Sponsors: ACC's Corporate & Securities Law Committee and the law firm of Constantine Cannon
Moderators: Steve Cannon, Constantine Cannon, former General Counsel of Circuit City, Member of the ABA Task Force on the Attorney-Client Privilege, and retained counsel to ACC on privilege issues.
Luise Welby, Associate General Counsel, Freddie Mac, and Chair of ACC's Corporate and Securities Law Committee
Speakers: Susan Hackett, Senior Vice President and General Counsel, Association of Corporate Counsel
Kim Rivera, Vice President & Associate General Counsel, The Clorox Company
Muzette Hill, Associate General Counsel, Ford Motor Credit Company
Todd Anderson, Of Counsel, Constantine Cannon

ASSOCIATION FOR CORPORATE COUNSEL
Title: Coercion & Waiver: Who's in Charge of your Client's Privilege Rights?
Moderators: Stave Cannon & Luise Welby
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Operator: Just a reminder today's conference is being recorded.

Operator: Welcome everyone the Web cast will begin in ten seconds. If you have any technical questions or problems please email us at accwebcast@compartners.com, thank you. Luise go ahead.

Luise Welby: Good afternoon and welcome my name is Luise Welby, Associate General Council at Freddie Mac as well as Chair of the ACC Corporate and Securities Law Committee. On behalf of the committee I want to thank you all for participating in today's Web cast; Coercion and Waiver: Who's in Charge of your Client's Privileged Rights?

I'm particularly proud to introduce this ACC program because as you'll hear ACC has been taking a leading role in addressing these important public policy issues. This is a topic of much

importance not only to the members of the corporate and securities committee but also to all ACC members.

The law firm of Constantine Cannon has been working very closely with ACC on these issues, including writing the amicus briefs, meeting with government officials, working with our coalition allies and helping develop ACC strategy. We're very excited that Constantine Cannon has agreed to sponsor today's Web cast.

Steve Cannon of Constantine Cannon will serve as both moderator and panelist today. We are particularly lucky to have Steve participate in this Web cast because he's also a member of the ADA task force on attorney-client privilege. Additionally, Steve brings his experience dealing with these issues as General Counsel at Circuit City for more than a decade until he moved back to private practice last year.

Steve also can share his insight on the government policy makers involved in privilege waiver issues based upon his time as a senior official at the Department of Justice and as counsel to the Senate Judiciary Committee. So, I know you're all in good hands today and I look forward enormously to this program and with that Steve I'll turn it over to you.

Steve Cannon: Luise thanks so much and thanks to all of the participants for joining us today as we have a very timely topic teed up for the next hour and a great group of panelists to lead us through a variety of issues.

As you'll see from today's Web cast, the current state of the attorney-client privilege and attorney work product doctrine is on the minds of lots of people and not only those who I would refer to as the usual suspects here in Washington and the state capitals all over the country, but equally important the in-house bar. Many of who face these issues on a regular basis.

Does the in-house bar care about what most certainly has been a steady, constant erosion of the attorney-client privilege? I believe the answer is an emphatic yes. To prove this point the ACC has produced two different surveys of its membership over the past year. The full results are on the ACC Web site and I'm sure Susan Hackett will reference the survey more fully in her remarks, but I think it's worthwhile to make two important points about the survey.

First the response to the surveys which were titled The Decline of the Attorney-Client Privilege and the Corporate Context was approximately ten times the normal response rate with several thousand responses. Truly the survey struck a responsive chord for the in-house bar.

Second there was overwhelming agreement in the survey that a government culture of waiver exists and that unfortunately agencies at all levels of government now expect a company under investigation to broadly waive attorney-client privilege or work product protections. Indeed about 75 percent of the survey participants agreed with that statement and more importantly only one percent disagreed. So clearly the ACC membership cares. The real question today is who else cares and why?

A broad coalition concern about privilege has coalesced around the issue. In addition to the ACC groups such as the United States Chamber of Commerce, the Business Roundtable, the National Association of Manufacturers, the Financial Services Roundtable have all joined hands with other groups as diverse as the ACLU to express concern, but more importantly to take action to stem the rising tide of waiver erosion and as you know it's not every day that business groups find themselves on the same side of any issue with the ACLU.

As Susan will address in a few moments the main focus of this activity has been directed to the Justice Department and other federal enforcement agencies such as the SCC. Focus is also been on the U.S. Sentencing Commission where we've enjoyed more recent success and which

Susan will talk about in a few minutes and of course, on Capital Hill where there is an apparent bipartisan and widespread support for the privilege.

Just a few weeks ago this bipartisan support concern was displayed at a hearing of the House Judiciary Committee with the Republican Howard Coble and Democrat Bobby Scott leading the way. Also as Muzette will talk about as well, the courts are increasingly getting into the acts, which are most recently surfaced in the government pursuit of KPMG and several of its former partners.

So much going on in so many places you'll really need a scorecard to keep up with it all and that's what we're going to attempt to do today. Susan Hackett, ACC's General Council will lead us off focusing on what's been happening at the Justice Department, the SCC and other agencies. Kim Rivera of Clorox will then focus the discussion on privilege in the audit context.

Muzette will then turn to the issues surrounding how employee rights can be affected and Todd Anderson will cover limited waiver. Finally, we'll have a short roundtable discussion about what counsel can do to be proactive and preparing and protecting your client from waiver requests as well as larger strategies for pushing back against inappropriate auditor and government agency demands.

A couple of administrative things; as you know everyone is able to submit questions as we proceed. So I'd encourage you to do that and we'll try to work them into the program as we go along. To enter a question, just simply go to the text box or enter your text in the lower right box of your screen and click send and also I would note there is a Web cast survey form when we conclude that if you would fill out the ACC would certainly appreciate that as well.

You'll also see more handouts as you scroll down your screen. The ACC in particular has done a huge bibliography on this and there are just an abundance of materials, background materials, for you.

So Susan of course needs no introduction really as our Senior Vice President and General Counsel at ACC. And, you know, what may be less well known is the role that Susan has played in really putting the ACC at the leading edge of the issue. She really does prove that old truism that there is no telling what you can accomplish if you don't care who gets the credit. As I said earlier, as a result of Susan's efforts the ACC is really the leader of this diverse coalition.

The ACC actually has taken a leadership role and Susan actually has met with the Attorney General, General Gonzales, Associate Attorney General Rob McCallum and other folks within the government. A frequent lecture and author, Susan is a Michigan Law School alum. And with that said, Susan let me turn it over to you.

Susan Hackett: Thanks very much Steve. Of course it's a pleasure to be on any Web cast with you but especially to be on a Web cast for the Corporate and Securities Law Committee and I thank you all who are listening in for coming to this program since it is so important.

I'm going to kick off as Steve noted in talking about the prosecutorial and enforcement arena which is really probably the most visible arena in which privilege waiver and privilege erosion issues have been arising as far as the media is concerned and the kinds of coverage you see.

We will be talking later about things like the audit context which may actually be a more common situation for many of you especially in the practice areas of corporate and securities law and that will be an important part of the discussion but that's going to be Kim's job as soon as I'm done.

So I'm going to try and hurry along and get out of her way by just giving you some backdrop into this arena of what happens when an allegation of wrongdoing is brought against a company and prosecutorial or enforcement agents begin to take an interest in what the company may or may not have done and may find that privilege is in the way of what it is that they would like to discover.

So I would start by noting a couple of things as an overview. First of all while we see an awful lot of action at the DOJ and at the SCC particularly, I wanted to note to you that that does not mean you shouldn't be paying attention to state AGs because in many cases especially if you're in places like the southern district of New York the state AGs are even more active on these issues than are some of the folks at the federal level.

I would also note that when we talk a little bit about the SCC I'm going to focus on the SCC not only because this is the Corporate and Securities Law Committee but because they truly have been the leader amongst the different agencies of the federal government in looking at privilege waiver issues and in their aggressiveness in pushing on this issue. And what I'd want to note to you about that is that while I'm not going to talk as much about what other agencies have done, other agencies are getting into the act and many of them are modeling themselves on what it is that the SCC which is as you probably already know usually quite an active model if you will for other agencies has done.

So you're going to see increasing amounts of privilege waiver material requests coming out of groups like the IRS and the FGC and the EPA and DOL and so on and so forth. But I'm going to focus most of my attention on the SCC because if you look at what they're doing you'll understand exactly what the other agencies are up to as well.

I think the most important thing to note about this area overall is that privilege waiver tends to come up in the prosecutorial and enforcement arena in the context of what's called the cooperation discussion.

At that initial charging decision time when enforcement officials or prosecutors sit across the table from a potential corporate target or defendant and even at the very first meeting before the facts are in, there's usually a conversation about what it is that the corporation is going to do in order to cooperate with the government's efforts and this cooperation issue is particularly important in the context of the Holder and Thompson Memorandum.

Eric Holder was the number two at the Justice Department in the Clinton administration and Larry Thompson was the number two for some time in the Justice Department in the Bush administration.

He has since left and has now been recently replaced by Mr. McNulty but the memos that carried their names first the Holder memo and now the Thompson memo which replaces it refer to the charging policies of the Justice Department and it is really within that Thompson memo that the first discussions of cooperation including privilege waiver took place on a reasonably routine basis.

Go back for one second if you would please, ((inaudible)), because I want to talk for just a second about Seaboard as well. Can you go back one slide? Thanks.

So I think it's important to note that that's really been the first place we saw cooperation coming out. But then came the Seaboard report at the SCC which picked up the same kinds of concepts and then we saw the sentencing guidelines that were initiated on this issue in the 2004, 2005 cycle and now are up for amendment in the 2006 cycle and we'll talk about that a little bit in the future, but they also linked cooperation to waiver of the privilege.

And now you see the state AGs are not only demanding this on a regular basis, but even looking at what are called industry preemptive strikes at the state AG level, which infers that state AGs when there isn't even an allegation of wrongdoing against an individual company but they see an area where they are concerned that there might be a practice within an industry, launching industry wide strikes where they go in and sit down with companies working in that industry and suggest that they would like preemptively to talk with them about how to avoid these problems and include in those conversations discussions of privilege waiver. Next slide please Todd.

So let's talk first of all a little bit about the Holder and Thompson memorandum. As noted it is the internal policy guidelines for prosecutors and it lists I believe it's, depending on how you count them, there are actually nine bullets. But there are really about seven factors that prosecutors are to consider when they're deciding who to charge within an organization or whether the whole entity should be charged and what those charges might be.

And cooperation as they always tell you is only one of these several charging considerations but what we have heard repeatedly in our surveys and in ad hoc conversations with members in the in-house bar as well as in the outside bar is that this factor, this cooperation factor, is disproportionately skewed toward the waiver of the privilege.

If privilege waiver isn't there, cooperation won't be granted even if the other factors might have been granted. And so accordingly it's been very much an issue for the DOJ to have companies not only waives their privileges early but to know that there will be consequences if they do not waive their privileges.

The DOJ always suggests that this is really a choice that these entities can have on their own but they can always choose not to waive. But that would mean there would be no settlement option available to them, no leniency options available under sentencing guidelines and once the entity

is charged as you well know as opposed to individuals being targeted, it's really the corporate death penalty. Next slide please Todd.

There is a famous phrase from a rather famous memo by a woman named Mary Beth Buchanan who was the director of the executive office for U.S. attorneys and Mary Beth wrote a statement that said basically when the company is charged, the entity is already guilty.

And so the DOJ's reasoning behind this privilege waiver demand if you will is that they can't understand why it is that a company that has nothing to hide wouldn't wish to simply turn over all documents and why it isn't in their interest to do so since the entity is not supposed to be aligned with the individuals who may have engaged in wrongdoing.

And we'll talk a little bit more about the individuals engaging in wrongdoing and how that plays in when Muzette gets a little bit further into this but this is really the background of why it is the Justice Department feels it's justified. Next slide please Todd.

If you've combined the Buchanan memorandum and the thoughts that she had written in this memorandum with the Thompson memorandum which is the Justice Department's formal policy, what it really suggests to companies that are engaged in these issues is that a lack of cooperation, meaning that you have not waived the privilege, signals to the Justice Department that you are obstructing justice.

And this causes incredible concerns within companies who wish to raise the census or who wish to suggest that the facts aren't in yet, or that they don't understand enough yet about the allegations to be able to feel confident that they are willing to waive privileges.

Nonetheless the issues that happen within the context of privilege waiver, which is that the client will lose trust in engaging in very important conversations about sensitive issues with lawyers.

This also creates a very strong incentive for companies to serve up employees who can be charged with crimes and waive documentation that will encourage third parties whether it's a shareholder derivative action or some other kind of point of class action and again Muzette will talk a little bit more about the employee issue later.

If we could have the next slide, please Todd. I also wanted to mention albeit briefly and I apologize for rushing through these things but our time is limited and I just wanted to give you a quick overview but the DOJ regularly has gone to the U.S. sentencing guidelines as justification for their waiver policies and why it is that they feel that privilege waiver is appropriate.

If you know anything about the sentencing guidelines you know that they were created back in the early 80s to create some sense of (comody) between all of the different states and federal judges who are engaged in sentencing and to make sure there were some level playing field and some level of consistency in sentencing.

But for most people who are involved in compliance on the corporate context we know that the sentencing guidelines are important because they actually detail for one of the first time in a federal government document what are the elements of an effective compliance program and how an effective compliance program should be shaped.

And so one of the things that the Justice Department was regularly doing is that with the amendment of the guidelines to include language that suggested that privilege waiver was appropriate for the Justice Department to ask for in an allegation, when an allegation of wrongdoing arises. It gave them a significant tool. I would note to you that this tool however may have been removed from the tool kit of the Justice Department as of about a month ago.

The sentencing commission which we have been working with for some time and testifying before and sending commentary to recently decided to propose an amendment to the guidelines which

will not be effective until November but is being proposed to Congress now which would remove that language from the sentencing guidelines which does suggest that DOJ waivers are appropriate.

What it is that this will do that's important from our perspective is that it will take this tool out of the DOJ tool kit. It will not however prevent the DOJ from continuing to request waiver. It just as I say, kicks out one of the legs from the stool. Next slide please Todd.

I would like to talk a little bit now about the SCC and how it has picked up many of the same kinds of issues that the DOJ has picked up and its discussions on privilege waiver and they've done it largely within context of their gatekeeper conversations and I'm sure that most of you on this call as corporate and securities law practitioners are very familiar with the SCC gatekeeper issues and how it is that those are playing out within the corporate context.

Certainly we've all asked that this conversation has come up, what is an SCC, what is the SCC definition of a gatekeeper and is that role consistent with the traditional roles played by lawyers, particularly in-house lawyers? Or is a departure from the kinds of roles we've seen played in the past?

Well on the one hand we have always had within the AVA model roles of professional conduct which really direct the state rules of lawyer regulation. Rule 1.6 and rule 1.13 which deal with confidentiality and the organization as a client respectively and especially rule 1.13 has always had provisions for reporting up the ladder within the organizational structure.

So in that sense this idea of the lawyer is someone who has obligations to ensure that issues bubble up to the top of the organization is not new and certainly the 1.6 rule, the confidentiality rules, have always suggested that lawyers should keep matter confidential except in certain

accepted situations where confidentiality should not apply, for instance, the crime fraud exception or bodily harm exception things of that nature.

But with the advent of the section 3.07 part 2.05 rules of the SCC, which now govern attorney conduct if you take those rules which kind of beef up 1.6 and 1.13 a little bit to make them more meaty, if you will, in their responsibilities and you add the gatekeeper rule what you really get is the SCC looking for lawyers to play a much more heightened role within the context of the organization when there's trouble within the organization specifically. Next slide please Todd.

So the question arises in the privilege context can a gatekeeper who has this responsibility to bubble issues up and under the 3.07 rule has at least some presumed role at least thinking about reporting these issues out. Can that gatekeeper appropriately keep confidences?

And it's important to remember that there's a difference between the professional responsibility which regulates confidential relationship and the rules of attorney-client privilege which are evidentiary rules which come into play in the court context.

And I think it's important to note this because remember when you're talking about privilege you're talking about something that happens in the adversarial relationship where one party is looking to get into the file drawers of the other party and that party that is trying to keep its files confidential says this files should remain confidential because of attorney-client privilege which is based on the confidentiality rules.

So the idea is at what point does this reporting up and potential reporting out responsibility start to conflict with these concerns that the SCC has that gatekeepers must send work, must make sure that anything that's going wrong within the organization be reported and I think that what we really see is in the Seaboard report the seminal document from the SCC.

Where they basically said that especially in the context of internal investigations when there are underlying allegations that there is an inconsistency with that gatekeeper role and confidentiality and they specifically suggest that there should be no work product protections for internal investigations when they are requested by the SCC and enforcement officials.

We have put into the material a very important analysis that you may want to take a further look at in your own time written by John Villa who's a lawyer at Williams and Connolly and he has examined lawyer liability issues and SCC actions.

Where the SCC has said that lawyers have behaved inappropriately, and I think that there are some very important issues that are raised there about the appropriateness of the gatekeeper role and how it is that it interplays and maybe even conflicts with at times some of the traditional roles of lawyers within the organization. Next slide please.

One of the key issues for you to recognize is that many times prosecutors and enforcement officials are going to work together on a matter. If it's a major allegation of wrongdoing in a public company you can bet that both the DOJ and the SCC will be there and they are getting better now, I believe, at cooperating and working in the tag team fashion to divide and conquer.

And really what they have done very effectively as a result of their request for privilege waiver and their lack of recognition for work product protections over things like internal investigation reports. Is they're really driving a wedge between the corporate interest and getting a problem fixed as soon as it's uncovered and the need of the company to avoid charges being filed against it.

Additionally, it's really driving wedges between in-house and counsel and the targeted employees that the SCC or DOJ have decided they wish to put the finger on because you're internal investigation notes and most specifically your interview notes with those employees that they are

targeting are going to become the center of this conflict and again Muzette will talk a little bit more about that during her presentation.

I would note to you as a final note on this topic before getting to our last issue that I'm going to talk about, is that a lot of these tactics as they've been deployed have been deployed against the lawyers themselves. There has been an effort to, if you will, roll the in-house lawyer and try to place them in the role of an employee or a judiciary rather than as a role as counsel to the company.

And as a result of those efforts they have threatened to charge lawyers or target the company's counsel when they're involved in document production which makes it that much more difficult for attorney-client privilege issues to be resolved successfully. Next slide please.

So I think the next debate for in-house counsel is really the larger question and we'll get into this more when we have the panel discussion of whether compliance is going to be ideally cited outside or inside of the legal department in the future.

Traditionally the legal department has been primarily responsible for compliance but if you're reading the literature carefully and you're seeing what's happening in the transit. Both the DOJ and particularly at the SCC there is an increasing level of interest in encouraging the appointment of a chief compliance officer who reports independently of the legal department directly to senior management, usually the CEO and not for a chief compliance officer who's within the legal department.

And one of the main reasons you're seeing that encouragement on a regular basis is because it will be impossible for those folks when documents are requested, when there's been a failure in compliance if you will, for those folks to be able to claim privileges as the legal department can

claim when they have been charged with compliance and documents are requested that they do not wish to produce under privilege issues.

I don't wish to in any way suggest that having a chief compliance officer is a bad thing. I'm simply suggesting to you that one of the main reasons you're seeing so much push for it from some of the agencies is because of this privilege issue.

We've heard several SCC and DOJ officials make this statement specifically and the questions about whether or not lawyers can keep information confidential if they aren't working on compliance questions, whether or not internal investigations should be conducted by non-lawyers as opposed to lawyers, and then available for production as stack documents are questions that will continue to be at the top of the law department agenda for the future when privilege issues are being discussed. Next slide please.

So with that I turn it back over to Steve to introduce our next speaker.

Steve Cannon: Great thank you Susan. Thank you for that whirlwind tour of the SCC and DOJ and a few points in between. That was just great. Now I want to turn it over to Kim Rivera. We are really lucky to have somebody with Kim's experience today join us especially with her experience with corporate compliance programs.

Kim is currently Vice President and Associate General Counsel of Compliance and International at Clorox Corporation and before that was actually Chief Litigation Counsel at Rockwell International. I'd note she's a graduate of Harvard law school but it shows that she was smart enough to leave the cold winters of Boston and go to the east bay to earn a living. So Kim with that, Kim's going to address audit issues and let me turn the program over to you.

Kim Rivera: Thank you very much Steve. Good afternoon everybody. I am going to try and take us on an equally whirlwind tour of the loss of privileges in the audit context. Excuse me.

As most of you know the confidentiality is the cornerstone of professional relationships and that's true both for accountant corporate relationships and lawyers' relationships as well. I think they share the same underlying interest of trying to encourage employees in companies to make full and frank communications, to make full disclosure in order to be able to really address, you know, corporate wrong doing, errors, or to conduct complete internal investigations.

Unfortunately there's a tensions between the two vital public interests that accountants and lawyers are serving. Unlike the attorney-client communication privilege the accountant-client communication is not as widely recognized.

In fact, I believe only a minority of states recognize the attorney, I'm sorry the accountant-client privilege and even among that minority a smaller group extend it to outside auditors which poses a serious issue in today's times, because you could end up waiving the attorney-client privilege as a result of disclosing information to your own auditors and to outside auditors.

And as most of you are aware in this post-Enron environment the scandals that Enron and other corporations have really led to firestorm of activity from Congress, the Securities and Exchange Commission, the Public Company Accounting Oversight Board and a whole host as the other panelists are talking about of regulatory law enforcement and other oversight organizations.

And one of the big impacts of all of this, of course, is the heightened role and responsibility of auditors and accountants in public corporations and this role has increased the expectation that corporations are going to provide their accountants with access to a much broader range of internal information than in the past and this can include litigation reserves, the results of internal investigations, compliance audits.

It can include attorney-client communications and attorney work product and so the types of information that accountants are now potentially looking for, being encouraged to seek in making their audits both in an issue audit and also in terms of certifying financials for companies is expanding beyond what was covered initially by the treaty and very briefly there was a treaty I believe in the mid 70s, 1975, between the American Bar Association and the –

Steve Cannon: The AICPA.

Kim Rivera: Thank you AICPA and it set the boundaries for what kinds of information auditors would be looking for and expecting from counsel when they are conducting their audits but in today's climate auditors are sometimes seeking information beyond what was covered in the treaty and in some cases are being encouraged to seek information that is privileged. Next slide please.

So given the current context, companies are really facing a dilemma of whether or not in the audit context they should withhold privileged information and risk the prospect of opinions, audit opinions, that are qualified or not issued at all and for those of you who work in public corporations, you know that consequences of selecting that option can be devastating.

And so it is unlikely in today's climate that companies can really make that choice. The other alternative is to provide information and potentially waive a legitimate privilege and subject yourself to discovery, not only from law enforcement agencies but in parallel civil litigation.

And so one of the things that is a real dilemma for compliance officers and from other lawyers inside corporations is how to deal with this issue, how to protect your attorney-client privilege and the attorney work product doctrine and still meet the needs of the auditors. Given that the auditor-client privilege is not really widely recognized. Next slide please.

Now in terms of the existing case law and the existing climate, dealing with attorney-client privilege courts have generally held that disclosure of attorney-client communications to the auditors does waive the attorney-client privilege.

There is, as I mentioned at the beginning, there's only a small handful of states, I believe it's about 15, that recognize the accountant-client privilege and so only in these states disclosing attorney-client communication to auditors may not result in a waiver but in the majority of states disclosing attorney-client information can lead to a waiver and the account-client privilege has never been recognized in a federal court.

So, I mean, it remains unaddressed and as most of you know if you have a privilege that is uncertain it's really tantamount to achieving no privilege at all because the chilling effect is the same. If people believe that disclosing information to their auditors could lead to disclosure beyond the company, beyond that circumstance, they're going to be very hesitant to make a full disclosure.

The courts are pretty divided at this point regarding attorney work product protection. There are divisions among the states and even within the same jurisdictions there are splits on some of the analytical points that apply to attorney work product. Generally courts have upheld the attorney work product protection.

So for example in some places like the southern district of New York they have found that there is disclosure of attorney work product in the course of an audit does not lead to waiver of the attorney work product protection. However that's not, that is not uniformly the case.

In some jurisdictions the courts look to analyze the situation under whether or not it was primarily work product that was being created, whether the primary motivation was because of litigation or whether it was a business purpose.

And there are some courts that have held that in preparing, for example, litigation analysis or reserve analysis the primary purpose was not for litigation but rather a business purpose and so you need to employ some caution in what you are going to disclosing to your auditors.

I think one, some of the steps that you can take to make sure is to sit down and make sure that you understand with your auditors what is truly material. Rarely do auditors really need an opinion of counsel beyond what was originally defined in the treaty between the American Bar Association and the AICPA.

I think typically and what I've experienced is, you know, making sure that you are clear internally in your law department and in those who are going to be dealing with the auditors and making sure that the auditors as well have a clear understanding what is expected in terms of the information that you're going to be turning over.

I think it's also important that to the extent you have outside counsel interacting with independent auditors, you be careful to make sure that those outside counsel are also aware of the guidelines and what is and isn't protected.

Often times you can provide disclosure that is sufficient for the auditors to make their assessment without truly getting into attorney work product or attorney-client communications. Typically you can find ways to supply the facts and information that don't jeopardize those privileges and I think that pretty much covers it.

One thing that we have not seen a lot of on is whether or not certification by a Chief Legal Officer and a General Counsel waive the protection for everything relied on in making that certification.

And again they are the I think the direction that things are going is going to be in trying to assess what role really that Chief Legal Officer is playing when they certify and I think that is also far from clearly determined at this point. So with that I am going to turn it over for Muzette and be glad to answer any questions at the end.

Steve Cannon: Great thanks Kim so much. It sounds like the tug of war which has always existed between the lawyers and the accountants is just been exacerbated as time has gone by here.

Now I'd like to call on Muzette Hill. Muzette is the Associate General Counsel at the Ford Motor Credit Company and leads the litigation practice at Ford and actually for those who haven't heard I have to brag. Ford recently won the Corporate Counsel's Best Legal Department Award. So congratulations to Muzette and everybody at Ford.

Muzette serves on the ACC Board of Directors. She has also served as Chairman of the Board's Advocacy Committee which obviously plays a crucial role in all of these activities we've been talking about. Muzette got her J.D. from Boalt Hall at Berkeley. So, Muzette let me turn it over to you.

Muzette Hill: Thanks Steve. Can everybody hear me? Okay good. Listen time, I can't believe how fast time is flying in this and so I'm just going to focus on one case here that illustrates how this point is starting to play out at an individual employee level and of the nine criteria and thank you, that's the KPM G case.

Of the nine criteria or indicia of cooperation there are two that have emerged what I consider the jugular veins of this, the investigation process and the first we've just talked about whether our clients will be forced to waive the privilege and second whether the companies will have to throw employees under the bus to make it easier for the Justice Department to prosecute.

Susan's covered that, what I consider that first jugular and the second one results from this paragraph that you now, that's now showing on the screen and the Thompson memo and that paragraph states that the other factor to be weighed is whether the corporation appears to be protecting its culpable employees and agents.

Well a U.S. District Judge Lewis Kaplan in New York City has scheduled a hearing for this coming Monday. So this is very timely, this coming Monday, May 8th to hash out defense lawyers complaints that federal prosecutors in New York are interfering with their client's right to counsel.

The prosecutors in that (sign) case have accused 18 defendants including 16 former KPMG executives of scheming to defraud the IRS by setting up bogus tax shelters that help wealthy clients evade some $2.5 billion in taxes.

Some defendants have argued that the prosecutors pressure KPMG not to pay the legal fees for any employees as the firm's sought to avoid prosecution and the employees sought the hearing on this matter. Sorry about that, sorry.

Okay KPMG agreed to pay up to $400,000 in legal fees for its partners and employees if they cooperated with the government according to documents that were filed with the court. The defense says prosecutors pressured KPMG to cut off legal fees for its former employees facing trial for their alleged role in the questionable tax shelters and you can see where this puts us literally now between a rock and a hard place in advising our clients.

All states allow for indemnification agreements and some states including Delaware where KPMG is incorporated mandate that companies offer indemnification agreements. You know, some companies bylaws do require employees who are convicted of a crime to reimburse those legal fees but that only happens upon conviction.

Defense lawyers for the former KPMG employees say there were no such provisions in KPMG's bylaws and before this tax shelter case none of the recently imposed conditions in KPMG's policy. KPMG in this case entered a deferred prosecution agreement with the government in August of 2005 agreeing to pay $456 million.

That agreement was widely viewed as the only way the firm could avoid a criminal indictment which we know proved to be a death sentence in 2002 for Arthur Anderson, the corporate indictment but several former employees are now facing trial.

Essentially where this puts us at a point now where employees have the justifiable expectation that the company will advance legal costs unless and until that employee is determined to have acted outside the employee's authority.

If a company makes a decision not to honor that agreement it won't be long before our clients are caught between the prosecutorial pressure and a wave of lawsuits on behalf of employees seeking the fourth indemnification under the bylaws and state statutes.

So at issue for Judge Kaplan is whether prosecutors pressed KPMG to cut off legal support for the employees. It's a tactic the federal prosecutors deny encouraging. Although the lead prosecutor Justin Weddle acknowledges that he raised the issue with KPMG in early 2004.

According to an affidavit he filed with the court Weddle says he merely inquired about KPMG's obligations to pay fees and quote "indicated that if it was within KPMG's discretion to pay fees, KPMG would not pay fees for individuals who do not cooperate." KPMG ultimately decided to cap those legal fees it offered the employees and ceased payment if these employees don't cooperate fully with the investigation.

Judge Kaplan's memo is very brief. It's only two pages and a paragraph but he seems to be concerned that the prosecutors even asking the question was inappropriate. In his memo the Judge wrote and I quote "against the background of the Thompson memorandum the inquiry itself arguably was a signal to KPMG as to actions that were promoted to chances of avoiding prosecution."

So Judge Kaplan's resolution of this may very well have a far reaching impact and even the fact that he's holding a hearing is significant because we've not been able to get these issues up to the court at this point. So we'll be watching very closely as this litigation develops.

Susan Hackett: We'll actually be doing more than watching Muzette. Our amicus brief is going to be filed this afternoon so.

Muzette Hill: That's right thank you Susan.

Susan Hackett: Well and thank you to the Advocacy Committee for authorizing it. It's one of important things that we might be able to do to influence this area.

Muzette Hill: Right so that's, I'll turn this back over now. I just wanted to highlight that one case.

Steve Cannon: Great Muzette thanks so much and Susan thanks for adding that about the amicus brief which hopefully will have an effect here. It will be fascinating to see how Judge Kaplan treats all this next week.

Last but not least a really important topic we wanted to cover briefly and that is obviously the question of limited waiver which you may have heard a lot about in different contexts and we thought it'd be worthwhile to spend a few minutes today.

Todd Anderson who's here with me at Constantine Cannon joined us a few months ago from the Anti-Trust Modernization Commission but has a background as a litigator and anti-trust lawyer with a little lobbying experience thrown in as well. He is a graduate of Harvard law school and has a degree from the Kennedy School as well.

So Todd would you cover limited waiver for us.

Todd Anderson: Thanks Steve. Limited waiver and sometimes called selective waiver is really a collateral issue but it's important because it exacerbates and highlights the underlying problem with the culture of waiver that's been developed.

Simply stated limited waiver means that a party can waive privilege on a limited basis. In other words a party can reveal protected information to one outsider while withholding it from other outsiders. So first question is when does the issue of limited waiver arise and the answer unfortunately is potentially any time a corporation is forced by the government to waive privilege.

So far in this Web cast we've been focusing on kind of a hypo if you will. People have been eluding on a variation on the following theme. A corporation is being investigated by the government.

The government investigators or prosecutors demand waiver as a demonstration of quote, unquote cooperation and the corporation is forced to comply, disclosing to the government information that otherwise would be protected under the attorney-client privilege and/or the work product doctrine.

That's bad enough and I didn't even mention the audit and employee issues that Kim and Muzette raised but wait the story's not over it gets worse. Just when you think this matter's been put to bed private plaintiffs darken your door.

First they actually congratulate you on your deal with the government but then based on that deal they demand access to the previously protected information that the corporation gave to the government. This is where a limited waiver doctrine would apply.

It would limit the corporation's waiver of attorney-client privilege and work product doctrine protections to just the government and private plaintiffs would be out of luck. So the next question as I flip the slide is should limited waiver doctrine exists in this context and the answer is always there are arguments on both sides. They're two equitable arguments in favor of the limited waiver doctrine.

The first is in the category of kicking someone when they're down. Absence, the absence of a limited waiver doctrine really is unfair to corporations who've just been coerced to turn over some of their most sensitive documents to government and other parties as well sometimes and to add insult to injury sometimes there are actually agreement with the government that the corporation have entered into prior to turning over this documentation.

Where the government has promised confidentiality and has said that it won't take a position of broader waiver. It won't make that argument. This argument's that the limited waiver doctrine should exist because without it it's unfair to corporations in this culture of waiver and the problems in that culture are just compounded.

The second equitable argument in favor of limited waivers that the plaintiff should not get any windfall as a result of a corporation being forced to waive privilege by the government. Private plaintiffs are not prejudiced because they're not entitled to prove their case from the files of defense counsel and if they sense there's any prejudice at all it really is asymmetric.

As I just pointed out quite light if it existed at all for private plaintiffs but substantial possibly for the company's if they're forced to turn over their documents to these third parties and private plaintiffs if there's no limited waiver doctrine.

There are of course arguments against recognizing a limited waiver doctrine and the first argument is a broad one saying in other contexts disclosure protected information to a third party generally does not waive privilege. Waiver for one is waiver for all and there's no reason that the government especially as an adversary should be any different.

A second is that the waiving parties are unnoticed if there is no such thing as a limited waiver doctrine if that's the case in the jurisdiction and as such it's just part of this waiver calculation. If the companies know that up front that there's not going to be limited waiver then they can just make their calculations.

This of course is not a satisfying discussion if you're a company that is truly being coerced to waive. The third argument is really a policy one or a tactical one and it's kind of interesting. It's the argument that eliminating this real obvious unfairness will just encourage the government to assist upon waiver and take away arguments from people opposing this culture of waiver.

There's a concern that imposing a limited waiver doctrine will just be a Band-Aid on this major injury caused by government policy as it creates the culture of waiver and the root problem should be addressed instead.

Even if this is a theoretically sound argument against limited waiver, however, of course it's distinctly unhelpful when the company is facing this issue, when in reality and being asked by private plaintiffs to turn over their protected, what had been protected materials.

So the next question is does it exist? Does the limited waiver doctrine exist and the answer is it's generally been rejected by the courts to date but may be recognized in some jurisdictions and I want to direct your attention to the sixth circuits opinion in the Columbia HCA.

It's really the leading case in this area and especially the leading case and most recent case saying that there is no such thing as a limited waiver doctrine. I'll just run through the facts quickly. There's a DOJ investigation about possible Medicaid, Medicare fraud.

In your anticipation of the investigation or in response to it Columbia HCA conducted internal audits of its patients' records. Ultimately Columbia HCA agreed to turn over some of its internal audit documents to DOJ as part of settling the case. By the way there's an $850 million fine there.

There was also an agreement of confidentiality with the government but there was follow on litigation by insurance companies and individuals and the private plaintiffs not surprisingly asked for these internal audit documents that Columbia had turned over to the government. The sixth circuit rejected Columbia HCA's limited waiver argument and offered several reasons for doing so.

One was that the limited waiver it doesn't foster full and frank communications between client and attorney which is really the basis for recognizing privilege and in fact it points out, you know, any waiver would undermine that goal. They also, sixth circuit also said that the limited waiver doctrine would transform privilege into a tactical litigation weapon which they thought was a bad idea.

The fact there was a contract for the government the sixth circuit said was of no moment. The attorney-client privilege derives from common law and is not a creature of contract and such a contract or honoring it in the situation doesn't serve the public ends. Sixth circuit also said that

government should act to bring to light the legal activities and not hinder the truth seeking process.

That's why you characterize the limited waiver doctrine and also the sixth circuit said disclosure was to an adversary, DOJ in this case, just pointed that out and there was no common interest and also made this argument about it was technically voluntary, the waiver, the corporations'' waiver to the government.

And therefore, the party could have anticipated the fact there was no limited waiver doctrine and made a different decision if it wanted to. The bottom line is the sixth circuit ruled that Columbia HCA waived its attorney-client privilege and the work product protections. There was a strong ascent in the case by Judge Boggs which we'll get back to in one second.

As you see on the slide though it's not all so bad, DC circuit first, second and seventh circuit have indicated that limited waiver may apply where the corporation has a limited waiver agreement or confidentiality agreement with the government and in fact, in the eight circuit the Diversified Industries case, a 1977 case, has suggested that limited waiver doctrine does apply at least there.

Moving on to changes on the horizon there's been one very recent and very interesting development and that's proposed rule 5.02B of the federal rules of evidence and I've got it there on the screen.

A voluntary disclosure does not operate as a waiver if the disclosure's made to a federal, state or local governmental agency during an investigation by that agency and is limited to person's involved in the investigation.

So this is an attempt to codify limited waiver. It would be applicable to all federal courts and a couple interesting notes that you see if you pull up the proposed rule and the comments. The confidentiality agreement is not required. So they do not actually require a confidentiality agreement and the reason they state, well there are a couple reasons.

One is that they anticipate arguments regarding a sufficiency of such an agreement if that was a requirement. They also think these agreements unnecessarily hinder the government if the government needs to use the information for other purposes or wants to.

And also the people drafting this proposed rule they think it has little to do with the underlying policy. Judge Boggs does enter into the equation here again and he's cited frequently in the discussions of this proposed rule.

Interestingly also there's been opposition of this rule by members of the business community making the case as I mentioned earlier that there's concern that this a Band-Aid solution to the major injury caused by government policies creating the culture of waiver and will just encourage the government to take away these protections from corporations.

Susan Hackett: Todd this is Susan if I could interrupt for just one second. We were, we had a meeting of the ABA's attorney-client privilege task force yesterday and this is a major topic of discussion within that task force and with which we are cooperating as another bar.

The concept here and I think an important one which is to note that codifying 5.02B as it's been proposed here would suggest to the government that there would be no situation in which it could be perceived as disadvantageous to a corporation for purposes of third party suits to claim that they should not have to waive if indeed there was now a rule protecting them against those suits.

So as Todd has suggested this is a major area of concern for those of us who have been very worried about trying to find ways to stop the government from asking for waiver rather than if you will memorializing their ability to ask for it by giving the corporations who are suffering this coercion limited protection from third parties.

But you'd now be in a situation where you'd virtually have no opportunity to suggest to the government that you should not produce to them if they can protect you against others what it is that they're looking for in the underlying investigations.

So it really does create quite a conundrum for those of us who are working on this issue because on the one hand I think it's proposed with the best of intentions. On the other hand it may actually codify the practices we find so heinous right now within the course of provisions of the Holder memorandum and Thompson memorandum.

Todd Anderson: Right and that's right and the ABA task force members, three ABA task force members actually submitting comments on this proposed rule.

The last point and then I'll turn it back over to Steve is that the standing committee of the judicial conference is going to address this in late June of this year. So we'll see what happens.

Steve.

Steve Cannon: Great thanks Todd appreciate that. We're running a little short on time here. There's been so much material to cover in such a short time but I did want to have a discussion, ((inaudible)) roundtable on practice tips and Muzette if I could turn to you first.

I can't tell you how many meetings I've been in and I think Susan and Kim and others where government agencies or officials will say, well one reason we really want to require or want you to

waive is we think that you, as defense council, over utilize the privilege and you've claimed the privilege far more often than you should and that the corporation itself doesn't have a good practice or kind of compliance program, if you will, for how you do you use the privilege.

How do you do that at Ford and make sure that your employees in particular are trained in how to use the privilege?

Muzette Hill: Well that's an ongoing issue let me tell you. We conduct training programs starting with our executives. We are in the process of rolling out a really robust compliance program so we do some online training. We don't have that up and running yet for the privilege.

We do it within our individual practice groups and educate our lawyers and legal assistants and then we are preparing education for our clients to let them know that they really, basically to let them know, that the privilege is there but that not every single communication is privileged; because overuse of the privilege, as Kim pointed out, puts you in a dangerous position of it meaning nothing at all.

So really what it boils down to is training, training, training, which we're in the process of doing.

Steve Cannon: I remembered Circuit City and Kim you may have a similar experience but every once in a while as General Counsel I would get an email from one business person to another business person that not remotely privileged but had me copied because they thought that would cloak it in privilege. Have you had that experience?

Kim Rivera: I have had that experience and I've had that experience and the experience of trying to deal with folks who let's just say the horse is out of the barn a fair ways before they come to see you and then they try and figure out how to get all that stuff retroactively into the privilege.

And so, I mean, like Muzette said I think one of the things that we try and do, I mean, you take those opportunities to try and make them learning points for employees and executives and others but I can't over emphasize the important of just ongoing training and discussion.

Both within the law department, within compliance department's to the extent that they're not within the law department, within audit functions and certainly at the executive level to try and heighten awareness of not only when the privilege applies but really what is the right way to make sure that you are protected.

Steve Cannon: Oh great and one more thing on the audit context as well. How important these days really is the engagement letter with the auditor?

Kim Rivera: Well it's critical. I think that it is a critical piece of the protections and steps that you need to take to make sure that within the audit letter you are clear.

You clearly define that the information provided is being used solely for the purpose of the engagement and the audit and that it require notification to the company. If the auditor is contacted by the government or a third party litigant to try and obtain that information and your engagement letter should contain and acknowledge the confidentiality of the information right up front as well.

Steve Cannon: Great and one follow up on this if I could; one question from the audience. You had said earlier in your remarks that auditors were being encouraged to seek information obviously they went beyond the treaty. The question is encouraged by who, encouraged by say the national office of one of the big accounting firms or who's actually doing that?

Kim Rivera: Well, I mean, when I said that I was referring more to in the current climate both the comments, speech's comments, and information that's emanating from regulatory agencies, oversight agencies and boards.

I mean, auditors are really being scrutinized in terms of the practices that they use and the diligence that they're exercising in certifying financials and so sometimes, you know, you have situations where I think auditors feel compelled to dig deeper and to dig for more detail than they have in the past to ensure that they are satisfied about how certain litigation matters are being handled and you need to be very cautious in those types of situations. That's what I was referring to.

Steve Cannon: Oh good that clears it up. Susan as the acknowledged leader in Washington here of the fight on privilege could you give us one tip of have one final thing to say?

Susan Hackett: Oh I never have one.

Steve Cannon: True.

Susan Hackett: There are actually quite a few practical things that in-house counsel can do, just a couple of them really briefly.

I think the first thing to do is I would make sure within the legal department that you've developed policies for personnel such as your receptionists at corporate offices to know what to do if investigators come to the door with subpoenas for documents.

Quite often those folks are not necessarily your most sophisticated employees and if they don't have specific guidance from you on what it is that they should do when someone from the federal government comes knocking with a subpoena in hand those folks can be 3/4 of the way through.

You know, rummaging through the offices before the corporate lawyers are called and material in those files which should not have been produced because it may have been privileged and trust me the in-house counsels files are some of the files that will be targeted first.

It's too late. So I think simply having some memos for the receptionist and we have some sample memos in our materials that you could crib from if you wish to create such a policy. You also may wish to take a look at some other kinds of things that you can do internally to focus on privilege waiver education.

I think it's really important to note that the privilege does not cover facts. It is not something that can cloak facts from discovery and most organizations don't wish to cloak those facts. Indeed they do wish to cooperate to the extent they can with the government when there's been some allegation. Not only to get it resolved but because most organizations are not rotten to the core. There's been something that's been done by errant employees and they'd like to get to the bottom of the matter just as much as anyone else.

So if you take a look at how you conduct your investigations and think about when it is that you wish to use non-legal personnel. So that for fact finding missions so that those kind of investigation reports can be produced without waiving larger privileges for those things that attorneys feel they must be involved in working on that's also a good tip and something to look at.

We have a lot of other material in the handouts that have other kinds of practical guidance in them if people want to go further and of course, I'm available to members all day long. You can email me at any time and I will give you as many ideas or as much help as possible. If there are other things we can do to help you on the way.

Steve Cannon: Great Susan, terrific. I tell you this has been a great hour and its gone awfully

quickly as I think our audience would see it's something we could talk about for a lot longer and I would urge everyone to stay tuned both through ACC and your local newspaper because I think that you will continue to see this in the news.

So I think at that point I have a few minutes after one. I think we can conclude and I thank everybody for joining and Susan thank you and Muzette and Kim and Todd for adding great work here.

Susan Hackett: And thanks to the firm of Constantine Cannon for having sponsored this event.

Steve Cannon: We are delighted to be of assistance so.

Kim Rivera: Thanks.

Susan Hackett: Don't forget your evaluations folks.

Steve Cannon: Oh exactly, evaluations please. All right I think this will do it and I thank everybody and wish you a good afternoon.

Susan Hackett: Good afternoon, thank you all.

Steve Cannon: Bye.

Kim Rivera: Bye.

Muzette Hill: Bye.

Susan Hackett: Bye-bye.

END