for
8 strategies. They're looking for evidence
9 that could assist them in some reasons
10 that in other reasons they may not be
11 able to get other ways, or impeachments,
12 or other corroborative material.

13 And when I talked to lawyers who do
14 this stuff, they often say that even
15 going into the internal investigation,
16 depending upon the posture, they know
17 that they're going to seek leniency for
18 the corporation, and that the regulatory
19 agency, or the DOJ, or whoever it is, is
20 going to seek this material, and that,
21 you know, they are still taking notes and
22 they're still effective.

23 And I wonder how much of what we're
24 doing is just hypothesizing slippery
25 slopes down the road, how much of it is,

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2 in fact, a reaction to what's going on.

3 Really, I guess my ultimate
4 question, since you are here representing
5 the Criminal Justice Section, what, if
6 anything, the Criminal Justice Section
7 can do to help us make the case through

8 something other than, you know,
9 conjecture, that the risk of compelled,
10 essentially compelled waiver,
11 functionally compelled waiver, is in
12 fact, or will in fact affect the way
13 lawyers do their work, the willingness of
14 clients to be candid with the lawyers, to
15 hire lawyers, et cetera?

16 MR. SALTZBURG: Let me answer the
17 last part first. I think probably one of
18 these that might be useful, although it
19 would be anecdotal, is to provide you
20 with, as Jan just did, with some samples
21 of what it is, the kinds of waivers that
22 are being sought. Now, I say it will
23 always be anecdotal because any kind of a
24 survey is going to have too many
25 variables in it to be very useful, I

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2 think. I think the experience we've had
3 in a number of areas, I'm thinking of
4 Mezzanatto being one in Rule 410 waivers,
5 where it starts out that you waive right
6 to use your proffers with the government,
7 you waive your objection to have them
8 used for impeachment. And suddenly you
9 find that you're now being asked to waive
10 your right to use them on part of the
11 case in chief. And then you have a

12 broaden waiver. You waive your right to
13 object to the government using them in
14 any way, shape or form to attack anything
15 that you might choose to do during the
16 trial. So you get suddenly, the slippery
17 slope, before you saw it, is over, and
18 what you thought you should worry about
19 is already there.

20 I think that the kinds of requests
21 for lawyers notes, for example, as
22 opposed to a, perhaps, memorandum the
23 company got, the board got when it made
24 the decision to cooperate with the
25 government, that lawyers who get their

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2 notes subpoenaed, and if they're being
3 asked to provide their open recalls of
4 what their conversations were, it's
5 troublesome.

6 And it's not, by the way, that
7 prosecutors are bad about this. I would
8 ask this, and I can't answer. When the
9 federal sentencing guidelines talk about
10 waiver, what do they mean? I mean, are
11 they saying that it's a limited waiver?
12 That you get the benefit of your
13 cooperation? Accept as your
14 responsibility in the light of
15 substantial assistance if you say, well,
16 we'll cooperate the way you just

17 described? Or does it mean blanket
18 waiver? You know, you can't go along if
19 it means blanket waiver, then the world
20 that -- it's not a slippery slope, then
21 that world is upon us.

22 I know the NI trust section got the
23 House of Delegates at the last meeting to
24 approve a resolution that basically
25 cautioned against overbroad waivers of

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2 attorney-client privilege, and we support
3 that, that notion. And I think one of
4 the challenges you have is that there are
5 probably examples that we could come up
6 with and anybody would say, that doesn't
7 sound like a bad waiver. It doesn't
8 sound like an extreme position in that
9 case.

10 But if the proposition is that
11 waiver is okay, is accepted, then the
12 next case somebody will just asked for a
13 broader waiver.

14 MR. CANNON: I have a couple of
15 questions for you. I'm glad you brought
16 up the sentence information that you
17 obviously would be in favor of the
18 commission changing or deleting the
19 language on just the docket on the waiver
20 for nicely articulated reasons, I think.

21 MR. SALTZBURG: Absolutely. I don't
22 say that it's always irrelevant, that a
23 decision to waive in certain
24 circumstances might, in fact, be
25 something that should be taken into

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2 account, but the way they've written it,
3 it seems to me to contemplate waiver
4 being the norm.

5 MR. CANNON: That really raises a
6 second question. And, by the way, I
7 thought your testimony was well done and
8 very helpful to me, in particular. But
9 everyone talks about it being okay when
10 it's in the public interest, or it's okay
11 in certain circumstances, and you just
12 don't see a lot of filling in the blanks
13 there, putting a little meat on the
14 bones.

15 And what I'm wondering, I was struck
16 by something in your testimony talking
17 about balancing the public interest
18 against a historic purpose of committing
19 clients to obtain the best possibly legal
20 advice. So it's like the public interest
21 is on this side, and on this side is the
22 historic purpose of committing clients to
23 obtain the best possible legal advice.

24 Now, I always thought that would be
25 in the public interest for the clients to

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2 obtain this legal advice. So how do you
3 sort that out? I mean, what is in the
4 public interest versus --

5 MR. SALTZBURG: Actually, I'm glad
6 you said that because I didn't mean to
7 draw a dichotomy there. If it weren't
8 for the attorney-client privilege, some
9 of the self-reporting that now goes on
10 probably wouldn't take place. That's one
11 of the things to worry about. If people
12 clam up because they don't -- they know
13 that there is a good probability lawyers
14 notes and everything that's said is going
15 to be revealed, then it may be that
16 wrongdoing is harder to uncover, slower
17 to be uncovered.

18 I'm thinking, by the way, that --
19 you know, there's this view -- and I
20 probably talk too long -- one of the
21 other areas that I think you probably
22 haven't looked at and should is this
23 pressure not to have a joint client
24 relationship. There's this notion that
25 if a company is willing to enter into a

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2 joint client relationship, even with its

3 leading officers, that that's a kind of
4 conspiracy to use the attorney-client
5 privilege to essentially bottle up
6 information.

7 Well, you know, it doesn't seem
8 reasonable to assume that if there's an
9 allegation of wrongdoing, and the
10 president of a company says, gee, I want
11 to be careful here. I don't think I did
12 anything wrong, but I certainly don't
13 want to make a misstatement, but I want
14 to help this company. That the
15 assumption on some people's part is what
16 you have to say is, fire the guy. Fire
17 the person, if he's not willing to tell
18 you what he knows. Well, that's
19 unreasonable. You don't want to fire
20 somebody who's been a good corporate
21 officer simply because they're worried
22 that their words can go to back haunt
23 them.

24 The idea of a joint privilege is
25 it's never, until recent times, been

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2 thought to be a bad thing. And now
3 suddenly there's this pressure to say no
4 more joint client relationships. I
5 think, again, it's a heavy-handed
6 approach that may turn out, as you put
7 it, to backfire.

8 MR. CANNON: But who determines
9 what's the right structure? That's what
10 I'm really kind of struggling with here.
11 Everybody says to me the appropriate
12 circumstances. Does this Task Force
13 define it? Does the Congress define it?
14 The Court's define it, probably. Who are
15 the agencies? The prosecutor certainly
16 will try to define it. So who's in
17 charge of defining it? If a broad
18 statement is given, it's okay if it's in
19 the public interest in limited
20 circumstances, then who's going to define
21 that?

22 MR. SALTZBURG: I'm thinking for
23 myself now. This is not the Criminal
24 Justice Section because they haven't
25 gotten to this place. It would make a

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2 lot of sense to me, but I don't think you
3 will get this, to have Congress by
4 statute forbid compulsory waiver of
5 attorney-client privilege, and then in
6 all but exceptional circumstances -- and
7 they would define what exceptional
8 circumstances were, and the reason I
9 don't think that would be so bad is this.
10 It is not unusual in a plea agreement or
11 in a settlement for the government to

12 ABA Task Force.txt
require and to indicate that this
13 settlement or this agreement is based on
14 representations that everything, all the
15 facts basically concerning drug
16 trafficking, defraud, or whatever, have
17 been disclosed. And that means if it
18 turns out that the individual company
19 didn't disclose all the facts, they're in
20 trouble.

21 I guess this goes back to Stanley's
22 question, which is, I don't want to
23 protect facts. The government is
24 entitled to the facts that are relevant
25 to an investigation. It's the private

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2 communications and the confidences, I
3 think, that don't need to be disclosed if
4 you are requiring disclosure of the
5 facts.

6 MR. HANDZLIK: If I could make a
7 comment to both Steves. I'd like to make
8 a comment in response to that.

9 It's a very good question. Who
10 defines the public interest? I think
11 your testimony goes to that, to the
12 extent that essentially every Assistant
13 U.S. Attorney in the U.S., Assistant U.S.
14 Attorney is now defining what's in the
15 public interest. One of the things that
16 I think your written testimony speaks or

17 points out is the necessity for a process
18 or procedure either within U.S.
19 Attorney's offices, or better yet, in the
20 Department of Justice to evaluate whether
21 or not it is appropriate to seek a waiver
22 of privilege. Because right now public
23 interest is whatever a particular
24 Assistant U.S. Attorney, or SEC, or some
25 other government attorney thinks it is.

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2 MR. CANNON: Actually, it raised one
3 more question I'd like to ask because you
4 referenced the idea of kind of keeping a
5 record or a log of when this was done by
6 who, and under what circumstances. What
7 to use it for? Who would have access to
8 that? I mean, what do you do with it?

9 MR. SALTZBURG: It's a good
10 question. If that were publicly
11 available, then the ABA would have access
12 to it, journalists would have access to
13 it, the clients would have access to it,
14 then we'd be able to at least know
15 whether -- this is as Bruce asked -- is
16 this an isolated thing where a rogue
17 prosecutor is pushing for an overly broad
18 waiver and it happens rarely? Or are we
19 seeing basically a seat change, where the
20 attorney-client privilege -- just forget

21 it for anybody who wants to strike a
22 bargain with the government.

23 That's part of why I think that it
24 may not work simply to have the
25 department do it. First, they may not

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2 make the records public, and if you're
3 right, if the public doesn't have access,
4 then the records don't mean much.

5 And second, the department -- I
6 mean, we know this, and Bruce knows this
7 very well, from what was called the
8 Thornburg Memo. The department's view
9 was that it wasn't bound by rules of
10 professional responsibility. That only
11 changed by statute, where, you know,
12 assistant federal prosecutors are bound
13 because of the McDade Amendment.

14 So Congress has shown that it can
15 respect the rules of professional
16 relationship. Whether it will here? I
17 don't know because part of, I think, your
18 difficult job is that people really
19 respect the attorney-client privilege
20 when they get in trouble. They
21 understand that when they are in trouble,
22 their lawyer is the only thing that
23 protects them from a very powerful
24 government, and I don't care if it's the
25 SEC, the Department of Justice, the

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Department of Transportation, whatever it is, where people begin to respect the attorney-client relationship.

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When they're not in trouble, and they're sitting there reading the newspaper, their basic view is that lawyers are an impediment, that they're not a factor that actually advanced the public interest. They just don't understand that. And that's part of the challenge for all of us who are lawyers, law professors, part of your commission is to make the public understand that lawyers play an important role in promoting a public interest, and avoiding the dichotomy I found myself setting up and you corrected me on, but it isn't a dichotomy between privilege and public interest. They go together.

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MR. KELLER: Well, just to comment sort of to get it straight. There is additional difficulty which is easier to articulate the importance of privilege in the context of individuals. It becomes

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harder when you're trying to justify the

3 context of the entity, the organization
4 as the entity or, quote, the wrongdoing
5 only committed by individuals. And
6 that's what I got real --

7 MR. CANNON: That's what's
8 important. I'm sorry.

9 MS. BASS: I was just going to say,
10 I know we'd love to hear from Steve all
11 afternoon, but we have a tight schedule.

12 MR. SALTZBURG: I thank you. I went
13 over the time you gave me, but I'm now
14 getting out of your way.

15 MR. GREEN: Thanks, Steve.

16 MS. BASS: Can I ask Ms. Hackett to
17 join us from the Association of Corporate
18 Counsel.

19 MR. CANNON: If you think about the
20 corporate entity, there's an entity that
21 essentially has done nothing wrong as an
22 entity. It's individuals within that
23 entity that have engaged in conduct, et
24 cetera, that then makes the entity
25 perhaps liable.

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2 MR. KELLER: Well, but I would go on
3 to say, once you make that assumption,
4 then you come from a very different
5 place, so the entity may not have done
6 anything wrong because the individuals,
7 in fact, may not have done anything

8 wrong.

9 MR. GREEN: Well, here we have a
10 representative from Corporate Counsel.

11 MR. KELLER: Members do not do
12 anything wrong.

13 MS. HACKETT: Never, as their
14 general counsel, I say no.

15 Thank you. I have a prepared
16 statement that I am going to read to you
17 today, and I will submit this statement
18 again electronically for the purposes of
19 your record. In the materials that were
20 sent out to you in advance are a few
21 pieces of information supporting our
22 testimony. One is the results of our
23 attorney-client privilege survey which
24 was conducted recently, and which got
25 responses from approximately 700 lawyers,

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2 about half of whom were in-house, most of
3 them at the general counsel level, and
4 about half of whom were outside counsel
5 who specialized in corporate
6 representation. And I will refer to
7 those results throughout my testimony.
8 I'm happy to take any questions that I
9 can. I think these results are posted on
10 your website, as well as on ours, if
11 people want to come to them later.

12 Additionally, in the material there
13 is a memo that was recently completed and
14 sent off to our members on the impact of
15 sentencing guidelines, specifically the
16 waiver provision in the commentary to the
17 Chapter 8 section of the sentencing
18 guidelines, and a letter that we had sent
19 initially when the Thompson Memorandum,
20 which was then the Holder Memorandum, was
21 issued, which evidences some of the kinds
22 of things that the Association over the
23 years has been working on as we have
24 pursued this issue. So with that, I'll
25 begin.

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2 Thank you for the opportunity to
3 testify before you today. I am Susan
4 Hackett. I'm the Senior Vice President
5 and General Counsel of the Association of
6 Corporate Counsel, which was formerly
7 known as the American Corporate Counsel
8 Association. ACC is the in-house bar
9 association with over 17,000 members,
10 mostly in the U.S., but an increasing
11 number overseas and over 50 countries
12 now. Our members represent more than
13 8,000 different organizational clients,
14 including small and large companies,
15 public and private entities, as well as
16 non-profits in every imaginable industry,

17 and in every size of law department, from
18 one-person shops to multiple thousand
19 strong departments.

20 ACC supports the ABA Attorney-Client
21 Privilege Task Force, and we commend you,
22 Chairman Ide, and President Grey for the
23 Task Force's mission and its work. We
24 have been honored to participate in this
25 process through our liaison status to

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2 this Task Force. And in addition to
3 attending your meetings, I've heard and
4 read the extensive testimony and the many
5 presentations offered to the Task Force
6 to date.

7 I come before you today mindful of
8 the dual role that this Task Force must
9 play in its work. You have an important
10 responsibility as experts to examine the
11 legal issues involved in this discussion
12 of privilege, as well as an important
13 role to play as stewards of our client's
14 fundamental rights. For the issue of
15 privilege before us is -- at its core --
16 about clients, and not about lawyers.

17 ACC members are very focused on
18 protecting the rights of their clients,
19 including their Constitutional rights to
20 counsel and the concomitant expectation

21 that these rights will be exercised and
22 supported in a context of
23 confidentiality. As a result, I'm here
24 today to urge this Task Force to focus
25 its attention on two things. First, how

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2 we can fulfill corporate clients'
3 legitimate expectations that the
4 privileges will protect and promote their
5 communications with counsel. And second,
6 how we can redress any actions or
7 policies that have the affect of
8 diminishing the value of or brokering
9 away clients' privilege protections.

10 ACC does not agree with a number of
11 those who have addressed this Task Force
12 who have come to the conclusion that it
13 may be practically necessary for clients
14 to cede their privilege rights in certain
15 context in order to gain otherwise
16 available favorable treatment from a
17 prosecutor or regulator. Many addressing
18 this group along these lines have
19 endorsed the concept of limited waiver.
20 It is ACC's position that trying to
21 fashion an "acceptable" limited waiver
22 puts us in the position and on the
23 slippery slope of acknowledging that it's
24 okay to ask clients to waive their rights
25 to the government. Limited waivers would

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not even be a topic of conversation here today if the government did not believe that it has the right to receive waivers in the first place, and punish those who refused to grant them.

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The privilege is not a bargaining chip to be played by the government in obtaining corporate cooperation or in making charging decisions. If we can find ways to make sure that such a chip is not part of the hand that prosecutors and regulators feel entitled to play, the issue of whether to grant a waiver or seek a limited waiver's protections is moot. ACC believes that this Task Force's most valuable contribution would be to pursue actions that will stop government intrusions into the confidential relationship of attorney and client since such intrusions come at the expense of corporate compliance initiatives.

Diminishing a corporate client's privilege rights vis-a-vis the government

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puts the company at an unfair

ABA Task Force.txt
3 disadvantage in what is clearly an
4 adversarial process staged on what should
5 be a level playing field governed by
6 established and predictable rules of
7 practice. Whether or not to waive the
8 privilege should not be a question that
9 the government is allowed to pose and to
10 answer. If this Task Force moves toward
11 promoting limited waiver alternatives,
12 then the presumption becomes that the
13 government has a right to ask for a
14 waiver, so long as they can "protect" the
15 client in third party or subsequent
16 discovery. While protection from third
17 party discovery requests is certainly
18 important, employees who seek legal
19 advice or feel obliged to report a
20 potential legal problem are far more
21 personally threatened by government
22 access to their statements than they are
23 by the longer term financial impact of a
24 third party suit on the company.

25 Through the eyes of corporate

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2 employees, if the company's counsel may
3 be compelled to divulge her
4 attorney-client conversations, then
5 talking to the company's counsel is
6 really no different than talking to a
7 prosecutor. Companies' lawyers will be

8 seen as deputized middlemen who are not
9 valued by clients for their ability to
10 helpfully advise the company or help to
11 protect from corporate wrongdoing, but
12 rather who are valued by the government
13 for their role in facilitating the
14 prosecution of their corporate clients
15 and employees when failures inevitably
16 occur. Clearly, from the perspective of
17 employees, and as suggested by the U.S.
18 Supreme Court in its landmark holdings
19 supporting the privilege in the corporate
20 context, an uncertain privilege is no
21 privilege at all.

22 While we all know and appreciate the
23 ethics axiom that the corporate lawyer
24 represents the entity and not its
25 individual managers, it bears repeating

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2 that on a practical level, companies
3 cannot exist or work but through the
4 action of individual employees,
5 executive, and directors. And the
6 corporate privilege does, in fact, thus
7 facilitate and give comfort to the
8 interaction of company lawyers and
9 employees. For if not for the corporate
10 privilege, employees who are approached
11 by the company's counsel otherwise face

12 the Hobson's choice of either refusing to
13 cooperate (which could lead to their
14 dismissal), or cooperating fully, knowing
15 that whatever they say to these lawyers
16 could be turned over to a prosecutorial
17 authority in the future.

18 Even those who are innocent of
19 wrongdoing would rather take cover in
20 these turbulent times than risk
21 unforeseeable consequences. Such
22 feelings are natural for employees in
23 today's company where it is incredibly
24 hard for even the most well-intentioned
25 and diligent employees to feel confident

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2 about their ability to keep up with
3 regulatory obligations and ever-changing
4 legal standards of reasonable behavior.
5 Corporate employees and executives alike
6 worry that even an innocent action might
7 appear in a less favorable light when
8 subject to the scrutiny of 20/20
9 hindsight in the aftermath of a corporate
10 failure. And to the mix daily headlines
11 about ever-increasing numbers of employee
12 prosecutions which underscore the current
13 environment of prosecutorial fervor for
14 assigning responsibility to someone when
15 corporate failures occur, what results is
16 an environment in which corporate counsel

17 and employees act at odds with each other
18 in a less than trusting relationship.
19 And the lawyer-client relationship
20 without trust is one that will not
21 effectively operate to the company's or
22 society's benefit.

23 The benefits of the privilege should
24 be every client's expectation and right.
25 For the protection of the privilege does

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2 not come at any significant cost to
3 either, the government, the society or
4 the company. The privilege (and
5 attendant work product protections of an
6 attorney's thoughts) do not protect
7 "facts" from the government's
8 investigation of alleged wrongdoing, nor
9 do they prevent clients from disclosing
10 in a cooperative manner all relevant
11 information about the client's activities
12 in question. The argument that the
13 government does not have the resources or
14 should not have to shoulder the
15 responsibility to investigate and make
16 its own decisions about a company's
17 alleged wrongdoing without access to
18 privileged communications is simply not
19 persuasive. And the mistaken belief that
20 the privilege inappropriately cloaks

21 "secrets" and protects wrong-doers in an
22 environment that would otherwise
23 celebrate corporate transparency, suffers
24 from a confusion between the purposes of
25 obtaining legal counsel and the reasons

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2 for transparency in governance.

3 In the material I've included to
4 accompany our testimony, you'll find our
5 survey of in-house and outside counsel on
6 these issues. Even the most casual
7 reader should be struck by the incredible
8 response rate and the unanimity of the
9 message that our members and outside
10 counsel responding to the surveys are
11 sending to us, and hopefully to you on
12 these issues.

13 I would like to specifically focus
14 on five points or six points raised in
15 the survey.

16 The first, a personally experienced
17 erosion in the corporate client's
18 privilege rights was confirmed by almost
19 one-third of in-house counsel respondents
20 answering the survey, and almost one half
21 of the outside counsel survey
22 respondents, indicating a growing problem
23 for corporate clients who wish to
24 exercise their right to confidential
25 legal counsel, and for the first time

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2 quantifying that a problem that is
3 significantly more burdensome than
4 prosecutors and others in government
5 oversight positions have suggested
6 exists. Erosion in the protections
7 offered by the privilege and work product
8 doctrines was cited as experienced by 30
9 percent of inside counsel respondents,
10 and 48 percent of outside counsel
11 respondents in the survey.

12 Reliance on the privilege, in-house
13 counsel confirmed that their clients are
14 aware of and rely on the privilege when
15 consulting them (93 percent of those
16 surveyed affirmed this statement for
17 senior-level employees, 68 percent for
18 mid- and lower-tier employees.

19 Absent privilege, it was confirmed
20 that clients will be less candid. If the
21 privilege does not offer protection,
22 in-house lawyers believe there will be a
23 "chill" in the flow or candor of
24 information from clients, 95 percent of
25 those surveyed confirmed this statement.

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2 Indeed, in-house respondents stated that

3 clients are more sensitive as to whether
4 the privilege and its protections apply
5 when the issue is highly sensitive (236
6 out of 363 respondents said that), and
7 especially when the issue might impact
8 them personally (189 of the 363 surveyed
9 respondents indicated that).

10 Privilege facilitates the delivery
11 of legal services -- 96 percent of
12 in-house counsel respondents to the
13 survey confirmed this statement.

14 Privilege enhances the likelihood
15 that clients will proactively seek legal
16 advice -- 94 in-house counsel agreed with
17 this statement.

18 Privilege improves the lawyer's
19 ability to guarantee effective compliance
20 initiatives -- 97 percent of corporate
21 counsel surveyed believe that the mere
22 existence of the privilege improves the
23 lawyer's ability to monitor, enforce,
24 and/or improve company compliance
25 initiatives.

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2 MR. HANDZLIK: I think that last
3 point is particularly important because
4 it indicates to me that the law on an
5 unintended consequence may be at play
6 here. The Department of Justice, the
7 government seeks privilege waiver, while

8 at the same time they seek to invest
9 corporate counsel with a great deal of
10 authority to pursue wrongdoing and
11 wrongdoers and to investigate
12 questionable activity. But at the same
13 time, it seems to make it more difficult
14 for the general counsel of the company to
15 do its job.

16 MS. HACKETT: Correct.

17 MR. HANDZLIK: To the extent that
18 employees, officers and employees are
19 inhibited from coming forward with
20 information of wrongdoing, or to talk
21 about what's happened in the past, I
22 think that undercuts the ability of
23 corporate counsel to carry out this
24 compliance program that you're talking
25 about.

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2 MS. HACKETT: Indeed, and I think it
3 goes further than that. When these
4 programs are designed before there's any
5 problem that may arise, I think that
6 there is a very important function that
7 in-house lawyers play as members of the
8 strategic team that's tasked with
9 figuring out how to prevent wrongdoing.
10 And often those kinds of relationships
11 are also inhibited when one assumes that

12 the lawyer is not necessarily working
13 primarily for the company's interest, but
14 for the government's interest, should
15 wrongdoing eventually occur.

16 We just had a particularly perverse
17 impact recently in a number of cases in
18 which corporate counsel themselves have
19 been prosecuted by the government for
20 compliance failures within the
21 organization either on a fiduciary level
22 or on the level of having provided the
23 legal services that, obviously, must have
24 failed in the event that a failure
25 occurred within the organization.

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So you're sending the message, not
to employees, but to lawyers that their
cooperative, candid and very aggressive
work in the areas of compliance may not
be rewarded, if, as is often the case in
the history of any organization, failures
do occur in the future.

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MR. HANDZLIK: Well, there is -- I
don't know whether the documents
articulated to the Task Force, but there
are couple of cases right now where
independent law firms were retained to do
internal investigations, and people didn't
come forward. They didn't tell them what
had happened. Then subsequently another

17 law firm came in, did an internal
18 investigation, and discovered the
19 underlying -- the real problem area. The
20 first lawyers are now the subjects of at
21 least a portion of the investigations by
22 the SEC.

23 MS. HACKETT: That's very
24 disturbing.

25 MR. HANDZLIK: Yes.

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2 MS. HACKETT: When offered a variety
3 of options listing the potential
4 circumstances under which government
5 officials should be allowed to request
6 disclosure of privileged information,
7 corporate counsel were quite clear -- the
8 largest percentage of respondents (both
9 inside and outside counsel) said that
10 waiver of privilege to the government is
11 not appropriate and should not be sought.
12 Only 22 percent of in-house counsel and
13 17 percent of outside counsel answering
14 the survey indicated that they thought
15 the government's request for waiver
16 should be allowed if there was a
17 guarantee that review by the government
18 would not waive the privilege as to third
19 parties in the future. Both in-house and
20 outside counsel, therefore, have made it

21 quite clear that they want us to protect
22 their client's privilege rights, not
23 facilitate their waiver.

24 Corporate clients sitting on the
25 other side of the table from the

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2 government are being pressured to waive
3 the privilege. The government's use of
4 words like "cooperation" cannot hide the
5 evidence that what is really happening is
6 something more akin to coercion. The
7 in-house counsel bar association, we are
8 being told by our members that we should
9 focus our efforts on finding out why
10 prosecutors believe they can remove the
11 privilege from our legal system, and they
12 want us to help find a way to stop them
13 from doing so in the future in order to
14 avoid negative impacts on corporate
15 compliance efforts.

16 Does ACC suggest that its members
17 could never be well-served by limited
18 waivers in some situations? No. And, in
19 fact, our board endorsed and still stands
20 by the proposal made by the Corporate
21 Counsel Consortium (which presented its
22 proposals to this Task Force as well)
23 that would change the rules governing
24 accountants (through the PCAOB) and seek
25 legislative recognition of a limited

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2 waiver right for auditors who request
3 certain kinds of privileged information
4 in order to assess the nature of the
5 company's business health and the
6 accuracy of its books. The fundamental
7 difference between this kind of limited
8 waiver and that suggested as a remedy to
9 prosecutorial erosion of the privilege is
10 not the company's prosecutor -- he
11 performs quite a different function --
12 one presumably in concert with the
13 client's interests.

14 There are probably current
15 situations in which some corporate
16 clients will seek a limited waiver from
17 the government because it's the best they
18 can get. Far too often companies under
19 investigation today are subject to
20 government policies and operating
21 procedures that leave them no other
22 choice but to waive their rights to the
23 government in the hope that a limited
24 waiver's assurance as to third parties at
25 least allows them to minimize potential

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2 future losses. But even limited waivers

ABA Task Force.txt
3 would not be necessary if the government
4 was barred from holding the company's
5 defense, settlement, and sentencing
6 options hostage to its agreement to waive
7 the privilege in the first place. This
8 latter is by far the better solution for
9 us to focus upon.

10 MR. HANDZLIK: Susan, let me point
11 out also that, given in a situation where
12 the company thinks that it's only waived
13 in a limited fashion, of course that
14 depends on what some judge in some other
15 proceeding may say later, it may be
16 interpreted in a subject matter waiver
17 depending on what --

18 MS. HACKETT: Correct.

19 MR. KELLER: Susan, let me just pick
20 up here because I really want to ask this
21 question. I understand what you're
22 saying about promoting the limited waiver
23 alone, in fact, can be counterproductive
24 to protecting privilege where it most
25 needs to be protected, which is dealing

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2 with the governmental prosecution.

3 But you are now touching on the
4 area, and we have to admit, I think that
5 there are circumstances where companies
6 do decide on their own. Say it's a blank
7 slate, no coercion, no request, but that

8 maybe it's new management that comes in
9 that wants to self-report, wants to
10 self-report fully, and wants to do so on
11 a basis of let's call it confidentiality,
12 protected information. So while it's
13 prepared to, if you will, lay itself
14 before the government, it doesn't want to
15 expose itself to civil liability, to
16 third parties.

17 Don't we need to recognize the
18 importance of limited waiver under those
19 circumstances? And I'll characterize it,
20 this begs the question, where it is
21 voluntary on the part of the company, and
22 if we can get the courts to do it
23 uniformly, that's wonderful, but through
24 whatever mechanism. So if that's true,
25 we're then left to the question, okay,

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2 how do you sort out what's truly
3 voluntary, and what's explicit or
4 implicit coercion?

5 MS. HACKETT: I don't know how to
6 sort that out. I think that the key
7 issue is the one you raised. When a
8 company voluntarily decides for whatever
9 reasons it wishes to waive to the
10 government and wishes to protection from
11 third parties, it's only been recently,

12 ABA Task Force.txt
to the best of my understanding, that
13 that kind of cooperation has included a
14 presumption that information provided in
15 order to be cooperative, in order to be
16 fully disclosing would include
17 attorney-client confidences.

18 I don't believe that historically a
19 company that laid itself open before the
20 government ever even contemplated until
21 the government began asking quite
22 regularly for privileged information as
23 if it was crucial to the definition of
24 cooperation. I don't recall that ever
25 having been a part of the kind of

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2 information that a corporation would
3 voluntary include.

4 MR. GREEN: When you say
5 historically, how far back are you going?
6 Because I remember working, I believe,
7 for the ABA in the Martin Marietta case
8 in the Fourth Circuit, and this must have
9 been in the early 1990s. And Martin
10 Marietta as an aspect of, I guess, trying
11 to persuade the regulatory agency that
12 the wrongdoing -- the company was not at
13 a very high level, and the company itself
14 should not be the subject of enforcement
15 proceedings, turned over the product of
16 its internal investigation, and then the

17 Justice Department indicted, I guess, a
18 mid level, but not a terribly high level
19 person there. And there was litigation
20 over whether the disclosure of that
21 information to the government waived the
22 privilege vis-a-vis the individual who
23 was then a criminal defendant, and also
24 issue about the scope of the waiver. And
25 this is close to 15 years ago. I may be

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2 wrong on the date, so I think this has
3 been around as an issue for quite some
4 time.

5 In that case the Supreme Court
6 didn't take certain, so the ABA never
7 openly really took an issue on the
8 merits. But if the Court had taken the
9 case, wouldn't you want the ABA to have
10 taken the position on the question of
11 whether the disclosure of some privileged
12 material to the government either waived
13 privilege vis-a-vis third parties, waived
14 the privilege vis-a-vis other material
15 that hadn't been disclosed?

16 I'm just a little surprised by your
17 opposition to the notion of limited
18 waiver in the situations where, whether
19 as a matter of pressure, coercion, or
20 voluntary, whatever you want to call it,

21 as a matter of fact that, you know, the
22 corporation has turned over privileged or
23 work product material. Is it really your
24 position that in those cases the ABA
25 either shouldn't take a position or

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2 should take the view that the waiver is
3 waived?

4 MR. KELLER: Do you want to answer
5 him or should I?

6 MS. HACKETT: I'll see you first,
7 and then I will jump in if you don't hit
8 my point.

9 MR. GREEN: No, no.

10 MR. KELLER: No. I think Susan is
11 pointing out, I mean, something that we
12 recognize. You even reflected -- go
13 ahead.

14 MR. GREEN: I want to know --
15 obviously, your organization has thought
16 a lot about it and represents a huge
17 number of people who are centrally
18 involved in these issues. I want to hear
19 your --

20 MR. HANDZLIK: If I could just
21 respond briefly.

22 MS. HACKETT: You're all doing a
23 great job.

24 MR. HANDZLIK: I think that there's
25 sort of a false -- why don't we set up

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2

here?

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I didn't hear you say that you were
against limited waiver.

4

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MR. GREEN: I did, and that's why
I'm asking the question.

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MR. HANDZLIK: What the concern is
that even if you waive on a limited basis
or you seek to do so, first of all, it
doesn't mean beans because it's not
protected.

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MR. KELLER: No, I don't think
that's it, Jan.

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MR. GREEN: Could we just ask?

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MR. KELLER: When you meant, which
is I think you're raising the concern
about the Task Force promoting the
concept of limited waiver for protective
legislation, and I think --

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MS. HACKETT: I think there is a
difference between arguing.

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MR. KELLER: -- that is a legitimate
concern, but on the other hand, I think
we all recognize the importance in the
circumstances of protecting limited

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waver and the difficulty of the task

3 before us is how do we reconcile those
4 two.

5 MS. HACKETT: In recognition that
6 companies are currently caught in
7 positions on a regular basis where a
8 limited waiver is their only option for
9 protection against the additional harm,
10 we have supported those individual cases
11 and the assertion of limited waiver in
12 those circumstances. But to adopt the
13 policy as the Task Force of the ABA sends
14 a message that the ABA and other bars
15 that may follow this policy are
16 interested in memorializing in some way
17 what it is that I think was the
18 conversation of the last person
19 testifying, Steve. In setting up a
20 discussion of it will only be used in
21 certain circumstances, the definition of
22 certain circumstances becomes a slippery
23 slope that is going to be very hard to
24 argue in the future.

25 I don't think I answered your

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2 earlier question, Bruce, though, about
3 the historical issue. I would like to
4 make at least one point on that.

5 There isn't a lot of announced or
6 published case law on this area primarily
7 because the majority of cases where these

8 kinds of issues come up, they come up
9 before anything ever goes to
10 adjudication. It always comes up it
11 seems in the context of the settlement
12 discussion, in the context of the
13 charging discussion, in the context of
14 the internal investigation, and the
15 government's entry into the case.

16 And in those situations where there
17 is an agreement between the parties,
18 while it may come up later that a third
19 party now does seek adjudication because
20 they are trying to have access to
21 information that the government received
22 from the corporation in question. It's
23 very rare that those cases come up in our
24 reporting as well.

25 The vast majority of what I am

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2 referring to tends to be more anecdotal
3 information because we just don't have a
4 lot of information on the record about
5 these cases. There's one or two cases
6 out there, and frankly they don't explore
7 the issues very helpfully for most
8 people's purposes.

9 MR. CANNON: Sue, one quick
10 question, kind of going back to my
11 question to Steven about public interest,

12 ABA Task Force.txt
and using Stan's example. Are we
13 equating the public interest to
14 essentially the interest of prosecutorial
15 functions of government enforcers, or
16 regulators, or something of that nature,
17 versus in Stan's example, it's a company
18 that, you know, change of management or
19 for whatever reason wants to come forward
20 and essentially correct something that's
21 wrong, but then is worried about and
22 wants to seek limited waiver because of
23 their concern about, say, follow-up civil
24 liability.

25 So let's just say for argument's

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2 sake that, in fact, somebody has done
3 something wrong, and in fact there is
4 civil liability that is possible, and is
5 being created because of this activity.

6 Now, what I'm sitting here thinking
7 is, then is the public interest
8 individuals who may have been damaged or
9 injured by this conduct, and therefore
10 have a -- there is a public interest in
11 giving them that information so they can
12 be prosecuted or not?

13 I mean, there are all sorts of
14 prosecutors. There's the government
15 prosecutor, and then there's essentially,
16 you know, someone whose bringing a case

17 on behalf of an injured party, who is in
18 a very real sense a prosecutor as well.

19 What's the answer to that? What is
20 the -- is it government or is it somebody
21 else.

22 MS. HACKETT: Every state holder in
23 every case will have their own perception
24 of what the public's interest is in the
25 resolution of the case. From my

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2 perspective, as someone who has worked
3 with in-house counsel to help develop
4 better preventive legal practices, to
5 help develop compliance initiatives that
6 keep the milk in the glass rather than
7 helping to clean up after it's spilled.
8 The public's strongest interest should be
9 in establishing and preserving
10 institutions within organizations that
11 prevent legal problems from happening in
12 the first place.

13 And since the privilege is so
14 crucial to the creation, implementation,
15 monitoring, evaluation, and improvement
16 of compliance programs, as well as the
17 company's opportunity and responsibility
18 to report upon failures of those
19 compliance programs, to threaten it in
20 this way is the strongest and most

21 negative way I can imagine serving the
22 public interest.

23 MR. HANDZLIK: I suppose one can
24 make the argument that the Fifth
25 Amendment is not in the public interest

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2 because if a person exercises his or her
3 Fifth Amendment rights, that results in
4 evidence being excluded or precluded, by
5 the same token documentation privilege
6 under that analysis is not in the public
7 interest because evidence that might be
8 probative and material is kept from the
9 process. While the same token the
10 attorney-client privilege serves a
11 legitimate purpose.

12 MR. GREEN: Well, let me ask. The
13 Fifth Amendment privilege can be waived,
14 and the government puts pressure, one
15 might say on defendants to waive the
16 privilege by pleading guilty or by
17 cooperating and not pleading guilty as a
18 condition of leniency. And one might
19 ask -- I'm not sure I would ask it
20 because involved in this long enough --
21 but one might ask why it should be
22 different for the attorney-client
23 privilege and not Fifth Amendment
24 privilege, why isn't it rational for the
25 prosecutor to say as a condition of

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2 leniency, waive the privilege in order to
3 enable us to prosecute people who we
4 think are guilty of more serious
5 wrongdoing.

6 MS. HACKETT: Because the privilege
7 does not prevent the prosecutor from
8 ascertaining any facts or information
9 that they need to pursue that prosecution
10 to ensure that any bad guys get punished.
11 The privilege only protects a very
12 limited amount of information. It
13 protects those communications between a
14 lawyer and a client that have to do with
15 seeking or providing legal advice. They
16 don't protect from discovery, the facts
17 of the case, and they will not protect to
18 some extent the results of
19 investigations, only those portions of
20 investigations that involve privileged
21 conversations.

22 So my sense is that the reasoning
23 behind the privilege being allowed to
24 survive is that not only does it perform
25 incredibly important public service

1
2 functions, but the expense of maintaining

3 ABA Task Force.txt
the privilege is very small. It's
4 minimal.

5 I'm conscious of the time, and I
6 don't want to take away from other
7 people.

8 MR. GREEN: Do we have time?

9 MS. BASS: Very quick.

10 MR. GREEN: As you know we are also
11 looking at disclosures of privileged
12 material to auditors. I don't know if
13 your organization has a position --

14 MR. KELLER: I think that was
15 addressed.

16 MR. GREEN: It was?

17 MR. KELLER: Yes.

18 MS. HACKETT: We do have a position
19 on disclosure auditors, and we have
20 endorsed the Corporate Counsel Consortium
21 proposal.

22 I did want to close, if I could, by
23 giving you what are hopefully some
24 specific thoughts about what we would
25 encourage you to consider, so that we

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2 don't fall into the trap of simply
3 telling you what we don't want you to do.

4 We encourage this Task Force
5 obviously to focus not on addressing
6 limited waiver alternatives, but on
7 redressing government actions that force

8 clients to choose and their privilege
9 rights and their continued well-being.
10 If the Task Force chooses to follow such
11 a path, your proposals might include the
12 following suggestions:

13 First, a commitment of the ABA to
14 join other bars to work cooperatively
15 with the Department of Justice and its
16 prosecutors, as well as federal agencies
17 and their regulators, to persuade them
18 that the privilege in the corporate
19 context serves the public interest,
20 deserves protection, and promotes
21 compliant and responsible corporate
22 behavior.

23 This means that we would jointly
24 approach the appropriate government
25 authorities to ask them to shun, and --

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1
2 where codified -- help us overturn
3 inappropriate policies that devalue the
4 privilege, such as those articulated in
5 the Thompson Memorandum and Chapter Eight
6 of the Sentencing Guidelines.

7 It is crucial for prosecutors and
8 regulators to agree that the client who
9 chooses not to accept the government's
10 offer for a limited waiver cannot be
11 punished, deem "uncooperative," or told

12 that it is ineligible for more lenient
13 treatment.

14 We must help them understand that we
15 are their partners in encouraging
16 corporate responsibility and
17 transparency, and that that partnership
18 extends to supporting confidential
19 communications between lawyers and
20 clients which facilitate compliance
21 efforts.

22 Secondly, we encourage you to
23 consider an effort to reach out to engage
24 judges and the court system in an effort
25 to educate them about the ways that the

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2 privilege is under attack, and to offer
3 alternatives that the courts might
4 consider in supporting our efforts to
5 stop its erosion, especially when
6 deciding cases that come before them.

7 It's important for judges to correct
8 the actions of lawyers appearing before
9 them who attempt to diminish the other
10 side's privilege protections in order to
11 further their cause. And it is only when
12 the case law governing privilege and
13 waivers improves and the judiciary exerts
14 its powers to dampen the government's
15 enthusiasm for privilege-eroding tactics
16 that our message will have its full

17 impact.

18 We need to enlist this country's
19 judges in our efforts so that they may
20 join us in protecting the judiciary's
21 authority from executive branch intrusion
22 when it comes to the appropriate
23 application of the privilege in the
24 corporate legal context.

25 Third, we suggest the creation of

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2 education resources for law students and
3 members of the bar to help them from
4 being their own worst enemies in
5 protecting the privilege in their
6 personal practices. Too many lawyers
7 rightfully invoke the ire of privilege
8 critics by trying to cloak in privilege
9 that which was never privileged to begin
10 with. Educational efforts might
11 therefore focus on addressing the
12 shortcomings of many corporate lawyers in
13 understanding what the privilege can and
14 cannot protect, and how to instruct
15 clients in its proper use, as well.

16 My point is that when we ourselves
17 engage in practices that over-inflate the
18 application of the privilege, or suggest
19 that it can cloak every word we utter,
20 then it is no surprise that our

21 ABA Task Force.txt
adversaries who we encounter will
22 question our judgment in making a
23 self-determination about when the
24 privilege actually should apply.

25 Next, a slate of suggestions should

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2 be offered to various national, state,
3 and local bars, providing them menus of
4 activities and relevant, practical
5 resources they may use to join the ABA,
6 ACC, and other bars in educating members
7 about how to fight erosions of the
8 privilege and promote its protection
9 within their local legal, regulatory,
10 judicial and prosecutorial communities.

11 The message that the privilege
12 should be protected is one that needs to
13 be echoed in every hallway, judicial
14 chamber, office complex, and government
15 office in the country. We've neglected
16 our responsibility to spend time
17 underlining the value of the privilege to
18 compliance efforts and to responsible
19 corporate behavior.

20 And finally, we suggest the creation
21 of a team of leaders tasked with
22 overseeing these projects and assuring
23 the success and implementation of
24 initiatives created to fulfill them.
25 This likely would require dedicated

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2 commitment of financial, staff, and
3 related ABA resources that would need to
4 be planned for and budgeted.

5 ACC is committed to pursuing these
6 goals, tasking staff and financial
7 support to these projects, and developing
8 an aggressive plan of action. As you
9 know, we are already working with the ABA
10 and other bar groups to some extent or
11 another on most all of these initiatives.
12 But we're all a long way from success in
13 these efforts, and more and better good
14 ideas on how to proceed will always be
15 welcome. We encourage the ABA's
16 involvement in order to multiply the
17 impact of our advocacy, as well as the
18 effect of our work.

19 As the world's largest bar, your
20 unified voice joining us on this issue is
21 crucial to the protection of our shared
22 interest in protecting corporate client's
23 rights.

24 I thank you for the opportunity and
25 the time to appear before you today, as

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2 well as your willingness to include

3 ABA Task Force.txt
4 organizations such as ACC in the open
5 process that this Task Force is engaged
6 in offering. I look forward to
7 continuing this dialogue and stand ready
8 to address your questions and concerns as
9 best I can, either now or as we continue
10 our work in the business meetings of the
11 Task Force that will follow.

12 MS. BASS: Thank you very much.

13 MR. KELLER: You will be providing
14 that to us?

15 MS. HACKETT: I will give this to
16 you electronically.

17 MR. HANDZLIK: Take your time.

18 And, Hilarie --

19 MS. BASS: Yes.

20 MR. HANDZLIK: -- I don't know
21 whether you've been commended on the
22 record, not only for your report, but
23 also for the survey. I think it's
24 terrific. And the response that you got
25 for such a survey, I mean in my
 experience, is unheard of. So it's

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2 really well done.

3 MS. BASS: Thank you.

4 MS. HACKETT: Thank you very much.

5 MS. BASS: Thank you.

6 Next is Mr. John Beccia. Welcome.

7 MR. BECCIA: Yes, thank you.
 Page 68

8 MS. BASS: Wel come.
9 From The Fi nanci al Servi ces
10 Roundtabl e.

11 MR. BECCIA: Thank you for the
12 opportuni ty to appear before you today.

13 My name is John Becci a. I am the
14 Research Di rector and Chi ef Regul atory
15 Counsel for The Fi nanci al Servi ces
16 Roundtabl e in Washi ngton, D. C. On behal f
17 of the Roundtable, I'm pleased to offer
18 the follo wing testi mony on the
19 attorney-clie nt pri vi lege. A l i t t l e b i t
20 backgroun d about the Roundtable. The
21 Roundtable is a national associati on of
22 the 100 largest i ntegrated fi nanci al
23 servi ces fi rms, whose members engage i n
24 banki ng, securi ti es, i nsurance and other
25 fi nanci al servi ces acti vi ti es. Member

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2 companies of the Roundtable support the
3 Task Force's goal to educate policy
4 makers and the public on the importance
5 of maintaini ng the attorney-clie nt
6 pri vi lege agai nst unreasonabl e
7 governmen tal efforts. On a personal
8 note, I have been honored to serve as a
9 Liaison to the Task Force over the last
10 few months.

11 Your mi ssi on is cri ti cal ly

ABA Task Force.txt
12 important. The attorney-client privilege
13 is one of the foundations of America's
14 judicial system. My goal today is to
15 provide the Task Force with an overview
16 of the current state of the
17 attorney-client privilege relative to the
18 financial services industry. I will
19 outline the regulatory environment in
20 which our member companies operate and
21 how the actions of government agencies
22 have affected financial institution's
23 business decisions. Generally speaking,
24 our member company CEOs and in-house
25 counsel have expressed deep concern about

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2 how government agencies are conducting
3 examinations and enforcement actions. In
4 the course of these investigations,
5 Roundtable members are being compelled to
6 produce privileged documents and
7 information in order to avoid severe
8 penalties. The Roundtable urges the Task
9 Force to take swift and appropriate
10 action to reverse this trend.

11 There is significant public interest
12 in protecting the attorney-client
13 privilege. A recent survey conducted by
14 the Association of Corporate Counsel
15 underscores the importance of the
16 attorney-client privilege and work

17 product doctrines in relation to
18 corporate activity.

19 I won't repeat the findings that
20 were just presented, but I would like to
21 reiterate two important points.

22 96 percent of corporate counsel
23 believe the privilege serves an important
24 purpose in their work; and 30 percent of
25 inside counsel, as well as 40 percent of

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2 outside counsel, report firsthand
3 experience with the erosion of the
4 protections provided by the privilege.

5 The attorney-client privilege
6 promotes candid discussions between
7 counsel and their clients. This is
8 especially important for businesses that
9 must comply with myriad laws and
10 regulations. Most are good corporate
11 citizens seeking advice on how to promote
12 their business interests while abiding by
13 laws that protect consumers. It is in
14 the public's best interest for the
15 government to encourage and protect the
16 privileged nature of these
17 communications.

18 The attorney-client relationship is
19 vitally important in the financial
20 services industry. Financial

21 ABA Task Force.txt
22 institutions operate in a difficult,
23 complex regulatory regime. Since the
24 enactment of the Financial Institutions
25 Reform, Recovery and Enforcement Act in
1989, banking and thrift regulatory

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2 agencies alone have promulgated 801 final
3 rules. In addition, insurance companies
4 and securities firms are subject to
5 numerous federal and state laws. Many of
6 the more recent laws and regulations have
7 been enacted by Congress as a response to
8 new threats, such as terrorism, as well
9 as recent corporate scandals. As a
10 result, financial services institutions
11 are inundated with reporting requirements
12 and compliance burdens associated with
13 the U.S.A. Patriot Act and the
14 Sarbanes-Oxley Act. Financial executives
15 rely on counsel to help them navigate
16 this maze of laws and regulations.

17 In addition to reporting
18 requirements, regulatory supervision and
19 enforcement of regulations have become
20 more vigorous. Actions being brought
21 against companies by federal financial
22 regulators, the U.S. Department of
23 Justice, and the State Attorneys General
24 have amounted to regulation by
25 enforcement. Business practices are

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2 being targeted and penalized without the
3 benefit of administrative review and rule
4 making procedures.

5 The pendulum has swung too far as
6 the government has created unreasonable
7 requirements and expectations of
8 financial institutions. The new
9 regulatory environment has changed the
10 relationship between financial
11 institutions and their primary federal
12 regulator. Previously, regulators
13 reviewed financial companies' systems and
14 their overall risk management.
15 Currently, there is a zero tolerance
16 policy in which every transaction is
17 scrutinized by regulators.

18 A reality of this new environment is
19 increased examination and enforcement.
20 In the course of these investigations,
21 government agencies are making wide-range
22 requests for documents and information,
23 some of which are protected under the
24 attorney-client privilege and work
25 product doctrines. The U. S. Justice

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2 Department, the Securities and Exchange

ABA Task Force.txt
3 Commission, as well as other federal
4 financial regulators, have adopted
5 policies effectively requiring
6 institutions to release information even
7 if it is privileged. These policies make
8 it clear that waiver of attorney-client
9 privilege can be a condition for being
10 deemed "cooperative" and will be
11 considered by the government as a factor
12 in determining what charge, if any, to
13 bring against financial institutions.

14 The Justice Department's policy on
15 the attorney-client privilege has been
16 clearly articulated in recent years. In
17 January 2003, then Deputy Attorney
18 General Larry Thompson issued a
19 memorandum to Justice Department
20 officials outlining guidelines for the
21 federal prosecution of business
22 organizations. The memorandum updated a
23 1999 memorandum on the prosecution of
24 corporations in general. The Thompson
25 Memorandum sets forth nine factors that

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2 prosecutors should consider in deciding
3 whether to charge a company and to gauge
4 the level of cooperation provided by
5 business organizations. The waiver of
6 attorney-client privilege is one of these
7 factors.

8 Since the passage of the U. S. A.
9 Patriot Act in 2001, the Justice
10 Department has become more aggressive in
11 bringing enforcement actions against
12 financial services institutions for
13 violating anti-money laundering laws and
14 regulations. Financial institutions are
15 being threatened with criminal
16 indictments in these cases. The Arthur
17 Andersen case is indicative of what could
18 befall a financial institution faced with
19 a criminal indictment. It would, in
20 essence, amount to a "death sentence"
21 since financial institutions do not
22 survive criminal indictments. Therefore,
23 it is safe to say there is a large
24 incentive for institutions to cooperate.
25 The Justice Department has

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2 procedures which go a long way towards
3 having the waiver of the attorney-client
4 privilege as a prerequisite for being
5 deemed cooperative during investigations.
6 MS. BASS: John, I don't mean to
7 interrupt, but given our time
8 constraints, and the fact that we have
9 the privilege of having your written
10 testimony in advance, if you wouldn't
11 mind just focusing on the

12 ABA Task Force.txt
recommendations, that way we can get some
13 interaction.

14 MR. BECCIA: Absolutely. Let's go
15 right to the good stuff.

16 We have primarily three
17 recommendations, and the first is
18 legislation that protects information
19 provided to regulators, combines two
20 pieces of legislation. The first is H.R.
21 1408, which is the Bank Examination
22 Report Privilege Act, or BERPA, which
23 would protect the integrity and
24 effectiveness of the bank examination of
25 reports, and a non-adversarial exchange

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2 of these reports between financial
3 regulators would also clarify the
4 information that a supervised institution
5 may voluntarily disclose to the
6 examination agencies. This is the first
7 piece of legislation.

8 And the second is H.R. 2179, and I
9 know that the Task Force has heard about
10 this piece of legislation in the past.
11 It was an SEC housekeeping bill that also
12 protected information that institutions
13 provided directly to the commission. So
14 upcoming weeks --

15 MR. HANDZLIK: John, may I interrupt
16 you?

17 MR. BECCIA: Sure.

18 MR. HANDZLIK: I apologize. I want
19 to ask you about your first
20 recommendation. You're talking about the
21 attorney-client privilege communications
22 or some your kind of communications that
23 you are seeking to protect?

24 MR. BECCIA: It's privileged
25 documents, called confidential

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2 supervisory information under the act,
3 under the original act, which was
4 originally presented in 2001. The
5 history behind it primarily was to
6 protect information that was privileged
7 that was shared between regulators.

8 MR. HANDZLIK: I understand that,
9 but I guess my question is, since our
10 mandate is to look at intrusions into the
11 confidential communications between
12 lawyers and clients, as well as work
13 product created by attorneys in
14 contemplation of litigation, is that what
15 you're talking about when you're talking
16 about banking?

17 MR. BECCIA: Correct. It would be
18 covered in that as well, and that's why
19 we're also proposing to combine it with
20 the language of 2179 to create that more,

21 ABA Task Force.txt
probably, what you would call it an
22 extended BERPA, if you will.

23 MR. HANDZLIK: A big BERPA.

24 MR. BECCIA: Sorry?

25 MR. HANDZLIK: A big BERPA.

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2 MR. BECCIA: Yes, big BERPA,
3 exactly, exactly.

4 So that's the first recommendation,
5 and of course another gap in recommending
6 that would be the information provided
7 for auditors, which was previously
8 discussed by the panel.

9 MR. CANNON: John.

10 MR. BECCIA: Yes.

11 MR. CANNON: I assume you agree with
12 this. Is absent what Congress wrote
13 getting into the act and enacting this,
14 limited waiver, it kind of traps you. I
15 mean, you just don't really know. Right?
16 It's always, who knows what a judge is
17 going do to someone else? Is that safe
18 to say?

19 MR. BECCIA: It's safe to say, and I
20 should also point out that we are
21 recommending this to the Task Force to
22 make this recommendation in August when
23 you put together your proposal, but the
24 Roundtable itself will be presenting this
25 legislation to Congress in the upcoming

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2 weeks, and we will get a draft of the
3 legislation to the Task Force, so we are
4 urging you to support us in that as well.

5 The second recommendation, again,
6 has been discussed in the past, and it's
7 on the U.S. Sentencing Guidelines, and we
8 are asking to eliminate the provision
9 that endorses a required waiver of the
10 attorney-client privilege. That's pretty
11 self-explanatory. I know it's been
12 discussed in the past.

13 And the third really talks about the
14 Justice Department guidelines, and we
15 recommend that the guidelines are
16 amended. The Thompson Memorandum is
17 updated to make it clear that the waiver
18 of attorney-client privilege is not
19 required in all investigations.

20 We also recommend that Main Justice
21 carefully scrutinize the tactics used by
22 U.S. Attorneys' offices around the
23 country to ensure that proper procedures
24 are being followed in a clear and
25 consistent manner.

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2 MR. HANDZLIK: John, I'd like to

3 ABA Task Force.txt
just make a comment.

4 MR. BECCIA: Sure.

5 MR. HANDZLIK: The Thompson
6 Memorandum, like the Holder Memorandum,
7 by their very terms say that the waiver
8 of attorney-client privilege is not
9 required. It's simply a factor to be
10 considered by prosecutors in evaluating
11 whether or not there has been complete
12 cooperation.

13 The second part of which you just
14 said that it should be looked at, I don't
15 remember the exact words, but there
16 should be controls over seeking waivers
17 or encouraging waivers, I think is what
18 you're saying. But the memoranda by
19 their very terms say that it's not
20 mandatory.

21 MR. BECCIA: Absolutely. It does
22 absolutely say that, but what we're
23 hearing from our companies is that that's
24 not what's happening in practice.

25 MR. CANNON: The limited waiver

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2 legislation that you want that is
3 enacted, how then do you say no to a
4 government agency, to a prosecutor? When
5 they say don't worry, you have this
6 legislative protection, how do you say no
7 at that point?

8 MR. BECCIA: It's a tough situation.
9 How do you say -- obviously, it gives you
10 additional protections that you don't
11 have now, and I guess it will have to be
12 played out in court and be challenged,
13 but, you know, we would need the
14 legislation to get there. I mean, at
15 this point we don't have anything. We
16 have policies and procedures and the lack
17 of legislation. Policies and procedures
18 that are not being followed, and the lack
19 of legislation that doesn't give any
20 protection. And under the current
21 environment, as I point out in length in
22 my prepared testimony, you know, whether
23 it's the SEC or the Justice Department,
24 our companies hands are tied.

25 MR. CANNON: My point is exactly

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2 that, that once this has been enacted,
3 then you really have a lot less ability
4 to decline to do it because the argument
5 will always be, well, you have your
6 waiver, you're limited to the waiver now,
7 so that's okay.

8 MR. KELLER: I mean, the
9 recommendation here isn't as a
10 stand-alone, that the legislation
11 recognize the limited waiver. It comes

12 coupled with other measures and steps
13 that seek to limit and prevent abuse in
14 the request, so to me the question is --
15 in fact, and to be coupled in a way that
16 is effective, as opposed to the problem
17 that -- I used to call it ACCA. What do
18 we call it now?

19 MS. HACKETT: ACC.

20 MR. KELLER: I look at it and say
21 ACC.

22 MS. HACKETT: Just call us.

23 MR. KELLER: ACC is concerned with
24 anything that is done to control
25 governmental policies and procedures may

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1
2 not be effective when compared to making
3 it easier to request it based upon the
4 limited waiver.

5 MR. HANDZLIK: I don't think there
6 are any prosecutors and regulators that
7 don't feel inhibited today to request or
8 suggest that it should be given, and I
9 think what we're dealing with is the
10 reality of the situation that you're
11 coerced or forced without actually being
12 required to waive privilege, but, in
13 fact, in essence you must waive privilege
14 to gain certain advantages. I didn't
15 hear you say it. Maybe I'm mistaken. I
16 didn't hear you say that you don't want

17 to cooperate, or you don't want to share
18 information. What you're seeking is
19 protection from the information that you
20 share.

21 MR. BECCIA: Absolutely. You know,
22 that's one of the clear problems we have.
23 It creates a chilling effect. Our
24 companies want to cooperate, but the
25 protection just isn't there. Take the

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2 money laundering situation, the
3 prosecution in the money laundering law
4 has been the biggest example of that, the
5 problems that companies have had in being
6 forced to waive privilege stuff.

7 MR. CANNON: Civil litigation or
8 liability with these sort of issues will
9 lead to -- because obviously everyone
10 worries about follow-on civil liability.
11 But are there specific cases of that? I
12 do not know much about your industry.
13 Are particular and obvious cases that you
14 worry about being filed?

15 MR. BECCIA: In what --

16 MR. CANNON: In terms of follow-on
17 civil -- because obviously you want this
18 information protected, and one of the
19 issues is always follow-on civil
20 liability. Knowing nothing or hardly

21 ABA Task Force.txt
anything about your industry, what sorts
22 of cases are there out there?

23 MR. BECCIA: Absolutely. Look at
24 the securities cases. You have civil
25 penalties that can be brought by the SEC,

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2 as well as individual shareholder action.
3 The ability to protect that information
4 that's presented to the SEC, to third
5 parties is vital because it would give
6 that shareholder a road map in the
7 litigation, on civil litigation. So you
8 can be hit on a number of fronts, and
9 also you have the potential of the case
10 being referred over to justice. So there
11 are a number of moving parts, especially
12 in the financial services industry where,
13 as I had said, it's heavily regulated and
14 causes quite clear concern.

15 MS. BASS: Thank you very much for
16 coming here today and testifying before
17 us. We appreciate it. As I said, we do
18 have your written testimony as well.

19 MR. BECCIA: Thank you.

20 MS. BASS: Next we have Jonathan
21 Bach on behalf of the New York Council of
22 Defense Lawyers.

23 MR. BACH: Good afternoon.

24 MS. BASS: Welcome.

25 MR. BACH: I'm Jonathan Bach. I'm
Page 84

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2 here on behalf of the New York Council of
3 Defense Lawyers. We submitted written
4 comments. I thought what I would do is
5 try to summarize some of the things in
6 our remarks. I'm doing it without
7 typewritten probes in front of me, but
8 feel free to jump in, ask questions, or
9 direct me to those area that interest you
10 in particular.

11 I think the feeling of our
12 organization is that the expectation that
13 a corporate client waive the privilege
14 has become the norm. It might be
15 precatory rather than mandatory in the
16 various government promulgations, but in
17 our practice in these jurisdictions it is
18 certainly the usual, and customary and
19 expected scenario, and so much so that
20 failure to waive the privilege can, or at
21 least it's assumed to inhere to the
22 prejudice of a corporate client. Our
23 organization has many different members
24 with many different personal views, but
25 as a whole I think we stand behind the

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2 view that waiver of the privilege should

3 be an option, but it should not defined
4 either in policy or in practice as the
5 norm, and that no adverse consequence
6 should flow from the failure to waive the
7 privilege, either as a matter of
8 practice, or even as a matter of
9 appearance. And the Thompson Memorandum,
10 the Holder Memorandum both create at
11 least the appearance that corporations
12 have to confirm or comply with any
13 government request to waive the privilege
14 in order to be viewed as a good corporate
15 citizen, and in order to minimize the
16 risk of criminal prosecution. That's one
17 of the major themes of our submission.

18 MR. HANDZLIK: May I ask you a
19 question?

20 MR. BACH: Sure.

21 MR. HANDZLIK: How do you deal with
22 the point just made further left of the
23 table from where I'm sitting about, you
24 know, it's voluntary, basically? The
25 prosecutors say, if you want these

101

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2 benefits, then there are certain things
3 we want you to do in order to get these
4 benefits, but it's entirely up to you as
5 to whether or not you choose to plead
6 guilty, or waive the Fifth Amendment, or
7 waive your attorney-client privilege.

8 How do you respond to that?

9 MR. BACH: Well, I don't think it's
10 voluntary when it's specifically defined
11 as one of the criteria that the
12 government considers in making a
13 prosecutorial decision. I mean, it has
14 become de jure, a factor that's
15 necessarily considered, or that the
16 government says that it will consider in
17 making these types of decisions. But to
18 say it's voluntary, I think, takes it a
19 little bit out of context.

20 When the government makes a decision
21 about whether to prosecute the
22 individual, chief among those
23 considerations is not whether the
24 individual is willing to cooperate with
25 the government. The government considers

102

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2 the conduct, it considers the facts, it
3 considers the strength that's evident,
4 and it makes the prosecutorial decision
5 on the merits.

6 But what is happening now for better
7 or worse, and perhaps because of
8 miscommunication is that there's a
9 perception that decisions are being made
10 as a matter of form, not as a matter of
11 substance, but if there is a failure to

12 ABA Task Force.txt
waive to go through the process, that
13 that puts the client in a worst light.
14 It has nothing to do with the underlying
15 facts. It just has to do with the manner
16 in which the corporate client is
17 responding to the government
18 investigation.

19 Another concern that our
20 organization has stems from what I think
21 is the fact that traditionally the Fifth
22 Amendment has been applied differently in
23 public and private contents.
24 Traditionally the Fifth Amendment has
25 been recognized as having constitutional

103

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2 stature in the public arena, when a
3 public law enforcement officer is asking
4 the questions, and to have no role in
5 private conversations or private
6 interviews by members of the private bar
7 dealing with private clients.

8 What we're seeing now, however, is
9 that outside of the Fifth Amendment the
10 distinction between public and private
11 law enforcement has collapsed, and I
12 think the most tallying example here is
13 the experience in this jurisdiction or in
14 the Eastern District of New York with a
15 Computer Associates case where a private
16 attorney is conducting investigations, a

17 comment to them can be considered a false
18 statement to the government in one way or
19 another.

20 And I guess 10 or 15 years ago a
21 corporation's lawyer could compel an
22 employee of the corporation to talk to
23 that lawyer and say, look, as a condition
24 of your employment, if you don't talk,
25 you could be fired. But the consequences

104

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2 of talking in that situation were not so
3 dire because it was not the equivalent of
4 a direct confession to the government.

5 I think what's happening now because
6 the likelihood of the waiver, because of
7 the reality of the waiver is always a
8 very likely scenario is that for an
9 employee to comply with an employment
10 condition, means often the employee to
11 risk incrimination.

12 MR. GREEN: Hasn't it always been
13 the case, though, that the corporation
14 could throw an employee to the wolves as
15 a way of getting off the hook itself?
16 And hasn't that been true for as long as
17 there have been white collar
18 prosecutions? Why has anything changed,
19 really? I mean, there's always been the
20 risk that if the corporate employee talks

21 to the corporate lawyer, or whoever else
22 in the corporation is doing the
23 investigation, that that could be used
24 against an employee?

25 MR. BACH: Well, it's always been

105

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2 the case. I think we can make your
3 example even more general, that any
4 statement to anyone else could be
5 evidence in a criminal proceeding. An
6 employee or any individual who talks, if
7 his admissions are heard by another
8 party, there's always a risk of
9 incrimination.

10 But historically I believe that
11 corporations with lawyers have enjoyed
12 some degree of protection or at least a
13 custom of protection in their
14 conversations with the corporation's
15 officers and employees, so that there was
16 not always the specter of this being
17 turned over to the government.

18 For instance, consider the posture
19 before there is any government
20 investigation, and the corporation is
21 investigating to see whether or not any
22 wrong occurred at all. Very legitimate
23 corporate function, good officers, good
24 employees want to cooperate, but if the
25 things they have to say are on the

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2 borderline, they might be deterred from
3 doing it because they know that whatever
4 they say will be turned over to the
5 authorities.

6 And I think it's not just that
7 there's always been that option. That
8 option has become more salient, so much
9 so that we think it's starting to inhibit
10 what would be a kind of more healthy
11 application of the privilege, so there
12 would be more legitimate guidelines.

13 MR. GREEN: Do you have any
14 anecdotal information or anything else of
15 that sort that would help substantiate
16 the argument that conversations are being
17 inhibited between corporate lawyers and
18 corporate officers or employees?

19 MR. BACH: I don't have a
20 statistical set of statistics to give
21 you. I can't give you specific examples,
22 largely because when people decide not to
23 talk, you often don't know about it, and
24 also so much of this is kept private.
25 But I don't think there's any real

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2 question that there is a chilling effect,

3 and the chilling effect arises from a
4 recognition by everyone concerned that
5 there are grave risks of obstruction of
6 justice prosecution. Sarbanes-Oxley has
7 increased the penalties for conduct that
8 has to do with interfering with this
9 process. There have been a lot of
10 obstruction of justice prosecutions, and
11 the false statements prosecution in the
12 Computer Associates case. It is becoming
13 a very dangerous terrane to participate
14 in an interview in the context of an
15 internal investigation, and I think it is
16 having a chilling effect.

17 I know that there are lawyers who
18 have found themselves, either asking
19 questions on behalf of the corporation in
20 an internal investigation, or
21 representing the individual, where things
22 become very testy and very problematic,
23 not necessarily because anyone has done
24 anything wrong, but because people are
25 scared. People are scared, and even

108

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2 though these conversations take place
3 under the veil of the corporation's
4 privilege, at least in the first
5 instance, there's always at least the
6 felt presence of the possibility that the
7 government will come in and hear the

8 entire conversation.
9 And that brings me to the next point
10 that I think we make in our submission
11 which is that there's no clear consensus
12 yet among practitioners about how to
13 handle some of the tricky situations, or
14 the ethically challenging situations that
15 might arise in the context of these types
16 of interview settings. When an
17 individual employee asks, for example,
18 should I have my own lawyer? The
19 response that I've often heard, or I know
20 members of our association give is, it's
21 hard for us to answer that question
22 because we're not your lawyer, and we
23 can't give you any legal advice. I don't
24 think there is anyone who thinks that is
25 ultimately a very satisfactory answer.

109

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2 And I think that an organization
3 like the ABA, in addition to using its
4 knowledge and its influence to raise
5 consciousness in various government
6 organizations and the Department of
7 Justice who are responsible for
8 promulgating these policies could, as an
9 organization, give guidance to its own
10 lawyers, refine itself in these
11 situations and help develop a sense of

12 what the best practices might be in these
13 types of situations.

14 It really is remarkable to me that I
15 know so many lawyers in the city, who are
16 excellent practitioners, and who confront
17 these situations on a regular basis, but
18 no one knows the right answers, and no
19 one knows how to handle a number of these
20 situations. There's no right and wrong.

21 MR. HANDZLIK: Would you recommend
22 that -- I think it helps the topic, I
23 guess -- would you recommend in that
24 situation that the corporate lawyer
25 inform the employee, speak to us, we hold

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2 the privilege, and there's an
3 investigation going on, we're going to
4 give your statement to the prosecutors?
5 Assume all those things are true, is that
6 what you think should be said in that
7 situation?

8 MR. BACH: Well, I do not know the
9 answer, but I do know that that is an
10 issue that is on the top of everyone's
11 mind, and that is when you're now doing
12 an interview of an employee, do you
13 advise them that what they have to say
14 could be shared with the government? And
15 further, do you advise them that,
16 therefore, they could be prosecuted for

17 some form of obstruction of justice or
18 making false statements? And I think
19 there are mixed feeling about whether or
20 not it's a good idea to do that. Some
21 people feel that it's only fair to the
22 employee, others feel they might be doing
23 or might be setting the individual up
24 more because they put them on notice of
25 the possibility of obstruction of

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2 justice.

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MR. KELLER: Or that they think
4 making their inquiry is less productive.

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MR. BACH: That's right. And there
6 are others that feel it will have a
7 chilling effect. It undermines their
8 duty to their corporate client.

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MR. KELLER: That leads to another
10 question. Don't you have to advise the
11 employee that, we are the company's
12 counsel. We are not your counsel.

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Otherwise, you get yourself into a joint
14 representative or representation box that

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shouldn't have been there. Then you can
16 add the gloss as what that means. If the

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employee is smart enough, they will

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figure it out -- which is, and therefore,

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anything you say is not privileged. It

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isn't your privilege. It is the

21 ABA Task Force.txt
company's privilege, and it could decide
22 to waive it. You have the right to your
23 own counsel. And that is a fair
24 statement. It may impede the
25 investigation.

112

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2 MS. BASS: Yes.

3 MR. KELLER: But that is then the
4 point, and you have to do that in the
5 internal investigation. Forget the
6 government asking for anything.

7 MR. BACH: That's right.

8 MR. KELLER: Isn't that -- well, is
9 it that that impedes the internal
10 investigation, as opposed to the fact
11 that the government at the end of the day
12 is going to ask for that information?

13 MR. BACH: Well, I think --

14 MR. KELLER: Can we get out of that
15 box?

16 MR. HANDZLIK: I think it's pretty
17 close to the same thing.

18 MS. BASS: I do, too.

19 MR. KELLER: I know, but in one case
20 it assumes the government doesn't ask for
21 this information, as we achieve all our
22 objectives, but the company can still
23 waive the privilege if it decides to
24 "cooperate voluntarily." In the other
25 case the government is asking, it is the

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same thing, and, therefore, do we have a
problem attributing the interference with
internal investigations at the
government's request?

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MR. BACH: Well, I think what you
just summarized is kind of the standard
speech that is given at the outset of any
of these interviews, and it's standard
practice to say what you've just said. I
think where the confusion comes in is, do
you go on add a sentence or two more
about the risk of obstruction of justice
or prosecution? I think when you do
that, there is a possibility that it
takes you to the next dimension.

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MR. KELLER: Computer Associates
isn't law yet, and we are not at the
point where every time you talk to
company counsel, and there is a
possibility that it will get turned over
to the government, that the attorneys,
the agents for the government, therefore,
so hopefully we are not there yet.

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MR. BACH: I understand. It was

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kind of ushered in through a guilty plea,

ABA Task Force.txt
3 rather than anything that was
4 adjudicated.

5 MR. HANDZLIK: I'm going to disagree
6 with you on one point. I think the
7 advice of rights that we heard a moment
8 ago when you said that would be the
9 appropriate thing to do, I don't think
10 that's really standard and common
11 practice. I think it is amongst good
12 lawyers, but in fact I think the
13 corporate lawyers many times, because of
14 all the pressures being placed upon them,
15 they want to get the information from the
16 employee. They don't want to send them
17 out the door thinking, boy, I'm in real
18 trouble.

19 I've seen this happen. They don't
20 necessarily say, well, we're talking to
21 the government. This could go to the
22 government. They certainly don't say
23 you're prosecuted for obstruction of
24 justice.

25 I think what they do say is, well,

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2 there is an investigation going on. We
3 hold the privilege. We could do with
4 this whatever we want. And you're
5 comfortable with that, aren't you? Or
6 something like that.

7 I mean, that's my opinion. But the
Page 98

8 fact of the matter is, I suppose it's
9 something to address, whether or not
10 there should be something standardized.

11 MR. BACH: Yes. And also what
12 happens after you're done kind of giving
13 the standard speech and questions are
14 asked? From what angle do you answer
15 those questions? Do you answer them from
16 the perspective of a corporation that's
17 interested in gaining as much information
18 as they can, and therefore crying any
19 anxiety that the individual employee may
20 have? Or out of kind the corporation's
21 sense that it wants to be fair to its
22 employees? Or are you a little more at
23 term, even if you can't give legal
24 advice? It is very hard when there is
25 any kind of back and forth about this to

116

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2 know which way to go.

3 MR. CANNON: John, can I ask to get
4 back a little more detail, which is a lot
5 of you say, waiver is okay, but reserve
6 for exceptional circumstances where there
7 is clearly warranted no other approach
8 available, can you give me some detail?
9 What constitutes exceptional
10 circumstances in your mind?

11 MR. BACH: Well, I think that

12 question has been posed in the doctrine
13 of privilege. It may, for instance, in
14 Upjohn, there are exceptions, if you
15 can't get the information anywhere else,
16 you can get it from the corporate
17 attorney.

18 MR. CANNON: But that's an
19 exceptional circumstance.

20 MR. BACH: That is one example. I'm
21 not saying that it necessarily applies
22 here, but I think that whenever a
23 privilege is created, it's rarely
24 absolute. And that in the case law, it
25 develops a doctrine, as there is clearly

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2 in the context of Upjohn about when you
3 can overcome a work product protection in
4 the corporate context. I don't want to
5 give you an example and say here is a
6 clear bright line, and here is one that
7 is exceptional, and here is one that's
8 not. I don't think it's possible to do
9 that.

10 MR. CANNON: I thought you were
11 talking about when someone who makes the
12 decision to agree with that.

13 MR. BACH: I think what we are
14 really saying is that this is an option
15 that a corporate entity can exercise, but
16 it shouldn't have to do it in order to

17 avoid, solely in order to avoid
18 prosecution. There should be some
19 exigency that's dictating this beyond it
20 being just a criteria in the Thompson
21 Memorandum.

22 MR. GREEN: Let me ask you this.
23 You know I'm a New Yorker, and I know a
24 lot of NYCDL folks have done internal
25 investigations. And often times when

118

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2 they do these internal investigations
3 after the public accusations, after
4 regulatory agencies, if we are going to
5 look at the company, and the company has
6 hired lawyers precisely with the
7 expectation that they will do an
8 investigation, and then go to the SEC, or
9 whoever it is, and say, you know don't go
10 after the company, go after someone else,
11 and they expect to give over the product
12 of their investigation, at least to the
13 point of saying this is what we learned.
14 And if the agency says, well, you're
15 saying this, but, you know, we want to be
16 persuaded, give us your backup, give us
17 your interview notes. What's irrational
18 about that? And isn't that, in fact,
19 what the lawyers expect now at least in
20 New York when they are doing this stuff?

21 MR. BACH: It is what we expect.
22 The question is not whether it's rational
23 or irrational. But whether it's
24 necessary.
25 MR. GREEN: If they say, we're not

119

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2 in the position to evaluate the
3 representations you are making because
4 they are all just your representations,
5 and we need -- you know, where is the
6 proof? Give us the proof. Isn't that a
7 reasonable thing for the agencies to ask
8 for? What's wrong with it? I mean, it's
9 not really saying, we're conditioning
10 leniency on you waiving. We're saying
11 until you persuade us by giving us the
12 proof, which may happen to be work
13 product material, we're going to proceed
14 under the assumption that the company
15 wanted to be the subject of regulation --

16 MR. BACH: I think it is a rational
17 request. I can certainly see why law
18 enforcement is interested in it. The
19 question, though, is whether there is a
20 contravening public policy that suggests
21 that, despite the interest of government
22 in this information, society recognizes a
23 value in having this kind of space in
24 which frank conversation can occur
25 without fear that it's necessarily going

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2 to be turned over to the government.
3 There's government interest in knowing
4 what husbands and wives say to each
5 other. It's rational for the government
6 to want to know. It's rational for the
7 government to want to know what a
8 penitent says to a priest, for example.
9 But we have traditionally said that
10 nevertheless, as a matter of public
11 policy, it's important for there to be
12 this area in which people can engage in
13 dialogue without fear of prosecution.
14 And what I think is observed, and not
15 just by myself, on behalf of my
16 organization, but by a lot of people who
17 you heard from today, is that that's
18 based smaller and smaller, and not enough
19 thought is being given to the
20 ramifications of undermining the public
21 policy.

22 MR. CANNON: What is the public
23 policy that's being fulfilled there?

24 MR. BACH: Well, I think the public
25 policy that's being fulfilled there is

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2 that a corporation is entitled, or it

3 serves the public for a corporation and
4 their lawyers to be able to develop fully
5 the facts surrounding allegations and
6 potential wrongdoing. It serves the
7 public that these corporations feel to
8 find out if people are breaking the
9 rules, if there are accounting problems,
10 if there are other species of fraud, it
11 serves the public for there to be an open
12 dialogue about them before you even get
13 to the government.

14 MR. HANDZLIK: Just to further
15 respond to the question, which I think is
16 a very good one. I think the request
17 being made by the government under those
18 circumstances is rational. And under the
19 circumstance where the corporate lawyer
20 really hasn't backed up what he's saying
21 with documents, evidence of one's work or
22 another that would enable government
23 agencies to make an independent
24 determination that something has
25 happened, I think it makes perfect sense

122

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2 for the corporate lawyer to say, well,
3 here is what these people have told me,
4 and I'll give you my work product.

5 But I think in a situation where a
6 valid credible internal investigation is
7 being conducted, documents have been

8 gathered, materials have been shared with
9 the government, maybe some of the
10 privileged or work product, things that
11 counsel had learned had summarized by
12 counsel; in other words, that the
13 lawyer's statements are not just
14 statements, but they are backed up by
15 solid evidence, I think in those
16 situations that's what we are really
17 talking about. Is it necessary for the
18 government to go that extra step and
19 demand the privilege be waived?

20 MR. BACH: That's right. I mean, so
21 often the underlying facts can be shared
22 with the government and the lawyer
23 without encroaching upon the layer of
24 privilege.

25 MS. BASS: We need to move on.

123

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2 Thank you, John.

3 MR. BACH: Sure.

4 MS. BASS: I appreciate you coming
5 today to give your testimony.

6 Next we have Elizabeth Cabraser, but
7 we also have President Grey, who just
8 joined us, who appointed this Task force.

9 Would you like to say anything,
10 Robert?

11 PRESIDENT GREY: No, other than I

12 appreciate the fact that you are all
13 doing what I consider very critical and
14 important work, and I appreciate the time
15 that you have given to this, and to those
16 that are here, thank you very much for
17 your time and consideration in the input
18 that you are going to provide and have
19 provided because this seems to me one of
20 the most important issues that we have
21 based on the profession right now.

22 I just finished meeting with the
23 publisher and editor in chief and senior
24 vice president of -- what is it called?

25 MS. HACKETT: American Lawyer Media.

124

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PRESIDENT GREY: Yes, American
3 Lawyer Media, ALM. It's not just ALM,
4 but ACC.

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MS. HACKETT: Oh, he's good.

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PRESIDENT GREY: And it was
7 interesting that they saw this as one of
8 the more critical issues that they are
9 examining as well, and very interested in
10 what you are doing, and what your end
11 product might be. And we went from that
12 to a discussion of MBP and other things
13 that have been brought up in this
14 session, but I know we are in good hands
15 with you, and I am looking forward to
16 your report to provide guidance for us as

17 we go forward.

18 Thank you very much.

19 MS. BASS: Thank you.

20 Elizabeth Cabraser, from Loeff,
21 Cabraser, Heimmann & Bernstein.

22 MS. CABRASER: Good afternoon.

23 Thank you very much for the opportunity
24 to provide this testimony today,
25 particularly at the end of a long

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2 afternoon. I submitted my written
3 testimony complete with work case cites,
4 and I even like to think about in
5 advance, so with your permission, I'm
6 going to try not to read verbatim from
7 the prepared testimony, and to focus on
8 the two essential points that I've tried
9 to raise, and then answer questions that
10 any of you might have.

11 First, with respect to the
12 perspective from which this testimony is
13 offered. I'm not here today representing
14 any institution or association. I'm here
15 on behalf of my firm directly, and
16 indirectly on behalf of a broad range of
17 clients that we have represented over the
18 years in securities, product liability,
19 employment and other cases. These
20 clients range from mutual and pension

21 funds, to large private investors, to
22 individuals who have suffered from
23 employment discrimination or defective
24 products.

25 And I think it's fair to say that

126

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2 there is not a monolithic view on most
3 issues. And some of the positions that
4 my various clients might take would be
5 case specific, but I think where the
6 issues align are on two very basic
7 points, and I know that no one on this
8 Task Force has forgotten or disregarded
9 these points at all. I don't mean to
10 seem to be a scold, and I'll try to be as
11 constructive as I can because I know
12 these are very difficult issues that
13 everyone is facing, and that we all face
14 as lawyers.

15 And these issues really come from
16 our dual roles, always intentioned, but
17 never supposedly in conflict to represent
18 our clients zealously, and to be their
19 advocates above all, while doing
20 everything we can to preserve the
21 integrity of the judicial process and the
22 litigation process, and to be faithful in
23 our duty of candor toward the court and
24 toward the process.

25 The first point that I would like to

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2 make is that we are, all of us, very far
3 down a very slippery slope because both
4 in-house and outside counsel have been
5 called upon increasingly unsupervised to
6 conduct and to design investigations and
7 compliance programs. And this phenomenon
8 has merged the fact finding and
9 investigation functions with that of
10 rendering legal advice and preparing the
11 defense. And this phenomenon has
12 jeopardized the confidentiality of purely
13 legal advice, creating difficult for
14 lawyers, and it's also been used
15 strategically to protect from disclosure
16 matters that are matters of fact, that
17 are not truly matters of attorney work
18 product or confidential disclosures.

19 MR. KELLER: Let me just ask. Can
20 we draw a clear distinction or stipulate,
21 if you will, that the facts are not
22 protected just because they were obtained
23 from the lawyer, but that the lawyer's
24 work product associated with obtaining
25 those facts may be entitled to

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2 protection?

3 MS. CABRASER: I think that's an
4 easy stipulation to make that I know the
5 case law attempts to sustain that
6 distinction. I think in practice can be
7 very difficult to sustain it.

8 The second point is the public
9 policy point, and the assumption which I
10 would respectfully submit is a dangerous
11 one that action should be taken to
12 protect a company's decision to obtain a
13 litigation advantage by disclosure of
14 privileged materials or attorney work
15 product to some adversaries, but not
16 others, specifically to a government
17 agency, while maintaining the privilege
18 or work product protection as against
19 private plaintiffs. This comes up very
20 starkly in securities and investment
21 fraud litigation, in both federal and
22 state courts when attempts to cooperate
23 with the SEC or the U.S. Attorneys office
24 have led to a situation where that agency
25 possesses information purportedly

129

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2 protected that for private investors off
3 money in the scheme, or seeking, or
4 co-criminal defendants are seeking. And
5 both of those situations came up quite
6 recently in the McKesson litigation that
7 is pending simultaneously in the federal

8 and state courts in California.

9 And in fact the second point in my
10 written testimony is elaborated on
11 against the backdrop in part of the
12 McKesson litigation. And just to give
13 you a summary of what has happened there.

14 The McKesson litigation arose from
15 collapse, post-merger collapse of
16 McKesson drop in the value of stock, the
17 loss of million of dollars primarily to
18 large pension funds and mutual funds.
19 Most of the large investors were
20 institutional investors. The U.S.
21 Attorneys office and the SEC got involved
22 in the criminal investigations. Criminal
23 indictments were brought, guilty pleas
24 were obtained, and the case went to
25 criminal trial quite recently against the

130

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2 remaining criminal defendants. Federal
3 class actions were filed under the U.S.
4 securities laws in federal court, and
5 individual investors, including public
6 pension funds and large mutual funds
7 filed individual cases in the state
8 court. I represent the large public and
9 private funds in the state court
10 litigation.

11 It so happens in California that

12 work product and attorney-client
13 privilege is governed by code, by
14 evidence code, and it is not a matter
15 that the courts can alter, at least not
16 easily.

17 As a result in that case on motion,
18 the private plaintiffs obtained
19 production of a report that had been
20 prepared by outside counsel to the
21 defendant. It was part of an offer of
22 cooperation to the SEC. The offer was
23 revoked. The report will show where the
24 audit fraud was. It will show you that
25 it wasn't us. We are going to help you.

131

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2 We will get lenient treatment for the
3 corporate entity, which turns out not to
4 have been indicted, at least not yet.
5 The investigation and the prosecution was
6 focused on the individuals.

7 On the state side we obtained that
8 report. That production order was upheld
9 by a published decision on appeal under
10 California's evidence code.

11 In the federal court, codefendants
12 in the criminal proceeding got their
13 report, and that order was appealed
14 through the Ninth Circuit which decided
15 the issue was moot because the trial was
16 already under way.

17 So the state's plaintiffs have the
18 report. The federal codefendants have
19 the report. Fairly recently the federal
20 court decided in the securities case
21 brought by private investors that
22 selective waiver would be accepted under
23 the minority view of federal
24 jurisprudence. That is now headed, of
25 course, to the Ninth Circuit.

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Yes.

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MR. KELLER: Let me get at this, if
you will, retention because I think
clearly to the extent that private
claimants have a cause of action, they
are entitled to it. They should be able
to pursue it, and they should be able to
obtain whatever evidence they can obtain
under the discovery rules and the like to
prove their case. But isn't there a
recognized public policy consideration of
one encouraging self-investigation and
encouraging self-reporting? And do you
end up discouraging that self-reporting,
if indeed you can't have an effective
agreement?

Dealing with government may be very
different than, if you will, dealing with
private plaintiffs -- I was going to say

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bar -- but I'm going to say class,
22 private plaintiffs class in terms of the
23 way you can pose the case, persuade and
24 the like. Do we want to interfere with
25 that?

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2 MS. CABRASER: I think we have
3 interfered with it, and that's really my
4 point. I think the problem arises
5 because selective disclosure or selective
6 waiver has been presented as an option,
7 even though most of the case law -- and
8 lawyers know this -- does not support it.
9 We are all told, as matter of practice,
10 not to expect or rely upon any court
11 upholding selective waiver because most
12 don't in the federal, as well as in the
13 state court system. The problem is you
14 never know for sure until you test it.
15 The problem is, how much do you want to
16 test it? I think that places -- and this
17 is a strange thing for me to say, as a
18 plaintiff's lawyer and a private
19 prosecutor -- I think that puts counsel
20 representing corporations that are facing
21 federal criminal or state criminal, as
22 well as the civil liability, in an
23 untenable position because of the
24 carrot-and-stick approach.

25 MS. BASS: Let me ask this question,
Page 114

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2 because I think that's what Stan was
3 trying to get at. Assume for the moment
4 that either by decision or statute there
5 was a reliable limited waiver in
6 existence, so that counsel on all sides
7 understood the perimeters of it. One of
8 the things we're dealing with is, should
9 we be promoting some a concept, and what
10 are the benefits of investigating that?

11 MS. CABRASER: Right. And my
12 position is, no, because it has been
13 attempted. You see the attempt in the
14 case law. It has not been successful,
15 and the policy arguments that are
16 revoked, for example, support selective
17 waiver are really of dubious value.
18 What's happened here is that government
19 prosecutors have been allowed and enabled
20 to dangle a carrot that they can't
21 deliver, and they probably should not be
22 able to deliver on as a condition, and
23 that places the defendant in an untenable
24 position.

25 You know, clearly there is no

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2 inhibition on internally developing facts

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3 in preparing a defense. The problem
4 comes when you decide to wrap that up in
5 a package, tie a bow on it, and give it
6 to some adversaries, but not others, in
7 order to obtain some strategic favorable
8 treatment.

9 When the government can hold the
10 stick against you, and say, you know,
11 don't worry about that. We'll help you.
12 There will be a confidentiality
13 agreement. By the way, if you don't do
14 it, you are a bad company. I think
15 that's untenable. Because, A, the
16 government prosecutors do not have the
17 charge under the law, and they do not
18 have the ability under the law, even
19 though they are the government, to obtain
20 recovery of investment losses. That's
21 going to be a matter of private
22 enforcement, private litigation, or
23 nothing.

24 In McKesson, for example, through
25 fines, the SEC did, I believe, the very

136

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2 best it could to get money back for
3 investors. They got approximately a
4 million, out of billions of dollars of
5 losses.

6 MR. HANDZLIK: May I ask a question,
7 Elizabeth, because of the time

8 constraints. You're saying that if a law
9 firm or a lawyer does an internal
10 investigation and writes a report, and
11 wraps it up with a nice bow, and gives it
12 to a potential adversary, the government,
13 then other potential adversaries have the
14 right or should have the right to get
15 their hands on that, but I think you also
16 said, certainly the lawyer conducting the
17 internal investigation who bring facts
18 and other things to the government --
19 isn't that equally discoverable?

20 MS. CABRASER: Well, facts are
21 discoverable, and I'm not suggesting a
22 situation in which -- well, let me put it
23 this way. The reason the attorney work
24 product protection exists is so that the
25 attorney can do his or her preparation

137

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2 and defend the client. Exploiting that
3 into a situation where we decide that the
4 lawyer is the one in charge of gathering
5 facts for the company is, A, creating the
6 danger. If the company wants to share
7 facts with the government before they, or
8 she, or with private litigants, that does
9 not run afoul of any of this. What's
10 discoverable can potentially --

11 MR. HANDZLIK: I don't want to

12 create a false comparison here, but
13 obviously facts cannot be protected.
14 That's not what we're talking about. In
15 civil discovery or in the criminal
16 process, facts cannot be hidden and
17 protected. That's not what we're talking
18 about.

19 We're talking about the exercise of
20 independent judgment, either
21 investigative legal research, whatever,
22 evaluation of evidence of counsel as they
23 go about investigations they develop what
24 happened in the company, and develop a
25 defense, or whatever, that's what we're

138

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2 talking about. I think there's a big
3 difference between the two. On the one
4 hand, no one is saying that facts should
5 be hidden from anybody. I mean,
6 obviously you have to go through a
7 process to obtain the facts. What we're
8 talking about is information developed as
9 a result of a privilege or as a result of
10 work product.

11 MS. CABRASER: That's right, and
12 that is what belongs to the client, and
13 that is why the work product and the
14 privilege exists because that is part of
15 the duty of advocacy. I think the least
16 mischief is done, and the greatest

17 adherence to public policy in any case is
18 done when you recognize that distinction
19 and say that the minute that work is
20 shared with anyone, not the client,
21 anyone that is potentially adverse,
22 anyone that has a claim against that
23 client that has been or is being
24 serviced, that is a situation where we
25 are in the realm of waiver, not selective

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2 waiver or selective disclosure. And the
3 bright line rule, as articulated by Judge
4 Easterbrook, with whom I don't always
5 agree, in the Seventh Circuit in the
6 Burton Meeks case (phonetic), is simply
7 that selective disclosure is not an
8 option. I don't think this is causing --
9 it's a difficult situation in terms of
10 corporate strategy and corporate
11 preference, but it is not a difficult
12 situation in terms of what lawyers know
13 they can and cannot do.

14 For example, American Lawyer Media
15 just published the article Waive
16 Good-bye, W-A-I-V-E, by Jerry Solovy at
17 Jenner & Block, which summarizes the
18 state of the law on selective waiver,
19 which is, don't count on it in any
20 circuit, and advises counsel that, yes,

21 they are between a rock and a hard place.
22 They do have to choose the rock or the
23 hard place. They can't have it both
24 ways, and that the client needs to know
25 that. And that is what I believe, that

140

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2 lawyers advise their clients today, and
3 how they operate. And I think that when
4 we try to depart from that, we are going
5 to create far many more problems from a
6 public policy standpoint that we could
7 follow.

8 MR. KELLER: Would it then follow up
9 in your view, to make sure that the
10 playing field is level and that there is
11 a choice, that there should be no
12 governmental coercion implied or
13 expressed in turning over material
14 because by doing so, effectively the
15 government is serving as the private
16 plaintiff?

17 MS. CABRASER: Yes, I absolutely
18 agree with that. Unfortunately, we don't
19 have optimal yet, we don't have optimal
20 cooperation in all cases between the
21 government and private plaintiffs. I
22 think that's a holdover from the old days
23 before the private securities litigation
24 reformat where investor class actions
25 were brought by individuals, not

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Now, it seems to me where mostly plaintiffs in securities case, at least in the federal courts, are very large investors, who, by the way, face this issue on the other side as well. A mutual fund that might be a plaintiff in one case, may be a defendant in another case. So it's not that there is no sympathy for this problem, but I think the best solution is for public and private prosecutors to recognize that they are the allies, that it isn't the SEC and the corporate defendant versus the private plaintiff. It is the SEC and the private plaintiffs against the corporation. That makes it much easier for the corporation to know who the adversaries are, and to protect itself through counsel. It avoids the situation where the SEC or the U.S. Attorney's office can pretend to use the carrot approach and say, you know, we'll give a confidentiality agreement, but you have

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to do this for us. You have to give us

3 the package. I think that creates an
4 untenable situation. It brings courts
5 into the equation.

6 I think companies, the SEC, private
7 investors have to know the facts aren't
8 going to be privileged. They can't be
9 put under a cloak of attorney protection.
10 Everyone is going to have the opportunity
11 through discovery to learn the truth and
12 cooperation between government agencies
13 and corporations should be based on other
14 more legitimate objectives. The SEC
15 should not be asking companies to give
16 something under a promise of protection
17 that is not enforceable.

18 MR. HANDZLIK: Why should it be
19 required to get your evidence the old
20 fashion way, through discovery, and hard
21 work and elbow grease, rather than
22 seeking the package that's presented by
23 the company to the regulators?

24 MS. CABRASER: Because the package
25 that is wrapped up is tied up. It's not

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2 that we will be able to get that
3 information as well. It's that the
4 privilege is being asserted with respect
5 to that information against the private
6 investors, and that's the problem. It's
7 not a question of, will it take more time

8 and effort to get it; although, that is
9 also a public policy consideration. It's
10 that one adversary gets information that
11 can be used with the rather perverse
12 expectation that, of course, it won't be
13 used, and won't be disclosed. And
14 another party is being told in response
15 to a request for production of documents,
16 subpoenas, interrogatories, no, you can't
17 have this subjected by privilege or work
18 product.

19 MR. HANDZLIK: Two private
20 plaintiffs are involved in a lawsuit
21 against a common defendant, a
22 corporation, and the company thinks it
23 can give discovery to one, but not to the
24 other, of course, that's not acceptable,
25 but there is a dig difference, I think,

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2 and responsibilities impact, whole raft
3 of things between a private litigant and
4 the Securities and Exchange Commission
5 and the Department Justice.

6 MS. CABRASER: Well, I think that is
7 a situation that's been allowed to
8 develop because of a false expectation
9 under selective waiver that. By the way,
10 in many states --

11 MR. HANDZLIK: No. I'm talking

12 about the roles of the agencies involved.
13 I mean, the Securities and Exchange
14 Commission has the ability to impose the
15 death sentence on a company. The
16 Department of Justice has the ability to
17 put people in jail or itself, but also in
18 terms of companies impose very severe
19 penalties. So that's a difference in
20 function. Your role, which is obviously
21 a very laudable role, is to see that
22 investors are made whole again or that
23 certain civil wrongs are remedied.
24 They're completely different functions.

25 MS. CABRASER: Well, and to enforce

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2 the integrity of the markets and the
3 securities laws. Yes, the penalties are
4 different from the standpoint of the
5 defendant, but the policies overlap and
6 are the same. We have a dual system. We
7 don't give the government the sole right
8 to enforce the securities law, and we
9 don't leave it entirely to private
10 litigants. It's a partnership. That's
11 the way the legislation works.

12 And what has happened here is that
13 there has been a misalignment of roles,
14 and there cannot be -- it's been very
15 difficult for courts to find an
16 overarching on public policy in this

17 arena, other than sympathy for a
18 corporate defendant that may be in the
19 prospect of being on the hot seat by the
20 government agency.

21 If you're in the interrogation room,
22 and they are playing good cop, bad cop.
23 And the good cop says, well, why don't
24 you just tell us where you stashed the
25 loot, and we will go easy on you because

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2 we are enforcing the law, and we want to
3 find it. That's good.

4 What's not good is when the burglary
5 victim has called the police department,
6 and the police department says, we've got
7 great news. We found out where the loot
8 is, but we can't tell you, and we can't
9 give it back to you, and you are not
10 going to get it back. The good news is
11 we enforced the law. Oh, and, no, we are
12 not going to prosecute the defendant
13 because he cooperated.

14 And that is the situation which in
15 too many cases recognition of this highly
16 uncertain waiver has resulted. I think
17 recognizing that this does not and should
18 not exist is most consistent with the
19 state of the law, and probably the
20 simplest answer.

21 MR. KELLER: Thank you. I don't
22 think you can do any better than you did
23 with that example, so let me kind of stop
24 here and thank you very much for giving
25 us a perspective that I think it's

147

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2 important for us to hear in dealing with
3 these issues.

4 MS. CABRASER: Thank you for the
5 opportunity.

6 MR. HANDZLIK: Thank you.

7 MR. KELLER: We now have Gerald
8 Lefcourt, on behalf of the National
9 Association of Criminal Defense Lawyers.

10 MR. HANDZLIK: He sent something
11 saying that he may not be able to make
12 it.

13 MR. GREEN: And he's not here.

14 MR. KELLER: Is Martin Kaufman here?

15 MR. KAUFMAN: Yes, I am.

16 MR. KELLER: Martin Kaufman,
17 Atlantic Legal Foundation.

18 MR. KAUFMAN: Good afternoon. I
19 promise I won't take both Mr. Lefcourt's
20 time and mine. In fact, I won't even
21 take all of mine because one of the
22 advantages and disadvantages of following
23 a long list of learned and comprehensive
24 presentations is that there's not much
25 for me to add.

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However, it seems to me that there is certainly a disconnect between the government's perception of what it does, and the private defense bar's perception of what the government does.

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Atlantic Legal Foundation had a conference in early March on the erosion of the attorney-client privilege, and the panels included private practitioners, many of whom had been government regulators or prosecutors, as well as Mary Beth Buchanan, U.S. Attorney for the Western District of Pennsylvania, and Eileen O'Connor, Assistant Attorney General in charge of the Tax Division.

MR. KELLER: Can I ask, is there a transcript of the conference available?

MR. KAUFMAN: It is being prepared on CD, and we will share it with this Task Force.

MR. KELLER: Would you?

MR. KAUFMAN: Absolutely.

MR. KELLER: Because some members of this Task Force were there, and it was a

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very impressive conference.

3 MR. KAUFMAN: We have circulated the
4 transcript to the participants for
5 correction, and we are beginning to get
6 those corrections, and we will make it
7 available.

8 The current government officials
9 took the position that they use the
10 demand for waiver very selectively and
11 only when necessary, and that they are
12 therefore complying with the literal
13 language of the Thompson Memorandum. The
14 consensus of the private practitioners
15 is, that ain't so. It has become
16 standard operating procedure for
17 regulators and prosecutors to ask for the
18 waiver.

19 It seems to me that one
20 recommendation should be, let's hold the
21 government's side to its word. Let's ask
22 them in each case, why do you really need
23 this waiver? In that sense also, I think
24 we would certainly support the notion of
25 legislation, which would make it clearer

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2 and avoid the conflicts that the common
3 law case determination inheres
4 legislation to make it clearer, both the
5 standards for demanding the waiver and
6 the effects of the waiver. That is what
7 we call selective or limited waiver.

8 MR. KELLER: Was there any effort at
9 the conference to define the limited
10 circumstances under which the requests
11 were appropriate?

12 MR. KAUFMAN: There wasn't really
13 because of the format of the conference,
14 speakers had a limited amount of time.
15 There was some cross discussion, but
16 often there was no real response, and so
17 it's uncertain.

18 MR. CANNON: Martin, was there any
19 discussion raised in answer to the
20 question that you just raised, which is
21 what the government or prosecutor says
22 when you then say, why do you need this?

23 MR. KAUFMAN: Well, I'm not sure how
24 often that question is really put, and
25 whether the company's lawyer really wants

151

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2 to test it because it often arises in an
3 environment what I would call
4 intimidation, and has been alluded to
5 here, there is the threat implicit
6 usually that if you don't cooperate,
7 there will be serious consequences. And
8 those are consequences that the company's
9 attorney rarely wants to face or even
10 have articulated, and the government
11 won't articulate it, probably because it

12 would be concerned that that would be
13 overt coercion and might vitiate the
14 waiver. Certainly, it would if it were a
15 private defendant, an individual
16 defendant in a criminal case, it's
17 probably a violation of his Sixth
18 Amendment right if you coerce this kind
19 of a waiver. It's a question whether a
20 corporation has a similar right, and
21 whether it could raise that similar
22 argument.

23 But the government repeatedly says
24 that it adheres to the principle that it
25 only asks for waiver in exigent

152

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2 circumstances. I think we can put them
3 to the proof of that, just as they put
4 the company lawyer to the proof of their
5 good faith.

6 MR. HANDZLIK: Isn't it a fact,
7 actually, that there probably are very
8 few requests or demands for waiver of
9 attorney-client privilege on behalf of
10 companies or work product because they
11 don't have to make demands? They might
12 say, are you going to waive
13 attorney-client privilege? Or what's
14 your position with regard to that? But I
15 don't think there are very many
16 prosecutors who demand or even request

17 the waiver.

18 MR. KAUFMAN: Well, I don't know if
19 we have empirical evidence about that,
20 and that might be a useful endeavor, just
21 as ACC has done a survey, maybe we should
22 develop statistical information as to how
23 often that's done. Again, Mary Beth
24 Buchanan took the position that an
25 internal survey within the Justice

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2 Department indicated that it was rare.

3 But it depends how you ask the
4 question, and whether the implicit threat
5 is sufficient to provoke the favorable
6 response. It's sort of like the cop
7 standing there with the billing club,
8 hitting it against the palm of his hand
9 and asking you to cooperate. So I think
10 that we need to develop some more
11 statistical and anecdotal information
12 about that. Whether there will be
13 significantly statistical response is not
14 clear.

15 MR. CANNON: What's your take on the
16 ACC survey information? I mean, it's not
17 a huge amount of responses, but it's
18 significant. I don't know if qualifies
19 as statistically significant.

20 MR. KAUFMAN: Well, certainly the

21 conclusions are significant, but again
22 it's important to have a broad enough
23 sample, and to make sure the questions
24 are asked in a way that doesn't skew the
25 answer, and one can, I think, construct,

154

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2 and maybe they have, but one can
3 construct a survey that will achieve that
4 purpose. And I think it would be
5 persuasive to do that, and persuasive
6 maybe even to the Justice Department.

7 With respect to limited waiver, I
8 think I ought to point out that it is
9 quite possible, again, if the government
10 officials are to be believed, that they
11 would support such legislation. Mary
12 Beth Buchanan in the fall of 2004
13 published an article in the Wake Forest
14 Law Review in which she hinted, at least,
15 at the government support for such a
16 position, and Steve Cutler of the SEC has
17 similarly made public expressions to that
18 effect.

19 MR. CANNON: You would expect that.
20 I mean, why would they not support it?
21 Because arguably the limited waiver
22 allows, gives them the ability to do
23 their job.

24 MR. KAUFMAN: Exactly, but it would
25 solve one of the problems that corporate

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2 lawyers face, which is the desire not to
3 disclose this information to private
4 plaintiff adversaries. And I think that
5 would be a useful step because it would
6 enhance the public policy of waiver
7 without prejudicing unduly the
8 corporation's interest in keeping some of
9 this information confidential.

10 I also would throw out a possible
11 proposal, if in fact there seems to be a
12 disconnect between what the government
13 says it does, and what the private bar
14 thinks it does to establish some sort of
15 an ombudsman within the Justice
16 Department to adjudicate, if you will,
17 whether the demands for waiver or the
18 suggestions for waiver are, in fact,
19 necessary. Again, all of these internal
20 mechanisms are fraught with dangers,
21 risks, possibly of corruption, but at
22 least it's something that ought to be
23 given some consideration.

24 MR. CANNON: Define necessary.

25 MR. KAUFMAN: Well, that, of course,

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2 is always difficult to do, and I suppose

3 the obvious answer is, if the information
4 cannot be obtained in any other way, and
5 it's not whether this is the most
6 efficient way or the most cost effective
7 way for the government to obtain it, but
8 whether it is the only way.

9 MR. CANNON: Well, let's just say
10 that it goes squarely to the heart of
11 privilege, and therefore it could not be
12 obtained any other way. Just as we were
13 saying in a Fifth Amendment situation,
14 certain information could not be obtained
15 any other way except by waiving your
16 Fifth Amendment privilege. So that's
17 what I'm trying to struggle with here.
18 There is some information that, in
19 fact -- is it information? Is it
20 conclusion? Or what is it that may never
21 be discovered, absent a waiver of the
22 privilege?

23 MR. KAUFMAN: Well, this goes in
24 part to the distinction that's been made
25 numerous times this afternoon between

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2 facts and work product, meaning mental
3 processes or opinion, and that
4 distinction should be kept very clear.
5 Whether there are facts that will be
6 disclosed to the company's attorney that
7 might not be disclosed to a government

8 prosecutor? Obviously, if the witness is
9 willing to tell it to the internal
10 investigator, but not to the government
11 lawyer, he's obstructing justice.

12 MR. KELLER: So the witness has
13 died; is that the case?

14 MR. KAUFMAN: That might prove
15 necessity. I mean, that often does in
16 the private litigation context, and I
17 think that would probably be a good
18 example of necessity. If the witness is
19 outside the jurisdiction of the United
20 States, he's fled to some jurisdiction
21 that doesn't have extradition or --

22 MR. KELLER: Or if the witness takes
23 the Fifth?

24 MR. KAUFMAN: Well, he's waived it
25 in the internal investigation. So, yes,

158

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2 I would say that probably is a case of
3 necessity.

4 MR. HANDZLIK: And that's what you
5 meant by he's willing to give it to the
6 internal investigation, but not to the
7 Department of Justice. He's obstructing
8 justice. I think it's a little extreme,
9 but I think that's what you meant in that
10 situation.

11 MR. KAUFMAN: Yes. If you have no

12 further questions, I think I will not
13 further burden the record. You have my
14 prepared statement. It summarizes some
15 of the views expressed at the conference.

16 MR. HANDZLIK: Let me ask one other
17 question.

18 MR. KAUFMAN: Sure.

19 MR. HANDZLIK: I think your
20 suggestion in your presentation of a
21 congressman who's in the Department of
22 Justice is very interesting, provocative.
23 Short of that, would you agree or
24 disagree with the DOJ instituting some
25 kind of a procedure to review and

159

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2 evaluate, either request for waiver or
3 encouraging companies to waive, whatever
4 you want to call it, some sort of process
5 to evaluate that, perhaps ending up on
6 the desk of someone of some
7 responsibility, the chief of criminal
8 division, perhaps, or something like
9 that, to make a decision on that, as
10 opposed to an ombudsman, which to my
11 mind, sounds like, you know, someone who
12 is sort of available to the public to
13 adjudicate things.

14 MR. KAUFMAN: Well, right now I
15 think the U.S. Attorneys take the
16 position that the U.S. Attorney himself

17 review these requests. Whether that's
18 true or not, I don't know.

19 MR. HANDZLIK: I'm not sure that
20 that applies to every district. I
21 haven't heard that as a policy in every
22 district.

23 MR. KAUFMAN: Well, at our
24 conference Mary Beth Buchanan clearly
25 implied that that was the policy. Now,

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2 obviously if a particular U.S. Attorney
3 delegates that through a subordinate,
4 that probably I'm sure is done often. I
5 think it could not do harm to have
6 somebody who is a little bit removed from
7 the give and take of a particular
8 investigation or litigation, review this
9 when such review is sought by the private
10 party who feels that the request is
11 unnecessary and --

12 MR. HANDZLIK: For example, the
13 deputy attorney general of the criminal
14 division has to approve subpoenas to
15 lawyers, and I'm not sure if they have
16 extended that to search warrants,
17 probably not because there is a
18 magistrate judge involved, but they keep
19 records of that. And the fellow who is
20 in charge of the crimination division has

21 to make a decision as to whether or not a
22 subpoena should be issued to a lawyer.

23 MR. KAUFMAN: I think that an
24 additional bureaucratic layer probably
25 would act as a break on Assistant U.S.

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2 Attorneys making these requests without a
3 real need, so it would be helpful.

4 MR. CANNON: One more question. I
5 know you were at the conference. I'd
6 love to see the whole proceedings. There
7 are a lot of great folks here.
8 Ms. Buchanan, as I understand her quote,
9 she says, essentially, the way to not
10 have to worry about all this is, as soon
11 you see something wrong, report it to the
12 government, therefore the lawyers aren't
13 in the middle of this, and you can avoid
14 all these questions about privilege. Is
15 that the gist of what she said?

16 MR. KAUFMAN: Right, it's one of the
17 things she said. I mean, this sort of
18 reminds me of a Law and Order episode,
19 where the policeman says, no, you don't
20 have to lawyer up, and the lawyer is just
21 going to get in the way, and we can deal
22 with this one on one. That's never good
23 advise.

24 MR. CANNON: But that's what
25 she's --

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MR. KAUFMAN: Well, of course, but
it's not really surprising.

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MR. KAUFMAN: I mean, it's sort of
amusing in a way. If one can detach that
some of the private practitioners who
were at our conference had been
prosecutors, and I'm sure that women were
prosecutors, their perception was, as you
described, that the lawyers get in the
way, and let us just handle it. It will
be much more efficient. Now that they
are in private practice, of course,
they --

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MR. HANDZLIK: They're outraged.

3 MR. KAUFMAN: -- are outraged, and
4 becoming, as one of them called it,
5 Junior G-Men in being deputized as
6 investigators for the government, in
7 effect. I think that zeal sometimes
8 overtakes judgment, and I think that if
9 one could discuss this dispassionately
10 with prosecutors, they would acknowledge
11 that there is an overriding public
12 purpose in a healthy adversarial system.
13 And it would be hard to deny that, given
14 in a quite different context, the
15 numerous examples of wrongful convictions
16 that have now come to light, almost as
17 frequently as public disclosure of a
18 corporate wrongdoing now comes to light.

19 I think we have to get beyond sort
20 of the public passion of the moment,
21 whether it's the outrage of the Enrons,
22 and things of that sort, or the public's
23 suspicion of the Fifth Amendment, that
24 you didn't do anything wrong, why do you
25 refuse to talk about it, and look at it

164

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2 from a public policy, an overriding
3 public policy perspective that these
4 rights, whether it's the Fifth Amendment
5 right or the attorney-client privilege,
6 serve extremely important social policies
7 which distinguishes us, in fact, from

8 some other countries, and I think makes
9 this a more just society.

10 MR. KELLER: Thank you, Mr. Kaufman.

11 MR. KAUFMAN: Thank you.

12 MR. KELLER: I want to thank
13 everybody who has participated today.
14 The testimony has been extraordinarily
15 useful. We thank everyone who prepared
16 material for us, and we can assure you
17 that it will be carefully considered as
18 we embark on this most difficult task.
19 Thank you. And with that, the hearing is
20 adjourned.

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C E R T I F I C A T E

STATE OF NEW YORK)

: ss.

COUNTY OF NEW YORK)

I, Maria Esther Rivera, a Notary
Public within and for the State of New
York, do hereby certify that the within
is a true and accurate transcript of
the proceedings taken on April 21,

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2005.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of May, 2005.

MARI A ESTHER RIVERA