PUBLIC HEARING HELD BY THE AD HOC ADVISORY GROUP ON ORGANIZATIONAL SENTENCING GUIDELINES

BREAKOUT SESSION III

CONFIDENTIALITY, INTERNAL REPORTING AND WHISTLEBLOWING

November 14, 2002

1:37 p.m. to 3:51 p.m.

Held at:

Thurgood Marshall Building

One Columbus Circle, N.E.

Judicial Conference Center

Washington, D.C. 20002

MODERATOR

WIN SWENSON

IN ATTENDANCE

MICHAEL GOLDSMITH

CHARLES LARSON

A. TERRY VAN HOUTEN

GEORGE WRATNEY

MICHAEL HOROWITZ

SEAN BERRY

B-R-E-A-K-O-U-T S-E-S-S-I-O-N

MR. SWENSON: Welcome, everybody, to the afternoon session, the topic of which is called "Confidentiality, Internal Reporting, and Whistleblowing." I think from discussions we've had with some of the participants here that the topics might be divided in a slightly different language into sort of a category related to whether or not clients' activities, if they're engaged in vigorously, can end up hurting a company, what we might call sort of for ease of reference a self-guided privilege or immunity bucket of issues. And then the second bucket of issues being internal reporting, mechanisms for accomplishing that, alternatives that might not be mentioned in the sentencing guidelines for effectively creating internal reporting mechanisms and issues relating to the confidential source protection. The dilemma of companies in many ways is not being able to promise confidentiality to employees even though

they would like to promise confidentiality to employees that raise issues. That's sort of, I think, kind of roughly the topic areas.

I want to make this very interactive in discussion, and let me propose that we start off by identifying ourselves for the public record. As you know, this is being transcribed. This will also allow sort of a sound test for our audio expert as well. I'm Win Swenson. I am a partner in Compliance Systems Legal Group, a principal of Integrity Interactive, and a member of the Sentencing Commission’s Advisory Group that issue those guidelines.

MR. HOWARD: Do you want to go around this way?

MR. SWENSON: Whichever way you want to go.

MR. HOWARD: I'm Chuck Howard. I'm a partner in the Hartford law firm of Shipman & Goodwin, and I'm also a member of the Advisory Group.

MR. SWENSON: Why don't we go this way then.

MR. HOROWITZ: I'm Michael Horowitz. I'm a partner at the Washington office of Cadwalader, Wickersham & Taft. I'm also a member of the Advisory Group and recently departed from Justice Department's Criminal Division.

MR. GOLDSMITH: Michael Goldsmith, former member of the Sentencing Commission, presently a law professor at BYU.

MR. GNAZZO: Patrick Gnazzo, Vice President of Business Practices at United Technologies Corporation.

MR. JOHNSON: Ken Johnson. I'm an independent consultant in ethics and policy. I'm here as a coordinator for loose group of what we'd call Coalition for Ethics and Compliance Initiatives. We've done some work in this area for years.

MR. SWENSON: Why don't we then -- we

have some people here who are observers, and they're welcome to participate. I think what I'm going to suggest is if there's a time you want to make a comment, we'll identify you. Let's identify the invited --

MR. LARSON: Sure. Yeah, I'm Charles Larson, United States Attorney for the Northern District of Iowa.

MR. SWENSON: Okay. Thank you. And Joe on the phone.

MR. MURPHY: Yes, I'm Joe Murphy. I'm a partner in Compliance Systems Legal Group, a principal in Integrity Interactive, and also co-editor of "Ethikos."

MR. SWENSON: And Joe is calling in from Australia. He can be with us for a limited period of time, and I think what we've agreed to do is to start off with Joe making some initial remarks followed by Commissioner Goldsmith and then perhaps we'll take a bit of a time out to discuss some of those issues pretty much, like,

to get the views or reactions of the -- of Chuck Larson from the U.S. Attorney in northern Iowa. Then we'll move onto our other witnesses after that, and we certainly can come back to the initial topics after we've gone through sort of the second round.

So, Joe, why don't you kick things off.

MR. MURPHY: Fine. The topic that I'm going to talk about -- there's several elements of this. One is the chilling impact to the current system, how it can interfere with the policy objectives of the guidelines. Now, I'll talk a bit about the idea of the self-evaluative privilege or really a form of immunity as part of the solution for these problems. Also another part of the solution is a potential form of limited waiver so the government gets what it needs but without sacrificing compliance efforts by companies. And then the fourth --

MR. SWENSON: Joe, could you just --

Joe, can you hold on a second?

MR. MURPHY: Sure.

MR. SWENSON: Just, actually, one other kind of point of order. I would say if any of our -- anybody here would like to ask a clarifying question or something along the way, that I think will be certainly helpful and welcome particularly since Joe is a disinviting voice, you know, thousands and thousands of miles away. So feel free to jump in.

Is that okay with you, Joe?

MR. MURPHY: That's fine, certainly. And then the last piece of this is perhaps a few words talking about what the Sentencing Commission's role might be in bringing this about. So the starting point is really talking about this chilling effect, the type of -- from my perspective, what the Commission has started is really an extremely important policy initiative. I think Enron, Worldcom, Tyco, Adelphia, again remind us how important this is

and that compliance programs are so key. But I think that these cases show how only real empowered compliance programs can make a difference. In, for example, Worldcom it was the aggressive internal auditors who uncovered what was going on. Whereas, people in other companies did not take action, and I think we need to do whatever we can to make these compliance efforts real and with sufficient clout that they can make a difference.

I think the risk of compliance materials being used against a company is, in practice, a weapon in the hands of those who are antagonistic to compliance efforts, and you find in companies -- for example, the litigation lawyers. They drag their heels or resist an expansive aggressive program. I've seen many parts of compliance programs that are difficult to do, if not even intimidating, things like help lines, audits, monitoring, surveys, focus groups, detailed reporting, but I believe it's those

aggressive efforts that are the real difference between sham programs and real ones. It is, though, an ongoing day-to-day battle to get these things accepted, and, sadly, government is often the strongest source of ammunition for those who oppose taking those types of aggressive efforts.

But beyond the question of whether a company will have a program, this chilling concern is also an issue of what types of things will be in the program. And in my experience the inhibitions that come from this fear of litigation can show up throughout the program. It is the type of thing that I see in my daily practice. And just to give you some examples of this -- and I outlined some of these in an article I did a few years ago called "Compliance on Ice." One that I run into on a routine basis is when I do compliance training, I will essentially say to the employees, "Don't take notes." What I say to them is, "Don't take them unless you're so good that you feel confident

reading them to a jury," in which they all stop taking notes. This is very bad advice from a teaching point of view, but in my opinion really necessary as a result of a case The Lucky Stores case where training notes were actually used against a company very effectively in litigation.

Similarly in codes of conduct, when I give advice to people -- or what they can say about the confidentiality of whistleblowers, I have to remind them you simply cannot assure confidentiality because of litigation. Even though you have government agencies, the EEOC comes to mind, which essentially says, look, we want you to assure employees that they can call in confidence, but, in fact, it's often the government that's the first one who asks for this type of information.

MR. SWENSON: Joe, you've already shifted gears past Lucky Stores, but could you just explain what happened in that case. What happened during the training that –

MR. MURPHY: Sure. The Lucky Stores case was an employment discrimination case. It was in California, and, among other things, Lucky Stores had instituted an employment discrimination program where they brought in an outside expert who happened to be a lawyer but was not practicing as a lawyer. And the technique this trainer used was to bring in employees from the floor, from the operations, and have them identify any and all discriminatory comments, stereotypical references, that type of thing that they had heard while they were working there. And, of course, as you all know how Murphy's law operates. Someone in the room took detailed notes of everything that these people said. The plaintiff lawyers apparently heard about this and demanded the notes. This went to the judge who said that absolutely the plaintiff is entitled to them. When the plaintiff got a hold of the notes, they said this is the smoking gun, this is it. When the court wrote its

original opinion on this, it held that the plaintiff should be able to allege punitive damages and then cited these notes as a basis for that. Interestingly enough, in her same opinion earlier on, she'd noted without any comment that when the company lawyers had found out about this, they discontinued the training.

MR. SWENSON: And your observation on that case is that the person conducting the training was sort of asking for people to provide this information during the course of the training so that they could have a candid discussion of what's going on and how to fix it. Does that make sense?

MR. MURPHY: Exactly so, and in the compliance field you find that the best learning examples are real cases, real things, things that come from the company. Employees identified the notes with that. It has the greater impact. At the same time what you find is the lawyers who understand the litigation system will say, well,

gee, it may be a great idea but you can't do it. We can't have that type of information out there and made available for use against us in litigation.

MR. SWENSON: Okay. Thank you.

MR. MURPHY: And part of my fear is always I may -- I may say something in training and an employee may write down only part of what I've said and then have some comment that could be used against the company.

Another area where I've see this type of resistance is something as simple as preparing a list of dos and don'ts. I've actually had a company lawyer say that he never does that because they can be used against you. As you know, I'm involved in online training. One of the things we do in that online training is we do not record the scores of employees on the quizzes. We only report that they successfully completed the training, again, for the same reason. Not publicizing the results of

discipline. Companies typically will not say anything about discipline, will not say anything about specific cases and action taken against employees for fear of use in litigation. But, of course, the issue is how can discipline deter anybody if nobody knows about it, nobody knows what's happened.

Not sharing the results of compliance audits and investigations because those types of things can be used against, and I mentioned the point that truly -- the real cases, the best examples of -- a great example of this was the recent video put out by GE, which is quite striking. It uses actual cases. It's very effective, but you'll note in that video the actual cases are all things that have happened quite some time ago, and companies generally just will not use something that is current.

The whole issue --

MR. SWENSON: Sir, if I could just jump in again to just make sure that we're trying

to hear what you're saying.

MR. MURPHY: Sure.

MR. SWENSON: Your point is that, again, being able to have a very candid discussion about what's going on in terms of compliance inside of your company is beneficial, but areas internally always push back -- have candor about those kinds of issues because once this information is generated in writing or circulated too widely within a company with risk -- there is a risk created it can be used outside the company, against the company.

MR. MURPHY: Exactly. And the judicial privileges that we deal with, attorney-client and at this litigation present work product, are very easily waived. And if you do that type of publication of them, even within the company, there's an enormous risk. I'd add another point to this that the lawyer who gives that advice is not being irresponsible. In fact, I would submit that the lawyer who fails to give

that advice is engaged in malpractice because you have to warn your client of the litigation risk of what you're doing.

MR. HOWARD: But the -- this is Chuck Howard. The chilling effect that you're talking about is that the threat of disclosure actually changes -- it changes for the worse the way companies handle internal training discipline, auditing, and consideration of whether they're law abiding. Is that what you're saying?

MR. MURPHY: Whether they're going to do those things. Not whether -- obviously not whether they'll obey the law, but efforts to assure that they are. The management efforts.

MR. HOWARD: Well, then --

MR. MURPHY: I'd add one other caveat to that, which is where I -- I do make the difference in my own view from the view of many other people. I don't see the issue so much as secrecy as it is misuse of the materials against the company.

MR. HOWARD: My question was leading up to the question, do you think it has a chilling effect on the companies' ability to find out whether it is -- it or some agents of the company or organization are engaged in illegal activity?

MR. MURPHY: Absolutely. Absolutely, it does. You'll find in companies that do audits, for example, that the -- the inclination is always to do process audits, not substantive audits because in the process audit you can look to see whether the program is working. In the substantive audit, you have exactly that risk of the material being used against [you]. Another thing you see is that where this work is done, often times it is done in control by lawyers rather than having managers do this type of work because that gives you the ability to at least argue attorney-client privilege. It also gives you much more control over how things are articulated.

MR. GNAZZO: Joe, this is Pat Gnazzo. I guess I would like to make one point with respect to your argument on secrecy. More to a company that is -- that has an established program and does all the things that they should be doing with respect to the sentencing guidelines, what we've developed is a road map for third parties, in effect, to look at our audit plans, to look at our audit programs, to look at our investigative reports, to look at our allegation reports, to look at our programs with respect to privacy for our employees to bring things to the attention of management. So it's not a matter of secrecy as much for a corporation as that we have developed for all intents and purposes a very strong road map for third-party litigators to go after us with respect to everything that they know we're doing in order to prevent the things -- the various things that we want to prevent as far as the commission of any kind of illegal activity. And that is a concern

for any corporation when they develop that kind of road map.

MR. MURPHY: I agree with that. And another element of this is if you have a really robust program and you have a company that's staffed by normal human beings who make mistakes, it's not just a fear that the company has committed some nefarious act and now will be uncovered. It's that you have a great deal of potentially embarrassing personal information about people, about activities in the corporation. And once you get in litigation, all of this is going to be in the hands of plaintiffs' lawyer who's going to use that very effectively to essentially extract money from the company.

Well, I'd like to touch for just a few minutes on some possible solutions to this dilemma, and one of these is something that's called a self-evaluated privilege, really a proposal to provide immunity from use and

discovery against companies for the compliance efforts. I drafted a model of this years ago in a predecessor publication to "Ethikos." The CECI has worked on this, and I think it really looks at a couple fundamental points. One is that for litigation purposes, compliance efforts really should be treated as if they do not exist. A key point about any privilege is --

MR. HOWARD: You're talking about third-party litigation?

MR. MURPHY: Yes. For any privilege that it needs to be certain and sure and not ad hoc. And as the Supreme Court said, I think, in the Upjohn case, an uncertain privilege is really a little better than no privilege at all. And I know from experience, if it’s uncertain no one will rely on it, and it really will do nothing. It will just be a tool for litigation but not something that affects behavior.

Now, as you may know, I'm very much a

skeptic. I really don't believe in relying on the good faith of people in corporations or anyplace else. So for me any type of privilege really needs to be conditioned on good faith, and I see two key elements to this. One is, it only applies if you fix what you find. This to me says there's a key check on good faith and it's found in the State Environmental Statutes. The only protection you get is if when you find a problem you fix it. The other is a requirement that there be some disclosure to the government, but only if the government has a good disclosure program like the Antitrust Division's program. And I see these two elements as key to keeping all of this activity on the -- on the up and up.

I would also provide that these benefits only occur for companies that have compliance programs, that have followed the guidelines' model. I see this type of protection as really recognizing that those who do this type of work in companies really are doing society's

work in doing so. And in this type of legislation, what we'd be talking about is not a privilege but a form of immunity that material could not be used against a company -- but a key difference between privilege and immunity in this concept is you don't have easy waiver and, most importantly, you don't have a requirement that the material be kept confidential in the company. If you're trying to protect attorney-client privilege, the essence of that is confidentiality. You keep it as closely nailed as possible and only have access by a few people. Whereas, in a compliance program, publicity is key for it to be effective. You want to -- you want to get the message out.

Another piece of this solution that I see is something that's called a limited waiver. I think there's strong policy reasons to favor voluntary disclosure to the government where violations are found. Among other things, it acts as a check on corporate honesty about their

compliance efforts, but the big dilemma here is that waiver of existing privileges unfairly lets outside adversaries get a free ride on the company compliance office or company counsel's investigative work. Because once you disclose to the government, you've disclosed to everybody, at least in the view of most courts. And the lawsuits protection really exposes those who are responsible for the compliance program to ridicule for being so naive as to trust the government not to disclose this material.

If you have a form of limited waiver, it is a real win-win answer as I see it. The enforcement agency gets everything that it needs to do its job. The company retains its privilege for every other purpose, and third parties really lose nothing. They're right where they would have been if the company had not done the compliance work. That is, if a third party wants to sue my company, they have to do their own work. They do not get a free ride on the

compliance program. So I see those two elements, some type of privilege and immunity and some type of limited waiver as key elements.

MR. GOLDSMITH: Joe?

MR. MURPHY: And it takes -- yes, I'm sorry.

MR. GOLDSMITH: Joe, Michael Goldsmith. With respect to the immunity -- and I intend to discuss that a bit when I chat as well. But do you see that immunity running only to the company or also to the employees?

MR. MURPHY: Well, that's a difficult issue that's also tied in with this issue of immunity. And once you get the individual involved, you start creating degrees of conflict, issues of when one can waive and the other not. I would view this essentially as the organization's -- it's the organization's responsibility to do self-policing. It's the organization's ability to control disclosure of this material in general. Now if we're dealing

with the whistleblower scenario, that I would view as an exception. There I think society has an interest in protecting the identity of the individual whistleblower, so that's the one area where I would say yes, that should be worked out as a joint protection so the individual can rest assured when they make that difficult call that their identity to the maximum extent possible will be protected.

MR. GOLDSMITH: I think that I share your view. Although, the obvious problem is that if an employee knows that he or she is not immunized, they're going to be less likely to work with the program in a cooperative fashion.

MR. MURPHY: Well, I suspect that immunity issue -- the more important immunity issue to the employee is not -- I don't think it's so much disclosure. It's a real genuine article. It's immunity. That's one of the reasons why the Antitrust Division's program has been so effective, their disclosure program.

Because when a company discloses, the individuals who cooperate are also protected. But that gets to the issue -- to me, it gets more to the issue of the type of disclosure program.

MR. GOLDSMITH: Okay.

MR. MURPHY: Just a couple comments on possibilities of the Sentencing Commission in this area. I think one is that the Commission could play a role as a key clearing house for compliance-related information data, information from the enforcement side about how they treat companies with compliance programs. I think the Sentencing Commission stands in their role of possibly being an honest broker in this. For example, perhaps pulling together a conference among enforcement and compliance people. There's a model for this. The Healthcare Compliance Association did this type of thing with HHS and the Department of Justice and the HHSIG.

Another thought to consider here is the need for some separate government liaison

office that operates for this purpose of promoting compliance, and, ironically, it's a lesson that's taught by item two of the sentencing guidelines. If you want something done, you really have to make it someone's specific job to do that. I think that anything that promotes strong bonds for any disclosure program is critical. Again, there's inconsistency among the different agencies. The Antitrust Division probably has the strongest disclosure program. Other agencies look at that program and say, well, gee, we can't do that because that's antitrust and this is something else. EPA has done some work in this area, but I think there's a need for a more consistent approach in government and something that draws on the lessons of the success of the antitrust divisions program.

And perhaps the Commission could actually propose legislation that really captures the policy significance of voluntary compliance

efforts, helps to move the courts away from the traditional suspicion they've had about privilege, and even suspicion about compliance programs, at least in some court opinions, I believe. Perhaps helping to establish baseline standards for enforcement efforts in this area and really to set a tone for all enforcement agencies to recognize that these voluntary efforts are important and to do as much as possible to promote these programs and really rigorous programs, not the weak paper programs that we see in a company like Enron. But to really promote aggressive programs that help truly prevent and detect misconduct.

So those are my thoughts for the Commission, my thoughts from Australia at least.

MR. SWENSON: From down under.

MR. MURPHY: From down under.

MR. SWENSON: Thanks, Joe.

MR. MURPHY: Melburn actually.

MR. SWENSON: Thanks, Joe. We'll

obviously be coming back to you.

Chuck, can I just clarify for a second?

MR. HOWARD: Yes.

MR. SWENSON: When you and I had spoken, my understanding was that you didn't have anything that you wanted to particularly come in and say off the bat, but that you were more than willing to react and give your thoughts as we went along.

MR. LARSON: Sure, yeah, that's right. And I just point out I think I'm an official spokesperson for the Department of Justice, but I'm here as one of many U.S. Attorneys to discuss some -- what might be good or not good. With me is Sean Berry. He'll introduce himself, and he came to Iowa to Cedar Rapids. It's our good fortune to have him because he came from California where he the head of their Major Crimes section of 32 or 35 attorneys there with him. So he has a good background, and I

asked him to join us to discuss our (inaudible).

MR. SWENSON: Okay. And obviously feel free at any point to jump in. I'm going to -- I think perhaps after Michael has a chance to talk to us, we'll come back to you a little bit and ask you some of your reactions in what we've heard.

MR. LARSON: All right.

MR. SWENSON: But is there anything you want to add?

MR. LARSON: I think we have one question for Mr. Murphy about his limited waiver. It might work when he's testifying in court if it's a criminal case, but would prevent the civil attorney that worried about the allegation being there hearing all that testimony.

MR. HOWARD: The government's civil attorney?

MR. LARSON: Yeah, the government or some other third party. That is one of the major issues in the question. What about a third-party

attorney hearing that testimony?

MR. MURPHY: Okay. You're asking about, let's say, something goes to some type of proceeding?

MR. LARSON: Yes.

MR. MURPHY: Although, I'd just add -- you'd know far better than I, but at least typically for a major company that does a voluntary disclosure, there's not likely to be much of a proceeding. They're typically going to settle. I mean, my experience with the major companies is the only ones that are going to go to litigation is if it's a death penalty if they don't, such as Anderson. So the risk of a plaintiff's lawyer sitting in court hearing the proceeding, at least in my experience, are relatively minimal because it just doesn't happen. Any company that's going to disclose, at least major companies, are typically going to settle.

But the issue for me -- and you've

touched on a difficult one that certainly some degree of information may be made public as part of the proceedings, and a third party could use that information to go after other information. But what the immunity would do is bar them from using anything in an official basis, using anything against the company that was disclosed on this basis. In other words, they could not -- they could not use documents, use information, use material that was from the compliance program as, for example, an admission against interest.

MR. BERRY: I think -- I think from -- this is Sean Berry speaking. I think the issue might arise more under your limited waiver scenario where the information is provided to the United States, the law enforcement side. Let's say that the corporation is not ultimately charged but individuals are and the individuals go to trial as often happens. It's in that trial where the stuff that under your limited waiver issue comes out in the open, and then it's there.

So any third-party attorney sitting in the courtroom can sit there and learn what they need to bring about the case that you fear.

MR. MURPHY: That's certainly true. What they can't do is request additional information of that sort. You, for example, are not likely to use an entire hot line log in a company. You may pick out the particular points you need to make your case, but the great nightmare in this field is once a company discloses -- you know you can't disclose a little. If you disclose part, you disclose all. And the nightmare is that the plaintiff's lawyer then has access to all of this information and it's going through, for example, all the audits, all the help line logs, all the investigations in getting access to that material. Whereas, what you just described, yes, the plaintiff's lawyer can take notes on the things that surface in court and use that for their analysis, but they cannot go to court and say that I'm entitled to

that audit report because it's already been made public, so, therefore, there's no privilege. So that's the key distinction. It's basically giving the company as much protection as it could possibly get in that context.

MR. LARSON: And hope for narrow use of the --

MR. MURPHY: But also keeping in mind that under the concept that I'm talking about, the company -- it's more likely the plaintiff's lawyer is going to get that in a certain sense because companies will no longer have this fear of waiving privilege by using material. So they will use materials, but they'll be able to use them in their company, for example, on a selected basis without this fear of kind of rolling up all the information, that everything is now disclosed because I disclosed even a little bit of the program.

MR. HOWARD: Why is that? This is Chuck Howard. Because that's a -- that's a logic

step that I missed. You started by saying you need certainty on this, and then what we've now just described is kind of an exception to that certainty where some of the material is going to be disclosed. Why would --

MR. MURPHY: Because the issue for me is not disclosure. It's the use, and particularly the official use in litigation. One nightmare in this field is that the things that you say can be used against you as an admission against interest. If you do a report that says we did X, in the (inaudible) the plaintiff's lawyer could take that into court and argue you were stopped for saying you didn't do X because you said it. It was an admission against interest, and, therefore, you're going to be held to that. You can, secondly, use it in court, use that documentation as evidence against the company.

MR. HOWARD: And you don't think that the same lawyer doing the same investigation is not going to write down that under this

circumstance? Because I think --

MR. MURPHY: They can write it down. The problem is they can write it down, but they can't use it, for example, as an admission against you or for cross-examination or for any other purpose.

MR. HOWARD: They could use --

MR. MURPHY: That's what the immunity concept would mean.

MR. HOWARD: Well, here's the other question -- and it's been some time since you and I've discussed this. But what concerns me is that if the goal is to get certainty of protection -- and I think you've correctly absolutely diagnosed the nature of the problem. But if this sort of limited immunity is premised on a good faith use, why then wouldn't everything come out in the third-party civil action in some sort of preliminary discovery hearing where the third party is challenging the disclosure -- the prior disclosure to the government as not having

been in good faith? And in order for any sort of fact finder to determine whether that prior disclosure was in good faith, wouldn't all of the facts and circumstances relating to what the could knew and how it dealt with it be disclosed in that sort of a proceeding?

MR. MURPHY: We've actually been dealing with that similar type of issue for a long time in a self-evaluative privilege. The good faith issue is very similar to the same argument you run into in crime fraud, and I would suggest the solution is a similar type of approach where you'd have to have an in camera proceeding. The burden would be on the plaintiff to make that a prima facie case that you acted in bad faith, and then that would have to be done in camera. And if the court didn't agree with the plaintiff -- and keep in mind the legislation that we talked about would have a strong policy in favor of compliance work. If the court didn't agree, then you would not have access to or the

ability to use that material.

MR. HOWARD: And it --

MR. MURPHY: So it would not -- it would not promote a fishing expedition. In fact, I think in the way I drafted the legislation, if you did that you would actually have to pay the cost of that if it were determined that you were wrong and that material -- and this had not been done in bad faith.

MR. HOWARD: Wouldn't the plaintiff's counsel in this kind of hypothetical third-party action want to engage in discovery perhaps broad based described initially so that they would have a whole series of documents and other information?

MR. MURPHY: No, because you can't -- you can't --

MR. HOWARD: This is the last half, not the first half.

MR. MURPHY: You can't do that, for example, to establish crime fraud exception. You

can't do a discovery fishing expedition on the basis that you want to see if there was a crime -- that counsel was involved in a crime or fraud. You don't get the discovery on that unless you can establish a prima facie case to open it up.

MR. HOWARD: Sure. Now I --

MR. MURPHY: The same would apply here. You can't do a fishing expedition to find out whether it's done in good faith. You're really going to have some basis for asserting that it was in good faith.

MR. HOWARD: But the fishing expedition or the discovery would be a subterfuge. It would be kind of a discovery on the general nature of the problem, you know, the facts relating to the case?

MR. MURPHY: Right.

MR. HOWARD: And so you wouldn't be able to cut that off?

MR. MURPHY: But the whole discovery directed at the compliance program would be

what's off limits. That would be immune. You could talk with people about what they were doing but you can do that today. What you can't do is notice a deposition of the compliance officer and spend the day harassing the compliance officer about what they were doing in the program.

MR. HOWARD: Let me change subjects slightly. What you're proposing would not be something that would be done with a recommended change to the guidelines? It would be a separate statute?

MR. MURPHY: That's how I view it, yes. That would be the preferred remedy. The jurisdiction of the Commission is limited. It can't -- it can't restrict discovery, for example.

MR. GNAZZO: Now, Joe, this is Pat Gnazzo. At least based on our experience, if we could split this in half from a criminal proceeding with the Justice Department or any federal official and go just to the third-party

civil action, one of our biggest problems in dealing with third-party cases is explaining to a judge over and over again the difference between a public good versus the individual right. If the Commission could at least establish some guidelines with respect to public good, the need to have a compliance program, the need to establish those programs, to build those road maps in order to continue to keep those programs viable, then a judge at least has something in looking at the scale in weighing a decision of the individual right versus the public good to have these kinds of programs and to limit access to discovery or a fishing expedition. So what I'm -- what I'm looking for is that in at least in our experience we had to have our attorneys spend an enormous amount of time dealing with the public good, how our program works, how good our program is, how solid it is, how we protect individuals in order to get the judge to understand that there is a public good in

balancing that individual right versus the public good. If the Commission could make some statements or some -- give some guidance to federal judges with respect to public good, that would be helpful because it gives them something to hang their hat on.

MR. MURPHY: I think that's an excellent point, and I think from what I've seen judges typically see the number one good as litigation and anything that interferes with litigation as bad and even in the one area where you see the most litigation on compliance programs, employment discrimination. And you have the Supreme Court in Ehlert [sic] and Farragher talking about the importance of this type of company work, you still find what seems to be court nitpicking with, again, the presumption that anything that interferes with litigation is bad.

So I think to the extent that the commission could make an even stronger policy

statement than it has in the past on just the point you said about this being a matter of public good. I think that would be an excellent step.

MR. SWENSON: Although, Joe, I guess absent some kind of legislative change, a policy statement by the Commission, were it willing to make one, would in a sense be arguing for a judicial remedy that doesn't formally exist right now, right?

MR. MURPHY: Yeah, that is right. It's only going to go so far, and, of course, it's also -- it's really -- as I indicated there's a couple parts to this picture. One is this whole privilege in immunity protection. The other is really enhancing and making more consistent the government approach to voluntary disclosure, and, again, that's something where the Commission can say something. Agencies may or may not listen. But really to make some progress in this, the (inaudible) is due by

legislation.

MR. SWENSON: Okay. Well, thanks, Joe. Stand by, if you can. As I said, we're going to withhold questions until after Michael went. As you can see, we've just done that.

Michael, I think this is a good segue into you.

MR. GOLDSMITH: Thank you. First I'd like to point out that Win invited Joe to kick things off. Joe kicked it off, caught the ball, ran it back for a touchdown on his own, and is about ready to kick it off again. Your comment about the Commission taking a position on this, Joe, makes me think about my departure from the Commission. In 1998 people asked me what I was going to do, and, of course, back then the Commission was vacant for the most part. They were having difficulty filling vacancies, so I indicated that I was going to establish a Sentencing Commission in exile in Park City, Utah, where I lived. So if you want that

Commission in exile to issue a policy statement, I can easily do that. There's not much of a bureaucracy. It might not be much good, but nevertheless I am prepared to go about.

This whole problem of self-evaluative privilege in this context brings to mind the adage, "No good deed goes unpunished." The Sentencing Commission essentially made internal compliance programs an essential aspect of federal sentencing policy and then, in turn, if it didn't create it, it certainly allowed to continue the existence of a dilemma faced by corporations that wanted to do the right thing to be good corporate citizens. Whereby providing, in effect, as Pat just pointed out a moment ago, a litigation road map to anyone that gets access to their compliance materials. The difficulty then that we have here -- and what I propose to do right now by my remarks is basically to summarize, I think, much of what's been said, and that may help you in terms of your record, Win.

The difficulty that we have is that there is simply no certain way of protecting compliance-related materials in this context. The attorney-client privilege only goes so far. It doesn't cover certain types of communications. Certainly there is an enormous risk of waiver. The work-product doctrine, likewise, doesn't apply. The work-product doctrine, for example, needs -- it is limited to matters prepared in anticipation of litigation. And even if the privilege or the doctrine does apply, it is subject to a balancing test of sorts.

The self-evaluative privilege, at least as of seven years ago, was not widely recognized. To the degree that it was recognized it tended to be applied mostly in a medical context, and it too was subject to a balancing test. With considerable assistance from Joe Murphy and Win Swenson, years ago I wrote an article dealing with this issue, and I made the observation that the law right now is uncertain.

In preparation for this meeting, I have reviewed the case law, none of which is cited in my article. Although, my mother read it. The case law continues to be very problematic. It is mostly negative. When a company tries to assert the equivalent of a self-evaluative privilege, for the most part it's been rejected or it's been confined to a medical context. Some --

MR. SWENSON: Michael, could I just ask you to help us understand what the medical context is and where it has been, in fact. Because I think it may help us understand the policy benefits --

MR. GOLDSMITH: The typical example would be in a case of medical malpractice and the hospital has its own internal review process to determine what led to the "therapeutic misadventure" and then plaintiff's counsel wants to get access to the peer review committee's findings to help make his case. So that's the typical scenario which has come up, and there has

been some success in asserting the privilege in that very limited context and you can see why. Although, the similar reasons obviously apply in a context under the guidelines. So I guess my point is that the case law overall has been very restrictive. It's been confined to a medical context. And indeed in other situations, the courts have said that even if we were to recognize such a privilege, we would not apply it with respect to a situation where the information is sought by governmental agencies. There is a recent Fifth Circuit case called "In Re. Kaiser Aluna" of the fifth circuit in the year 2000 that makes that point.

A continuing problem here is the dearth of cases addressing the sentencing guidelines, specifically with respect to corporations in compliance programs because most of the cases settled. So we just don't know how courts will responds. This issue that we're looking at really hasn't been addressed

specifically by any court in the context of a guideline program. In light of that, we have as I said very few cases and some of these cases are examples of hard cases making bad law. I know in one case, for example, a court declined to find that a privilege applied to an internal investigation conducted by a kennel club, so these are not the types of cases that are going to get a lot of attention by the courts and produce the type of response from a policy standpoint either from the courts or the Congress that I think you're looking for.

I concur with Joe's view of immunity. There needs to be some certainty here. Years ago I thought that the position that Joe had taken on this was that he was arguing for transactional immunity, which I thought was too broad. It appears that Joe's position now, and maybe was then as well, but he endorses what is the equivalent of use immunity. Nothing that is provided by the program or

generated by the program may be used against it nor anything derived therefrom.

The use of the immunity statute federally has worked very well. The -- a party needs to establish by the preponderance of the evidence that any evidence it has available to it in court was not, in fact, derived from immunized testimony. The difference between the use of (inaudible) that is on the table right now and the Federal Use Immunity Statute is that the Federal Use Immunity Statute does not have a preclusion against civil application. Whereas, what we have in mind here would.

I think that the present context or climate rather from the standpoint of corporate criminality and the public's heightened awareness of it and certainly Congress' awareness of it. We all know it's a serious problem. That this is a good time for the Commission to take the initiative and go to Congress and say that we have established the importance of internal

compliance as part of the federal sentencing policy. We, in fact, are undermining that very policy by not protecting companies that make an effort to comply with that initiative with -- the initiative of internal compliance, and, therefore, it's incumbent upon the Congress to pass the equivalent of the Use Immunity Statute in this context to protect these types of materials. Only by adopting that type of measure will you provide companies the requisite to certainty that will ensure that the programs in fact work and that people do make full disclosure.

MR. HOWARD: When we talk about the immunity statute, I'm assuming that you're skipping over or reaching the conclusion that the government is still going to make disclosure a requirement. Are you -- and is the better way to do that -- in other words, you've given up fighting the battle on whether there's going to be a required disclosure. You've conceded that

the government surely will continue to make disclosure a requirement and so you're fighting a battle on what use can be made of what we give to the court? Is that --

MR. MURPHY: When you say "disclosure," we're really talking about the type of voluntary disclosure where there's a quid pro quo. A company makes a disclosure, and as a result of that there's typically something that the government gives for that, for example, exemption from prosecution or some lower penalty, something of that sort. One thing that this legislation would address, however, is the current practice of basically conditioning of any benefit on a complete and total waiver. That is --

MR. HOWARD: Run that by again. I missed that.

MR. MURPHY: I'm sorry?

MR. HOWARD: I missed that. Would you run that by again?

MR. MURPHY: Yes. In the attorney-client privilege area, for example, the company does a voluntary disclosure. There are some enforcement people in the enforcement community who will say, look, as we sign of your good faith, you must waive all privilege. What the proposed legislation says is no, you can't do that. If you have the limited waiver, then that way -- the government cannot condition a voluntary disclosure on giving up not only the limited waiver but all privilege.

MR. GOLDSMITH: And I'm not sure that I necessarily view disclosure as a prerequisite to getting the benefit of the immunity. For example, as I can see this, I would imagine that if the program were immunized that the company, for example, would not have to respond to a grand jury subpoena. Just say listen, this is protected. It's really a question of timing. When does the immunity attach?

MR. MURPHY: Well, there's also -- I

mean, realistically there's a political question of what the public is going to accept in terms of privilege versus involuntary disclosure. I am a big believer in voluntary disclosure if the government keeps its end of the deal, if there is some benefit from that. But certainly where there's criminal conduct, I don't really see -- I don't see a realistic possibility of legislation that's going to permit someone to commit a crime and then -- and then not disclose either the fact of the crime or how they found out about the crime. So at least in the criminal context, I think that -- this is just my own political expectation, that any type of immunity is going to be conditioned upon some disclosure to the government so the government can check on the legitimacy of what the company did.

MR. GOLDSMITH: Well, Joe, clearly the immunity ought not give the company a license to commit a crime. In fact, the Supreme Court's decision in Afflebaum (phonetic), an old perjury

case, said that the fact that you've been immunized doesn't immunize you against a perjury prosecution for conduct that you engaged in during the course of your immunity grant.

MR. MURPHY: Sure.

MR. GOLDSMITH: The question I have -- I guess this follows up on Chuck's question then is, how do you see this occurring from a timing standpoint? When would the company actually receive the immunity grant?

MR. MURPHY: The immunity would always be there on the compliance work. It would basically be saying that when the company has an effective program under the guidelines, the material that it creates, the work that it does is simply not available for use in litigation. In the sense that companies are doing self-policing, so this is something that should not be used against the company. But if a company uncovers a criminal violation, it would need to disclose that to the government. This

would be part of the definition of good faith, and the only way you would get the immunity is if you're always acting in good faith in the program. So that's how I would see it.

The immunity is always there, but once you found a criminal violation -- at least this is one way to do this. That failure to disclose the criminal violation to the government would (inaudible) the whole argument that you were acting in good faith.

MR. HOROWITZ: This is Michael Horowitz. I have a couple questions just on the use immunity question. Who would you envision it applying to? Just the company or its directors, CEO, CF – I mean, how does this layout? Because someone has got to make the decision in the company.

MR. MURPHY: The company. It would apply to the company.

MR. HOROWITZ: No individuals?

MR. MURPHY: That -- yeah, the

individual piece would really -- would really come up when you look at the form of immunity -- look at the form of the voluntary disclosure program that the government has. But ultimately it's the organization. It's the company that this applies to.

UNIDENTIFIED SPEAKER: Michael, are you in agreement? Do you have agreement?

MR. GNAZZO: I totally agree with Joe and any corporate compliance ethics program, the protection -- or the intent of the protection is to the company, not to any one individual, and, therefore, the use immunity should go to the corporation if they were doing everything they possibly could to protect. What's going on with respect to a compliance program, the intent is not to protect the individual who committed the act. (Inaudible.)

MR. MURPHY: Yeah. But recognize that as a practical -- as a practical matter, the person suing that individual director is not

going to have access to this material because material is immune from discovery and use. So what we're saying, it's the organization's privilege. The practical result is going to be the government will get access to that but prior plaintiffs are not going to get access to that compliance material because it's off limits in litigation.

MR. GNAZZO: But I wanted to go further, Joe, in saying, however, you have to understand that what you're doing in a program like this is asking employees to come forward who have knowledge of a particular event, and we try to protect those individuals who come forward who have knowledge of that particular event. So the use immunity is the protection of the corporation. But in doing that, we have to protect the individual who came forward because if we don't, I mess up my -- I mean, my program is dead.

MR. HOWARD: Then you don't know where

it's going to go.

MR. GNAZZO: That's correct.

MR. HOROWITZ: Well, then that's -- this is why I'm asking that question because stepping back we're pushing in this use immunity idea with the privilege idea, and they're really two -- I think there are two separate issues. One is ensuring that disclosures can be made to the government without third parties benefitting from it.

MR. GNAZZO: Right.

MR. HOROWITZ: And the other privilege concerns a company being willing to walk into the government and not have it turn around and get tagged with what they've disclosed. The problem is the people who have -- I understand on the privilege issue, the third-party issue, and what the concern is. From the morning session, it sounded as if at least the government representatives on the panel understood that as well and have as much trouble with that notion.

The question I have on the use immunity side is there is going to be a group within the company that has to decide this question. And I guess the question I have is, if the concern is companies coming forward and making full disclosure, I go exactly where Pat just was and say okay. You also then want to encourage the employee to come in and disclose and that would be high-level people. We don't have to strain our imaginations too far nowadays to think who that might be and what examples we could use. And if those individuals know that the company would then essentially be obligated to waltz into the government because it would be impossible to explain why you didn't disclose if you got immunity for your company. Why they would do that if there were the high-level executives who were involved with that wrongdoing and how do you get to that next level and explain to the individuals and make sure the individual who is

full of ideas and fostering and encouraging people to disclose? Don't you just dry it up down --

MR. GNAZZO: You're making -- you're making a presumption that the disclosure is always going to come -- or the majority of the disclosures are going to come from the individual that committed the act. And I have to honestly tell you, our experience is not that the individual who committed the act that is making the disclosure. It's the individual who's being asked to commit the act or the individual who watched the act occur and is sitting there pondering whether their careers are going to go down the tubes because they bring something to the attention of management. It's that individual that I want to protect.

MR. MURPHY: Yeah.

MR. GNAZZO: Our policy says clearly that the individual who committed or participated in the act knowingly is going to be punished.

Now they may be punished by the government, but they're also going to be punished by the corporation because they've violated policies. So my concern is to protect the individual who wants to come forward who did not participate in the act, who saw the act, and is uncomfortable about coming forward because of fear of some form of retribution.

MR. MURPHY: Yeah, I agree with that very strongly. If I gave you a list of all the senior executives that I know who voluntarily disclosed that they did something wrong, it's a remarkably short list. And I think their concern is not what's going to be done with discovery. It's the concern that they're going to have to pay a price for doing something wrong, and none of us can remove that. I mean, there's just no way a company can say to someone, oh, good, you're going to admit that you deliberately engaged in environmental pollution that killed people. Well, we'll assure you that X won't

happen to you. Companies are never going to have that freedom, and I'm not sure that they should, so it --

MR. SWENSON: We have a guest who would like to make a comment, but I'd like to go to our more official witnesses first and then we'll come to you, sir, next. Okay.

MR. BERRY: I just had a question for either Mr. Goldsmith or Mr. Murphy. Under this immunity proposal -- let's take -- let's take a hypothetical. A company does its internal investigation and finds a crime that's been committed. The government is completely unaware of it, and the company self-reports to the prosecutor. What can the prosecutor use under your immunity? Is that -- is the prosecutor in a position that they have to somehow prove that they would have found out about the crime?

MR. MURPHY: No, no. Let me -- but that's --

MR. BERRY: Let me finish.

MR. MURPHY: I'm sorry.

MR. BERRY: In order to prosecute the corporation itself?

MR. MURPHY: Let me use the best example, which is the Antitrust Division's voluntary disclosure program. And then we can go to another example, but in that example you would go to the government. You do a proffer. If the government buys in, your company and its employees will not be prosecuted by the government. Now the reason they do that is in every antitrust case there's always another potential defendant. So you get off, but they nail someone else. In other programs you may find that the deal is you do your disclosure and you'll -- let's say you'll have to pay some penalty, something bad will happen to you. But in what I drafted, the government has full right to use that material. The only thing that makes that palatable for the company is the fact that there has to be a voluntary disclosure program so

the company knows -- as long as it tells the truth to the government, it knows what will happen as a result of that disclosure.

But my view is you cannot limit the use of the information by the prosecuting agency. That limitation has got to be something that's part of the voluntary disclosure program.

MR. BERRY: But that certainty comes from then legislation that says self-reporting grants immunity? Is that where you're going?

MR. MURPHY: It comes from whatever structure it is that we set in place to make sure that government agencies have effective, well-thought out, strong voluntary disclosure programs.

MR. BERRY: And how does the Holder memo fall into that? Not strong enough for you?

MR. MURPHY: No, it's not. I'm always -- I think one of the lessons of the sentencing guidelines is the enormous value of some level of commitment. The guidelines have been an enormous

success because of that. The Antitrust Division's program has been an enormous success because of that. You either give commitment or you don't. If you don't do the commitment, you don't get the response -- the same response from the regulated community. If you give that commitment, that's what causes the commitment from the other side.

So the critical element to me is not having a soft policy that says, gee, we think this is good and we might give you the benefit of it. We'll consider lots of things, and we may give you the benefit. That's not a commitment.

MR. BERRY: And so this is more the carrot aspect of getting people to self-report? Another alternative, though, would be to make it more painful not to self-report, to go with the stick to enhance the guidelines, right?

MR. MURPHY: Well, I guess that's true, but, you know, in China it's a capital offense to engage in any form of bribery and China is rife with bribery. So if you can't

prevent crime by killing people for engaging in a crime, I'm always skeptical about how much leverage you can get by just increasing penalties.

MR. HOWARD: Let me follow up on a hypothetical, Sean, that you started. What if everything that Sean said happened, the prosecutor said that we're not going -- we're not going to indict you. You're not going to be charged, but it's very serious and I'm going to walk this file over to the civil person and action will be commenced civilly. Can -- what happens to the information then? Can the government not use --

MR. MURPHY: That's got to be part of the voluntary disclosure program. The voluntary disclosure program can't be a case of regulation by ambush. It's got to be something where it's predictable, and the disclosure has got to be global. I mean, whatever it is has got to be global. What I put in my draft legislation on

limited waiver is you can only -- the government agency can only discourage the other agencies that are subject to that same limitation.

MR. HOWARD: So, in other words, the civil side could not use it?

MR. MURPHY: No, the civil side -- the company -- the agency would have to draft its disclosure program in a way that dealt with both criminal and civil, and that would be dealt with at the same time. I'm loath to start imposing water tight compartments on government agencies where they have to quarantine people and if you look at this file then you can't do anything else related to it. I'm loathed to impose that type of administrative burden. The much smarter approach is just to have a voluntary disclosure cover the entire agency or cover the entire enforcement community.

MR. GOLDSMITH: Joe, I want to get back to the question that was put to us earlier in terms of the company going to the U.S.

Attorney and saying that this is what we've done. And the question put to us was whether the information provided to the U.S. Attorney at that time can be used against the government.

MR. MURPHY: And it could be used against the company?

MR. GOLDSMITH: Yes, against the company. Yes.

MR. MURPHY: You mean, you've already done your voluntary disclosure --

MR. GOLDSMITH: Yes.

MR. MURPHY: Or you're at the proffer stage?

MR. GOLDSMITH: Well, you come in and meet with the U.S. Attorney and say this is what happened. You're making your disclosure. The question is whether the disclosed information may be used against you as a basis for a criminal prosecution or civil suit. Was this --

MR. MURPHY: Well, in the current -- in the current environment we all know the answer

to that. They can do whatever they want to do.

MR. GOLDSMITH: Right.

MR. MURPHY: What we're looking at is a proposal that would say, first, there would have to be a voluntary disclosure program. The company would have the option. If they wanted to go outside the voluntary disclosure program, they'd be taking that risk. But the wise company would go through the program, do its proffer, negotiate whatever it could negotiate, and then turn over the information so the government could use it to verify that the company had told the truth. But the government would already be committed to what their -- what remedy they were going to pursue, assuming the company had initially told them the truth.

So could they use the information? Yes, they could use it, but the remedy is limited to what's -- what was negotiated in the voluntary disclosure program.

MR. SWENSON: We have an observer who

is patiently -- do you still have your question or did --

MR. SOLOW: I do.

MR. SWENSON: Can you identify yourself?

MR. SOLOW: Yeah, my name is Steve Solow. I was the chief of the Environmental Crime Section at Justice. I'm now a partner at the Washington, D.C., office of Hunton & Williams and so in both my past and present life this is a very big issue. I was wondering about the issue – you said that the immunity is always there if it's an effective program under the guidelines, which almost seems like we're the snake swallowing its own tail again here because we get back to the question of who's going to determine it's an effective program under the guidelines for which it had the immunity and are we then saying, you know -- you were then getting back to the question of who's going to make that

judgment, which my guess will end up being litigated and actually the people deciding whether effective compliance programs will be federal judges.

MR. GOLDSMITH: But that's -- that's like having the judge rule on whether there is an attorney-client privilege in place. It's comparable to that. The court gives a ruling and --

MR. SOLOW: Right. Except judges have been ruling on privileges for many, many years, and their ability to determine whether a company's sophisticated program was a "quite effective program" sufficient to allow the immunity to take effect is far more problematic. And since what I recognize MR. GNAZZO was talking about is the need -- what we're all talking about is the need for certainty and the need of people to have something they can rely on. And I just don't know how you get that through this if we're just going to shift the (inaudible) from one forum

to another. Maybe --

MR. MURPHY: I guess my response on that is we've crossed that bridge ten years ago when we elected to take this route of having effective programs. That is really the key indicator of whether an organization is a good corporate citizen. Because of the nature of criminal settlements, we haven't had ten years of litigation. I would just mention that's shifting now. You're seeing that litigation, but you're only seeing it in the employment discrimination area. I think to me the test of good corporate citizenship, the test of good faith, is whether companies have this program -- these types of programs.

We probably do need to give more direction to the judiciary that -- what the Sentencing Commission had said really is American policy, that it is critical for companies to have these programs. And my view is we're going to have to bite the bullet, that at some point

there's going -- somebody is going to have to make judgments about whether these programs are sham or real. You can set that standard wherever you want. You can make it that the program has to be perfect. It's got to be a hundred percent of everything or you can just require that it be a good faith effort to meet all of the seven elements. And I think that's a negotiable legislative issue on where you set that. But I think requiring companies to buy into this and to use at least good faith efforts to have a program, to me that's a train that's left the station. That's something that we've got to buy into that. The purpose of this is to get companies to engage in these types of programs, and it's not unreasonable to ask them to do that.

To say that they have to have a perfect program, I would agree with you. That puts too much at risk. But to say that there should be some measurable standard, some standard that we can apply and say companies either have

or have not tried to meet this in good faith, I view that as essential. I think it is only a matter of time before companies will routinely have to address that issue in litigation.

MR. GNAZZO: Can I make one comment? And that is for companies -- and I'm not going to tout United Technologies, but for companies that started compliance programs long before the Sentencing Commission came up with compliance programs because we were members of the Defense Industry Initiatives and established our own set of guidelines and decided we were going to do voluntary disclosure at that time as an organization, and we have historically been dealing with these compliance issues since 1986. I will tell you that the two things -- that realistically the two things that we've had to confront over that period of time are, one, do we waive attorney-client privilege when we make a voluntary disclosure and, two, do we give up the name of the individual who brought it to our

attention in a third-party lawsuit because that individual is now suing us for another reason and now their plaintiff's lawyer wants to get into the case and wants more information with respect to how individuals dealt with a particular action? That's the reality of what we've had to deal with.

The attorney-client privilege waiver, we make that decision on a case-by-case basis when we go in with the Justice Department, and we cut whatever deal we need to cut with respect to whether this is going to criminal first, whether it's going to go to civil. And I'm living with that decision with respect to attorney-client privilege and the waiver of attorney-client privilege. I don't have a problem in all seriousness in making those decisions. I have a monumental problem in encouraging employees to come forward, and we have a program that has --

MR. SWENSON: You know, I think we want to really kind of lay that out as an issue.

MR. GNAZZO: Okay.

MR. SWENSON: So what I'd like to do is see if we can -- at least momentarily. We may have time to come back to this to discuss it more. But soon what we need to do is close this issue and then go to you Pat and talk about this very important related issue. Sean, did you have anything else that you'd like to ask?

MR. BERRY: Just quickly.

MR. SWENSON: I'm sorry.

MR. BERRY: About the timing of how we would be able to indict then. Do we need to go to a judge and say that we believe that this compliance program is not in good faith and, therefore, we're able to indict and let a judge decide whether the government brings a case or do we bring a case and then litigate whether or not the corporation's compliance program was in good faith and risk having the case then dismissed and the government is then open to a Hyde amendment action?

MR. SWENSON: Well, what facts are you assuming? You have an independent knowledge --

MR. BERRY: No, someone just brought it into us and we think, you know what? They just brought this into us because they thought we were going to find out, and there really isn't a good faith compliance program there so they're trying to get this immunity now that's on the books. And so they bring this in right before we find out and, you know what, we don't buy it.

MR. MURPHY: You mean that the disclosure is in good faith?

MR. BERRY: Pardon me?

MR. MURPHY: But that's a question of how you define your program. If you look at the Antitrust Division's standards, for example, they've already answered your question. You would not be able to make the voluntary disclosure in the case where the government already had enough to indict you.

MR. BERRY: Okay. I understand –

MR. MURPHY: I mean, that's just set out right in the program.

MR. BERRY: I'm saying that we don't, though. We do not have enough, but the company fears that we will get enough or on the verge of finding. And let's say wrongly. Let's say they're wrong.

MR. MURPHY: I mean, to me that's -- it's relatively easy to answer that by -- I mean, I think there's enough experience in companies doing this type of thing that you know what standards you need for a voluntary disclosure program. I mean, certainly from what I've seen in my experience with the Antitrust Division program, it's a program that works. I don't know that there are any examples of people who now feel that the government got taken for a ride in that type of system.

MR. BERRY: My question to that --

MR. MURPHY: That will be the first

point is if you answered -- you answer that question by how you define it. But ultimately if somebody does the disclosure and they're very good and you do feel that they fooled you, you'll have some basis for that. You'll have some reason for believing that and you would challenge that and that would go into an in camera proceeding before a magistrate or a court to make that determination very similar to the analysis that's used for the crime fraud exception that we've been dealing with for quite some time.

MR. BERRY: Under your idea, wouldn't that -- would that decision by the magistrate or the judge occur before or after indictment?

MR. MURPHY: Likely -- I mean, the ability to indict really wouldn't be affected by this. You can indict whenever you had sufficient evidence, but your access to -- of course you already have access to the compliance program material. That's what the limited waiver means. They've wasted with respect to you, so you

already have access. You don't have to go to a judge or magistrate. You have access through the voluntary disclosure. You're the only one who has access.

MR. BERRY: I understand. I guess I'm confusing your limited waiver issue versus your immunity issue. I mean --

MR. MURPHY: Yeah, I put the two together, but when I -- when the company comes in that does the voluntary disclosure to you, they have opened the door. They have basically said that we're buying into this because you've given us the assurance that you'll treat us the right way because we did the voluntary. But they are giving you the information. You don't have to -- you don't have to go to the magistrate to get some waiver. They've made that waiver but only with respect to you.

MR. BERRY: Thanks.

MR. SWENSON: Steve, you're welcome to add anything more you'd like to.

MR. SOLOW: No, I'll just keep listening. Thanks.

MR. SWENSON: Okay. Well, with that we'll turn it over to Pat, who has now left the room.

MR. MURPHY: Okay. When can I -- can I drop off and do my presentation down here?

MR. SWENSON: I'll tell you what, Joe? Can you hold on for one more question?

MR. MURPHY: Sure.

MR. SOLOW: Joe, it's Steve Solow again. A lot of times in the antitrust context, the major distinction drawn between that program and its smooth operation and the other programs like the XYZ program and the (inaudible) program and the others and the reason why the HHS program you see is different is because there is no way for them to get these cases unless one person comes forward who's in the conspiracy. One of the antitrust conspirators has to come forward and so there's a distinction with a difference.

At least that's what the Department has said in the past. I just wondered -- and I know you sort of addressed that in passing saying that you didn't think much of that. But why is that wrong?

MR. MURPHY: I'm sorry. I don't think much of what, saying that the Antitrust program that's been so extraordinarily successful that the same principles don't apply elsewhere?

MR. SOLOW: You said in passing that there were other programs that were not as good.

MR. MURPHY: Yes.

MR. SOLOW: And the Department had said in the past that there were differences, and I was, I think, articulating what that difference was that they had said. And I wondered what --

MR. MURPHY: Oh, yeah. I understand. Let me give you an example where I've been told there's a difference that doesn't apply. That's the area of bribery and overseas payments and where the Criminal Fraud Division takes the

position that, well, this is different. And I have trouble ever picturing a bribery that occurs where there aren't more than two people involved. It's also the case -- you are right in the antitrust field that the typical disclosure is another company coming in, but I think that everyone involved in this area knows the more common source of information on the fence is it's an individual who was involved becoming ticked off for some reason and disclosing what's happened elsewhere.

And I also don't agree that the only way you can break an antitrust case is by one of the parties turning themselves in. As I say, you can have an individual turning themselves in. It's also my experience that even in these conspiratorial cases, you'll have other evidence. You'll have documents, that type of thing. And I think in any type of offense you will have the potential for at least individuals come in and providing information. So I think there's an

important opportunity for voluntary disclosure, and when you have voluntary disclosure, for example, on a bribery case, as in the Baker Hughes case, the company came in and voluntarily told what happened which allowed the government to go after other offenders, including Baker Hughes employees in KPMG Indonesia. So I do not see the difference and I am an antitrust lawyer. I also do Foreign Corrupt Practices Act work. I simply do not see a principal distinction between the antitrust field and the others, and I do know that the antitrust program was opposed by some just as vigorously as the current opposition to extending the Antitrust Division approach to other divisions.

MR. SWENSON: Thanks, Joe. One -- actually, I have one last question before you go, and it's -- I'm wondering whether for Chuck and Sean you have anymore questions about sort of something fundamental that underlies this whole discussion and that is why some of these

compliance activities are sensitive. Why -- well, actually, let me put it a different way. Why they can be very important for companies to engage in to make their programs effective and is it -- do you think -- has Joe helped you get an understanding of that? Because that's sort of what it relies on, I think, for all of us.

UNIDENTIFIED SPEAKER: Yeah, definitely.

MR. SWENSON: Well, great, Joe. Thank you.

MR. MURPHY: Okay. Well, I was happy to participate and help in any way that I can.

MR. SWENSON: Okay. Take care of them dingoes. What was that other animal, the porcupine one that you just saw?

MR. MURPHY: Well, there's something called an achinda (phonetic) and there's also something called the forest dragon, and I have to report I have actually seen a forest dragon.

MR. SWENSON: Okay. I wanted to get

that on the record. Thank you.

MR. MURPHY: Okay.

MR. SWENSON: Take care.

MR. MURPHY: All right. Bye now.

MR. SWENSON: Pat?

MR. GNAZZO: My name is Pat Gnazzo, and by way of background, just to explain where I'm coming from, I was the chief trial attorney for the Department of the Navy prior to coming to United Technologies Corporation and at one time was Vice President for Litigation at United Technologies Corporation. I'm now the company's compliance and ethics officer, and I've been in that position since 1993. I've been managing the program. I'm the current chairman of the working group for DID, the Defense Industry Initiatives, and I'm a member of the Board of Directors of the Ethics Officer Association.

United Technologies' program started with DID, and in that program we made the decision, along with the rest of the Defense

Industry Initiative companies, to establish hot lines for our organization so that employees could bring to the attention a management wrongdoing in the area of government procurement and government issues. When we did it in 1986 we went one step further or maybe ten steps further and we established both a written and an oral program where employees could call an 800 number or they could write us in a DIALOG written program, and we told them they could do it anonymously. They could do it with anonymity, and they could do it with confidentiality. And we did it through an ombuds program, not through the business practice organization.

Today we've had over 65,000 DIALOG or ombuds issues raised in the company since 1986 worldwide. We have 167,000 employees. We operate in over 200 countries, and we have more foreign nationals than we have U.S. citizens as part of United Technologies Corporation's employee base. That program has been in

existence since 1986, and I have to tell you that I only get as the ethics officer four percent, about four percent, of all of the 65,000 DIALOG or hot line calls. About four percent are related to both ethics and compliance or illegal activity. The rest has to do with anything an employee wants to raise with respect to management from I'm being harassed to the traffic light outside the plant is too slow at the time of shift and can you do something to change it. And we respond to all of those issues within a prescribed -- we try within a 14-day period of time, but we investigate everything.

With respect to the issues that I get, the four percent, those issues are thoroughly investigated and reported to the audit committee of the board of directors, and with respect to that -- and a limited number of those issues have to do with illegal activity. And, in fact, we monitor some 31 categories that go to the audit committee of the board. A good number of them --

and please understand that from a perspective of a company that wants to have a strong compliance program, a good number of those issues are internal protection to the corporation, embezzlement, accounting irregularities that impact on the company and to the benefit of the company to do the right thing. Not Foreign Corrupt Practices Act, not fraud, not antitrust. Those issues obviously are part of the 31 categories, but we are not only protecting our corporation from doing illegal activity but protecting our corporation from individuals in the company that want to misuse company assets, company property. So it's an effective program from our perspective, not only for the prevention of crime and the voluntary disclosure if so necessary but also to prevent individuals from doing harm to the corporation internally.

Our one concern obviously is confidentiality of the source. We've had 65,000 employees bring to the attention of management

issues that they want to raise. Of those 65,000 employees, about ten percent of them do it anonymously. The rest are willing to come forward and give the names at least to the ombuds person or the DIALOG administrator knowing that we have promised confidentiality and anonymity to those individuals who come forward. Those names are not even given to me with respect to my investigations, and we go through the ombuds or DIALOG person in order to get more information. They establish lines of communication many times with the individual that wants anonymity. They answer questions that we may ask, but we don't know who the particular individual is, and then we conduct the investigation and move forward from there. And we've been successful in protecting the 65,000 issues that have come forward. Part of my job is to protect individuals who claim that they are being -- claim that they're being impacted by coming forward and using the process. That is one of my

obligations as the ethics officer of the company.

So to my issue, we would appreciate it if the sentencing guidelines talked in terms of confidentiality and the need for confidentiality. It is very important for a corporation to be able to establish good strong confidential programs that employees can rely on. We've done surveys in our corporation worldwide, and even though we have 65,000 issues that have been raised through our program, we still have 25 percent of our employees who do not believe or trust that the corporation will protect them or maintain their confidentiality. We expect that 25 percent is probably a normal number. A normal number that those individuals have never had to be tested were put in that kind of a difficult position. However, as much as we've publicized this program, as much as we've had this program for 15 years, 16 years, as much as we have even gone to court to protect the source, the individual, by hiring separate counsel for the

ombudsman. In addition to U.T.C. attorneys representing the corporation, we have hired a separate lawyer to handle the ombuds issue to explain to the court the public good versus the individual right to know who the source is of information that comes to the attention of the company. We feel very strongly about protecting that source, and anything that the Commission can do to talk in terms of confidentiality, to talk in terms of the need of confidentiality, would be greatly appreciated with respect to keeping and maintaining these programs.

MR. SWENSON: Pat, I assume they would not help people for the commission simply -- well, maybe they would. Let me ask a question. Would it help if the Sentencing Commission simply dropped the word confidential into step five that talks about, you know, internal reporting processes?

MR. GNAZZO: That is -- at a minimum, that is something that we would hope would

happen.

MR. SWENSON: Here's my concern.

MR. GNAZZO: At a minimum.

MR. SWENSON: Here's my concern. Now we have government talking (inaudible). The Sentencing Commission is saying it ought to be confidential. The Department of Justice in comments that it has submitted today, which are not available -- you probably haven't seen, but let me just read it to you because it's germane. It's in response to a question that we put to the comment --

MR. HOWARD: That's the question that this group is dealing with?

MR. SWENSON: Yes, exactly.

MR. HOWARD: Why do you want (inaudible) for what it is?

MR. SWENSON: Well, let me just -- yeah, one (inaudible). Let me just sort of skip to it. Part of it is endorsing the idea that other means of internal reporting "could include

a mechanism to confidentially," that word is underlined, "report to the board of directors and the board audit committee where appropriate without fear of retaliation." Sawbones-Oxley in talking about the need for internal reporting processes that the audit committee has to put in place uses the word confidential. Now perhaps the Sentencing Commission can do the same thing. The reality is that all of these statutes, pronouncements require, in essence, to have a bona fide program, but you're still in the same litigation boat of who wants to go forward. You have no protection whatsoever apart from your ability so far, and you're probably giving the company to go in and argue and defend an ombuds privilege to protect the confidentiality of that source.

So I guess my fear is it's put into -- put in as a requirement, but the litigation environment hasn't changed. So companies are promising something they generally can't relay.

MR. GNAZZO: From a litigation perspective, I think that we pretty much insulated ourselves as best we possibly can. And understand our program is a separate program. We have a separate ombuds person and we have separate ethics officers and we have maintained over and over again that those who investigate our files are discoverable, for the most part, unless there's a attorney-client privilege that even sues. And we use attorney-client privilege sparingly because we don't want to be in a position of constantly putting every investigation under an attorney-client privilege and misusing the process.

So my files are discoverable. The files of the HR department are discoverable, and in many instances the files of every -- the environmental department or any of the other departments that take action or take official action are discoverable. We've argued that the files of the ombudsmen shouldn't be discoverable

on the grounds that they are neutral. They are passed through. They are not an individual that takes any -- does any investigation, does not do any reviews. All they do is pass information from the employee to the company, the company back to the employee, but in effect take no action, act as a neutral. Our argument is that it would hold stronger weight if we could point to the use of confidentiality or the expectation of confidentiality, not only internally but externally in the statements that are made by the Sentencing Commission.

MR. SWENSON: Let's imagine a company other than UTC which does not have an ombuds program because you already have had some success. How many cases have you brought defending the privilege?

MR. GNAZZO: Five or six and one in England, and, actually, we were successful in England too.

MR. SWENSON: So you were successful

in half-a-dozen cases?

MR. GNAZZO: Yes.

MR. SWENSON: Companies that don't have an ombuds program are not in the position to make that argument and may not have as good of lawyers. I don't know. They're not in a position to --

MR. GNAZZO: That was a compliment to you, Chuck.

MR. SWENSON: -- to make the argument that you're making because they don't have an ombuds program, but in the sense they may be in the same position, which is they want to tell their employees that we know this can be a hard thing to do. We want you to feel comfortable coming forward. We'll protect your identity. They don't have your six cases --

MR. GNAZZO: And -

MR. SWENSON: So my feeling is we say your program must allow for confidential reporting, but there is simply no way that a

company can make that promise and mean it in the current litigation environment.

MR. GNAZZO: I totally agree. Take United Technologies out of the equation and talk in terms of any other company that wants to have an 800 number or a hot line. What we understand to be the case because of our experience -- because of our 65,000 employees that have used this from time to time, what we have learned through our experience is it is extremely important for a company to go to every measure it possibly can to protect the individual when they come forward in the use of the investigation and how we do the investigation, how we even tell management what we found, and who was the individual that brought it to our attention. All I'm saying is forget the ombuds privilege, forget the ombuds person. What I'm saying is companies should understand the need for confidentiality if they want employees to come forward.

Publicizing confidentiality when they

ask and tell employees that it's their duty and obligation to come forward should mean something more than window dressing. It should mean something to management. It should mean something to the commission. It should mean something to the Justice Department. It should mean something to even judges in saying that for the public good wherever you can strengthen the ability of employees to feel comfortable about coming forward without fear of retribution, you should do that. And this is a public obligation on the part of the Sentencing Commission, public corporations, and the Justice Department and any other regulatory body is to want individuals to come forward. And whatever we can do to talk in terms of confidentiality, encouraging management to have confidential programs, encouraging judges to understand and respect confidential programs, and having lawyers on both sides understand and respect the needs for confidential programs would be helpful.

MR. HOWARD: Were they criminal cases?

MR. GNAZZO: No, no, they were all -- they were all third-party lawsuits. They were all individuals who actually used the program and then for one reason or another were fired for -- and it had nothing to do with illegal or business practice type issues. They used the program. Later on they were fired for whatever reason and wanted to then bring in the ombuds structure, and we were able to explain that in that process that person was a neutral. Any information that that person had was developed as a neutral and that the files of -- the company files were discoverable, so they were all third party.

And that's -- and that's -- obviously in having that kind of a program what I went back to say originally is we built a road map for private litigators. We built a road map that said that we have this program and we have 65,000 cases where employees brought certain things to our attention. Now they may be cases of

harassment. They may be cases of parking violations. They may be any number of cases, but we built a road map. We would like some measure of protection wherever we can for those individuals to come forward.

MR. HOWARD: Well, what would you suggest then further on for the criminal situation? Do you keep relying like we do now with -- in U.S. Attorneys' work, a lot of confidential informants are -- virtually all the narcotics cases involve, as you know, confidential informants. You keep it confidential. Some cases go onto trial without them, as you no doubt well know.

MR. GNAZZO: I would venture to say that in 95 percent of the cases that we would ever get involved in from a criminal aspect that the individual would be known both to the company and, therefore, would have to be given up to the Justice Department in dealing with that particular activity. There are one or two

occasions where we don't even know who the individual is. So the question is then, are you going to violate that privilege? If I give you everything that I know as a company, if I give you all my investigative reports, and if I'm even willing to give it my attorney-client privilege, do I have to also give up my ombuds person who has sworn that he would never reveal the source or the name? And that's the concern that we will always have. We've never had to do that. We've never had to be in that position. We train our ombudsmen to bring people into the light of day for the most part. We train our people to want to come forward and give us their names. To that extent, if we have the name we will give it to you if we're asked to do that.

MR. SWENSON: Pat, hypothetically if you ever find yourself in that position where if somebody has gone to the ombuds person and they've committed a crime, you eventually sort of -- you've become -- you do an investigation. You

find that this actually occurred. What would you do in that situation?

MR. GNAZZO: In that particular instance, the ombudsman is never going to tell me that that individual was the person that came forward. But I'm going to name that individual as one of the bad actors.

MR. SWENSON: That you found independently?

MR. GNAZZO: In the investigation that I found independently and turn that over to the government.

MR. GOLDSMITH: I have a question. This reflects on how long I've been in law enforcement. The informant's privilege, it's not absolute, is it?

MR. LARSON: No.

MR. BERRY: No, there's a balancing --

MR. GOLDSMITH: There's a balancing of sorts? The court can require a disclosure and then drops the case as long as it's not --

MR. BERRY: Sure, sure.
MR. LARSON: Now we'd have to evaluate it.
MR. GOLDSMITH: Right. In terms of --
MR. LARSON: That's the only eyewitness you had and it's extremely important, but it's not uncommon, as most of you know, to not have to give up the confidential informant. And in many cases --
MR. GOLDSMITH: The reason I ask the question is because my recollection being accurate that the informant's privilege is one that involves the balancing of sorts. It's hard for me to imagine a circumstance, at least judicially, in which a privilege would be conferred upon employees that would be anything better than what the informant would enjoy, which, again, speaks to the need for some legislative resolution of this matter.
MR. GNAZZO: What we're trying to raise, though, is we'd like to make sure that

everybody understands where the scale should be with respect to confidentiality. And the more we can talk about it, the more we can try to guarantee it, the more we can try to protect it. From all sides the better off we are in getting the information the individuals need. I know that we'll never protect every instance, but we want to make sure that we still have programs in place that people feel comfortable about coming forward, and if there's cooperation both from the Sentencing Commission in talking in terms of the need for confidentiality and other parties understanding the need for confidentiality for the public good, the value then becomes better for us in talking to management about maintaining those strong programs.

I'll make one final point because I know you have to move on. And in addition to obviously our interest in source protection, one plea to the Commission and it's a constant plea. For companies that have been managing these

programs for long periods of time, we obviously fight budgets like everyone else for compliance programs and for strong compliance programs. The need for metrics, the need for data from U.S. Attorneys in negotiating settlements that take into consideration compliance programs in either the lessening or the increase of penalties based on this compliance programs would be very helpful for any corporation that wants to look at -- sometimes we forget the fact that most corporations are run by metrics and they look at numbers and they look at cost benefit analysis for just about everything. And the value in being able to say look there have been this many cases that occurred, and the Justice Department in their settlements have taken into consideration the Sentencing Commission guidelines and have either reduced penalties or increased penalties based on the fact that companies didn't have a program or did have a program. It's as simple as that. Will they take

it into consideration, did they have a program, and was the penalty increased or reduced based on the fact that they didn't have a program or did have a program would be very helpful for anybody trying to establish or keep or maintain a compliance ethics program in their corporation.

MR. SWENSON: Just a point of clarification, the Sentencing Commission has data on what happens in real cases where there has been a conviction and a sentence imposed.

MR. GNAZZO: But that's because -- that's because there is a case.

MR. SWENSON: Right.

MR. GNAZZO: But in the settlements, we have no information.

MR. SWENSON: Exactly, and we -- I think this is an important point. It kind of comes out of this morning's discussion. Bill Lytton kind of touched on that briefly. It's sort of in his article. The concern that the Department in its own charging policy says that

compliance is a consideration, but it's sometimes hard to tease out of the different statements about how to handle the case if that really was a consideration and how the consideration came into play.

UNIDENTIFIED SPEAKER: Even if it is captured, it's only the tip of the iceberg.

MR. SWENSON: Right.

MR. LARSON: Well, we did -- I chair that white collar crime sub-committee, and I've invited Win to come to the next meeting in January. Maybe we can formulate an action item or a point to narrow that down and then give support to the Department of conducting some kind of survey to get an answer for you. It seems like it's quite --

MR. GNAZZO: I don't need to know names. I don't want to know amount.

MR. LARSON: No, no. We know that.

MR. GNAZZO: All I need to know is it's been applied and there's been an advantage

or a disadvantage based on the fact that it exists or didn't exist.

MR. LARSON: Yes, and if Win can help us formulate the issue and come in January, that's not too far off, that would be helpful because we want to see people have good effective prevention. Just like a drug situation or anything else, it's all about prevention.

MR. SWENSON: Thank you, and we will -- so we have an invitation to pursue that. It's much appreciated.

I guess the only other -- before we leave this topic, the only other question I have is sort of like the question I asked at the close of our last topic, which is, you know, have we made the case here? Is it understood why employees are often reluctant to come forward and how a promise of confidentiality can be very helpful?

MR. GNAZZO: I think the case -- if I could just make one final point. The case needs

to be made that a corporation is not an identity that doesn't have many faces. Individuals management, individuals come and go. With 167,000 employees, attitudes change from time to time. Support for various things are going to change from time to ti Institutionalizing words like confidentiality and institutionalizing programs becomes the value in being able to route out these types of issues.

So today I can tell you that a corporation has all the right ingredients to want to do the right thing, but there are faces that may come into a corporation at any one point in time that are going to prevent that. Having these words and encouraging confidentiality and protecting confidentiality is something that these faces will not be able to destroy if we develop these kind of programs with confidentiality and the support of government.

MR. SWENSON: I guess I'll just throw into the record, there have been a couple of

studies done -- boy, several. I know The Ethics Resource Center has done a number over the years. KPMG did one a few years ago which tends to support what you found in your own company, which is that there is -- even with a company's best efforts, there's always sort of a residual number of people with fairly significant -- and you said 25 percent still didn't quite believe you meant confidential when you said it. I think there are even higher numbers on average in many companies of people who think they will be retaliated against if they come forward, and it isn't a function of the company being a bad company. It's that there is a certain amount of fear associated with coming forward period regardless of best efforts. What you're really saying here is that the best effort to encourage people to come forward would have to include some promise of confidentiality.

MR. GNAZZO: Well, as you said, when were you part of the KPMG study that talked in

terms of fear of retaliation it was something along the 60 or 70 percent range from a lot of individuals who were just asked these questions who worked for small companies or large companies. There was a large proportion of the population that doesn't trust management. It is not going to retaliate if people come forward. No matter how much we talk about it, no matter how much we emphasize it, and no matter how much we prove that we have not done something to impact, there is going to be a certain amount of skepticism. And any support for confidentiality would be helpful.

MR. BERRY: And I think the United States -- we wouldn't necessarily disagree with that, but you also understand that there are some instances where we can't promise confidentiality? Ultimately the testimony may be needed. The name may need to be revealed. While we agree with you that confidentiality is important to have people step forward to have your programs work, it's

just not something that from our position we can say and, therefore, it should be guaranteed.

MR. GNAZZO: I think if the decision is based on an absolute need, fine. If the decision is based on just trying to beat the company over the head, that's a different story. The only way we're going to ever separate that out is having policy statements that talk in terms of the value of confidential programs. Then we at least have set a standard that everyone is going to have to deviate from on those exceptions.

MR. LARSON: Now is there (inaudible) had lots and lots of calls coming in, but it has significantly prevented fraud and wasting fraud and abuse.

MR. GNAZZO: Absolutely.

MR. HOWARD: If I could just jump in here a little bit. As Pat said, I do knowing something about this, but one of the -- and I agree with everything that Pat has said, but one

of the things that makes this work is that you've kind of separated an information process and a counseling process for employees from the couple. The ombudsmen is independent, neutral, confidential, doesn't investigate, doesn't make any -- doesn't make policy, doesn't implement anything and so the function there really is one of filtering information, assisting the employees, giving them the comfort to come forward.

To the extent that the company -- that the issues come forward, maybe they come forward in a way that the company now knows that there's an issue but may not know who's doing. What Pat has described is that the company then does all of its work through the compliance the way it always has done, and that's -- that's what they're willing to share and provide. But at the ombuds confidential protection since it's nonoperational. It doesn't -- it's not part of management. The company has kind of separated

those two functions. And at least in that case and some others, it has worked fairly well simultaneously allowing people to feel comfortable coming forward handing off issues that allow the company to then take responsible action with them.

And (inaudible) his work in some ways, but by saying confidentiality is important, you give the company that much more leverage to essentially justify and support its promise of confidentiality.

MR. GNAZZO: But if I could just give you a quick example of the way something like this would operate, an individual is an administrative assistant to a high-level person in a corporation and is aware of something that that high-level person is doing and is the only person that is aware. So you've got two people that are committing. One person is committing the act and the other person is either an unwilling participant or a knowing individual,

and that individual goes to the ombuds person. The ombuds person is trained to have that person come back, call back in two weeks, call back in three weeks, comes to the business practice officer and says, "What are you going to do to help this person if they're able to tell you what's going on." And I may go in and talk to this individual anonymously over the phone when they call back and give them some kind of comfort that if they tell me that it's X division of the company and they tell me it's a vice president of that division and if they give me the circumstances that might have occurred, I can order an audit of every vice president's expense report, for example, for a six-month period of time in that particular division. And I guarantee you we have uncovered things based on that, and the individual has then been fired and the person who brought it to our attention I've never known their name. I've never needed to know their name, and I've never even gone back to

them to say, hey, you did a nice job. But they know what happened and they know how it happened and they know that their name never came forward.

We will go to those extremes to protect that individual's anonymity. All we would want to do is have people understand that if you do have a strong program, if you care about your program, if you care about protecting your corporation in the public entity, then we need support wherever we can get it. Understanding that there are exceptions to every rule.

MR. LARSON: Say somebody calls in and their conscience finally bothers them. They've been a party to an ongoing conspiracy. Then the question that comes then -- it's a hard question. Do we charge them?

MR. GNAZZO: Our policy clearly tells them that if they are a participant to an ongoing activity and they're involved and they've been involved, they're not immune. We tell them in

advance that they are not immune, that they don't get -- they don't get immunity just by coming forward.

MR. HOROWITZ: That was actually what my question was going to be. What do you tell them about confidentiality, immunity, and retaliation?

MR. GNAZZO: We tell them that if they had been a participant to the activity, they are not immune. They still have an obligation to come forward, but we're really concerned not so much with the individual who committed the act or the person who participated in the acts, but the individual on the sidelines who's watching the act occur, has not been participating in the act, knows that it's happening, has an obligation to come forward because we tell them that they have an obligation to come forward. Those are the individuals that we need to protect. It's not the individual who is participating because that individual is going to get caught up in the

investigation. That individual is going to be terminated, and if it's a criminal activity, that individual is going to be made known to the Justice Department, along with everyone else that participated. We're not going to be able to avoid that. And that's not that we're trying to avoid. We're trying to avoid the individual who's on the sidelines and fearful of coming forward.

MR. HOROWITZ: And I guess my question is I know what in my former life we had to do when you had someone coming off the street who was a witness and wanted to report something. You would tell them to go to whatever means necessary to protect their identity. Often times you would set up several layers between them and the sting you ultimately did so that there would be several layers of protection, but you also always tell them that you can't make a hundred percent guarantee. And that's what I'm trying to get from you is --

MR. GNAZZO: Right, but you need to understand the context for a corporation opposed to a Justice Department in giving immunity. In a context of a corporation, I have a bad actor who's going to be here next year and the year after that and the year after that. If I turn around and say I'm going to protect that bad actor because that actor was a participant but then came forward halfway through the activity as one bad actor along with ten others, I've still got that bad actor in my system. What does that say about that piece of the compliance -- the sentencing guidelines that says that I still have somebody in a position of authority when I knowingly know that that individual was doing something corrupt. So, I mean, I can't protect that individual because I'm not going to want that bad actor to stay in the company for periods of time beyond that.

MR. HOROWITZ: But I guess I want to go beyond that, beyond the immunity issue, to the

innocent person on the sidelines. What kind of representations does a company like yours that has this program in place -- what are you able to tell them? Is there some comfort level? That's what I'm wondering.

MR. GNAZZO: That's something you need -- that's something you need -- we tell -- we tell employees that if they go to the ombuds DIALOG process, we will guarantee immunity. We will guarantee confidentiality. Now we tell them if they come to me, I can't guarantee confidentiality. I'll try to do the investigation as best as I possibly can without naming them, but if they go to the ombudsman we will guarantee it. Now how do I guarantee it? I guarantee that the ombudsmen will never be shaken down by anybody in the company for that information, and I will guarantee it by hiring an outside counsel to protect the ombuds and the ombud's information in any litigation. That's the extent of my guarantee, and we tell our

employees that that's what we will do. So no management person can ask the ombuds – or they can ask, but they're never going to get the answer because the ombuds people and the DIALOG administrator -- and I have our ombuds person here, MR. Wratney. Do you feel protected by me?

MR. WRATNEY: Absolutely.

MR. GNAZZO: Feel free to speak. But my position -- my position is one that says I am supposed to protect the information that goes to the ombudsman, and I report to the audit committee, the board of directors, and they know that that's my function. So for a publicly-held company, my obligation is to protect that -- the ombuds and the DIALOG people. So far we've been able to do that.

MR. HOROWITZ: And I assume that's where the whistleblower protection comes in? Confidentiality leads to protection.

MR. GNAZZO: Yes.

MR. SWENSON: Anything else before we

move on? We can come back.

MR. LARSON: Just an anecdote to prove MR. Gnazzo's point that a lot of employees worry about this. My cab driver Tuesday night in the rain had just lost his job. Actually, the corporation has an office in Cedar Rapids, in fact, and so he says, "But I was a whistleblower and that's why they let me go." Although they had a big layoff and so I said, "Sarbanes-Oxley. Tell your lawyer Sarbanes-Oxley." When I got out of the cab -- and he was excited and almost drove off with my suitcase.

MR. SWENSON: Ken?

MR. JOHNSON: Yes. We can go from macro to micro. I am an independent consultant, and I'm representing a group called the Coalition for Ethics and Compliance Initiatives. A lot of folks in this room have been involved in it. It's a very loose organization. It will have a web site next week, I think. We have an interest in having effective ethics and compliance

programs. And the early, early topic that we hit on was this confidentiality issue. What I had to contribute here -- because I have nowhere near the experience that Pat and George have in terms of the practice, but I do have -- I can tell you what some of the objections we've run across in the field are.

George and I made a point of going and talking to as many people as possible to find out what the really bona fides were for this issue, including talking to voluntary disclosure program people, IG for DOG -- DOJ - or DOG -- DOD and organizations. We have not quite gotten the confidence to go with the trial lawyers yet, but I'll do this down the line. But what I want to do is bring a couple of things together here and say what -- I've made a note to myself. What we're hearing a lot is systemic ignorance. You heard it from Joe. You heard it a couple ways. I don't want to know. Don't tell me who you are or whatever else for all sorts of very good

policy tactical reasons. Most of it goes ultimately down to you gentlemen, that is that they will demand this information that will hurt.

Someone used this comment of, "No good deed goes unpunished." When I was a lieutenant in the Marine Corps in Vietnam, an old gunney said, "I don't mind dying, but I don't want to die stupid." And so you see a lot of this is the fear. It's that, well, look, I'm going to go and do the right thing and then I'm going to get popped and punished and people will say why on earth did you do that because you could have kept quiet. So what I think we're looking for in many ways is not the companies doing the right things but the context of which the Justice Department and the voluntary disclosure programs are apart that says, look, we really do want you to come forward and we'll do everything we can to make it so you don't look stupid when you do the right thing. Part of this has to do with this promise of confidentiality. It has to do with being able

to make an enforceable promise that I promise you that if you come give me information I will do the right thing with it and you won't be penalized for all sorts of reasons.

We talk about management retaliation that this -- the alleged -- the research also indicates they're afraid of peers, let alone management. So how do we promise that? So one thing that I would ask -- and I've got some real wrap up recommendations or suggestions at the end, but I think that in terms of commentary we need to look at the importance of the culture of the organization and the context in which the organization does business to decide if it's designed an effective program.

If you have a culture where everyone will speak up, then you don't need all these confidential mechanisms except to meet the requirements. If they don't, then you've got to find mechanisms to get them to speak up. In many ways that's a promise that says, look, you can

call and we'll do it anonymously, which is fine, but you don't get all the information you want if you do it anonymously. So the next step then is confidentiality.

In my practice I've evaluated ethics programs for companies that are in trouble with a number of agencies, including the Air Force voluntary disclosure program. When I go in and do interviews in focus groups, I have to sit them down and say, now, your organization has promised confidentiality. Oh, okay, good. So you can talk to me. However, I have to tell you that I have to give a whole long litany of all the things that could go wrong. By the time I do that, the list over what could go wrong far outweighs the promise of confidentiality. And I have no idea what knowledge I didn't get that wasn't passed in my report to the Air Force that used them to make a decision regarding their program. And so it's an -- it's a knowledge issue, and we need to do what we can to do that.

That, of course, is where these privileges come in.

There's a strong bias against privilege. There's no question about that. We want all this information to come forward. But, on the other hand, there are any number of areas, privileges, like relationships that are protected. There is the Wigmore test and all this sort of thing. But there's also things like the repairing -- you know, the damage remedial repair sort of thing where the best proof going is that somebody repaired the step that was broken and we say, no, you can't use that. Well, why? Because we'd rather get it repaired than have that little bit of evidence that makes the prosecution easier.

So I have many more comments to make, but I think we've touched on it. The key to what I think here is that -- and I was a litigator many, many years ago in a former life, and I would have to say that if I were making my living

in the plaintiff's bar, I would rather give up not knowing who came forward with the information that led to the organization to report the misconduct that I now found about and I can sue on than to keep it such that I desperately want to know who brought that forward and then they don't. So I never even knew it happened. So it seems to be on balance from a public policy perspective; we're much better served if we can say, look, just this little bit of information, who was it that came forward and reported the misconduct. We'll -- it's off the table. We won't even worry about that. We'd rather encourage people to come forward. And I think that can be an absolute privilege. I think as a prosecutor that I was one time. I think I -- and I'm not any longer, but I think I probably would sign onto that.

Now what it requires, of course, is good faith on the part of the company that will actually do things with the information. And in

that sense, that's where you get into having an effective program of which this confidentiality is but a part - a contextual thing that makes it possible. And if they don't have an effective program, then there's no privilege. The only thing that Pat is concerned about is not so much keeping information down. He's concerned about having his program be effective and they won't come forward. So if he didn't have an effective program, then he's lost nothing. So the idea is have an effective program of which this contextual thing helps, and let public policy say, fine, just like that broken step, we'll let that go. You got to do it in good faith. They come forward and make the information. We won't inquire as to who it was that brought it forward.

Now what happens if you can't prove it? I mean, let's take the acid cat test and say, you know, maybe we could have proved it if we had just known that little bit of information. You know, we've learned a huge amount. First

off, somebody in the system, because it came confidentially, knows that it happened and knows who brought it forward. Now you can't retaliate against them, but that doesn't mean that you can't fix the problem. It also doesn't mean that if you find out that, my God, you can't -- you know this happened because U.T.C., to give an example, Pat's closest reported it but you can't prove it criminally, then you know that you've got major problems in terms of all the systems and everything. Even if assuming you've got an effective program. But assuming you don't, you now know that your standards are not -- let's go through them. You know your standards are not adequate, right? You know your auditing monitoring is not adequate. You know that the training for this kind of thing is not adequate. So even from a social policy there, you've learned so much more.

Now I grant you it could be a horrendously horrible criminal case and this kind

of thing and it would make it more difficult. But on balance, I think that to preserve this ability to prosecute -- and I'm trying to say easy and that's really not it. The ability to have that little bit of information that actually kicks this notion forward, I think is -- I think is -- I think it's short-sided. I think it really is the case of saying, look, if you can show you have a bona fide company and we now know there's -- there's a tremendous book on whistleblowers by Mark Alfred at the University of Maryland that is a horrifying story. It's just -- he talks about the exposure -- the experience of whistleblowers as being like being on another planet. They're so isolated (inaudible). I think we can support them, those individuals and organizations, by saying, look, we will let people come forward with a promise of confidentiality provided the organization demonstrates it does -- it uses it well. Society will be better preserved by preventing or earlier

curing these problems than they will be in the punishment. And what happens is with the knowledge that they voluntarily brought the information forward but you can't make the case probably means they don't have an effective program, and it also means that there are major things that have to be changed. There's a lot of benefit to that, both from a management perspective and, I think, from a public policy perspective.

I think what I would suggest in terms of approaches for the advice we give to the Commission is that in your commentary you do make an expressed note that these programs are dependent upon the culture of the organization and its context of which a privilege is a key aspect because if there is a privilege then one can promise confidentiality. If not, then they can't, which means their whole -- the number five, step five, their auditing and monitoring processes has to be more auditing and monitoring

than the confidential reporting. So it's a fact that needs to be taken into account just like the size of the organization.

I think it would be very helpful to Pat's note that the Commission would note in commentary that there are salutary effects of privilege, that some anecdotal experience or research does indicate that a privilege would help. I think -- I think this is probably going too far, but it did seem to me that some of legislation -- the authorizing legislation talks about outreach. Perhaps even a call for judicial legislative privilege would be appropriate or at least further study. It certainly is the case -- and George may remember this is that we met with some of the IGs with the DOD. I think Dick Bednar set us up to talk to them. One of them said, well, how do we even know that more people will speak up if there is a promise of confidentiality. I think that's an area that needs to be researched. I think it's something

that the Ethics Resource Center or what somebody ought to do is find out would a promise of confidentiality really bring more people forward.

MR. SWENSON: Ken, is that -- just to interrupt for a second.

MR. JOHNSON: Yes, go ahead.

MR. SWENSON: Is that your position that before we arrive at the right policy that there ought to be more research on that question? I mean, you're putting it forward and certainly had argued very strenuously in favor of it. But this is not something we need to speculate about, but, in fact, a promise of confidentiality does encourage people to come forward. Is it your position that we really don't know?

MR. JOHNSON: I think it would be very helpful particularly to people that really have the obligation of prosecuting cases to see that there's research indicating yes, there is that -- it's a tough thing to do. Now there's a lot of

-- intuitively it makes sense, and I think that we're certainly getting anecdotal experience and probably we could pull together stuff to look at. I'm just not aware of any studies that we could point to that says yes, you have that --

MR. SWENSON: It's sort of inferential from some of the surveys that have (inaudible)?

MR. GOLDSMITH: In terms of studies, during my experience with the Commission our staff was just terrific in engaging all kinds of sophisticated research and issued so-called staff studied reports on their good issues. This might be an appropriate one for the staff to examine in detail. They could interview practitioners, people from the Justice Department, various principals of companies, employees, et cetera. The Commission has the resources to do that. And what I like about that is it would then produce a report that, in turn, could be cited in the courts to make the kind of case that you're trying to make and document the need for this in

the public good argument for all of that.

Short of a staff study -- which I think is eminently doable, and I really would hope that the Commission could do that. If the Commission conducts a hearing in which they receive testimony comparable to what they heard today and that testimony, in turn, is published, then that would generate hearings that could be cited during the course of court proceedings that, I think, would also be helpful.

MR. HOROWITZ: In terms of the self-evaluative privilege and what it would mean, confidentiality is one aspect of it to encourage people to report. We had talked earlier, and I'm just going back to the use immunity discussion which flows out (inaudible) to this notion creating a privilege. And my question in that area is, are you familiar with any studies or any surveys that show that having such immunity -- well, let me back up.

In -- and maybe this first question is

for Pat, which is that a public or regulated company really has an obligation to do the evaluation, privilege or no privilege. You've got to do it and you've got to self-disclose if you find something. So we're putting -- we probably should put, unless anyone disagrees, regulated companies to the side because they have a whole different set of issues that they have to deal with. They have to go forward if they think there was wrongdoing in the company. So now we're talking about unregulated companies. And is there any evidence to suggest that those companies are when they -- when high level officials or even ethics or compliance officers who aren't sufficiently (inaudible) learn that there may have been wrongdoing, that they are making a decision not to evaluate or not to investigate because of the consequences that come forward with that? Because that to me -- it seems to me to be an important question for people who want to see an evaluative privilege or

actually more (inaudible) an immunity provision put in place.

MR. JOHNSON: One thing that strikes me, and I guess I wish I had asked Joe this question, now is if you look at a self-evaluative privilege because an incidence has arisen is kind of one issue. What I'm in favor of and in earlier bid I submitted, I recommend an eighth step to the sentencing guidelines. I think the guidelines are wonderful pretty much as written with some minor tweaking. I would add an eighth one that says that you need to demonstrate that you've evaluated your program for effectiveness on a regular basis. It's very similar to what Lynn Sharp Paine said that in the corporate America it's unusual that one has programs that one doesn't evaluate to see if it's effective and that is not to be found in those seven steps, as I think someone else said.

If you added that into it, it's not that that would be a complete answer to you but

it would be close because it wouldn't be an episodic self-evaluation. It would be that this is what we regularly do and if we don't regularly determine we have an effective program with metrics and criteria, then we don't have an effective program. And so I think that's the distinction between an episodic self-evaluation, which I would be suspicious of frankly, and one that's a regular basis of doing business, which I would support wholeheartedly.

MR. SWENSON: I think we do have on the record from Lynn -- I'd have to go back and check. But I think she voiced the view that she thinks there is not very much evaluation going on. You're saying --

MR. JOHNSON: Yeah, it's very much --

UNIDENTIFIED SPEAKER: She said that in her written comments (inaudible).

MR. JOHNSON: Right, and besides that that's my experience as well. It's -- it's really true even if you notice at the conference

on evaluation last week and even GPRA, the Government Performance Results Act, which requires evaluations not evaluate, so evaluation is a scary, scary thing to do. But if you make it a management practice, then I think you can support the self-evaluative privilege. I wouldn't be in favor of doing it if it's not a practice.

MR. SWENSON: And it's not -- I think the idea is not simply that, you know, okay we've heard about something, do we investigate or not. I think that's different.

MR. JOHNSON: It's different.

MR. GNAZZO: The DID companies have been doing evaluations. As part of DID one of the issues is do you -- that we have to evaluate it ourselves on a yearly basis, and we do that both externally and internally. We've used outside auditors and we've used inside auditors to evaluate every aspect of the program, and then we submit that.

MR. SWENSON: And I think -- well, as I said, I think what Lynn is saying and I think what Joe said in terms of what he called substantive audits, he said there's a fair amount -- maybe there's some process letter. I mean, did we distribute our -- did we actually train people that we said we were going to train, but there's not a lot of substantive auditing. You know, are we -- are people actually following the laws they're supposed to follow? And Lynn I think was saying there's not a lot of evaluation.

I want to just go ahead for a second go back to something that Joe said at the outset because self-evaluative privilege is even narrower, I think, than what Joe was proposing. It seems that, for example, that there are all sorts of other kinds of client's activities that's healthy, beneficial, that are kind of kept under raps because of a fear of disclosure. You know, telling people at training to don't take notes, not publicizing cases on discipline, not

widely sharing -- well, this is sort of an evaluation issue, but not sharing the board's audit reports because you're keeping to a very few and perhaps under attorney-client. Don't prepare a list of dos and don'ts. As Joe said (inaudible), so I think the issue is --

MR. GNAZZO: I violate all of those.

MR. SWENSON: And some companies do, but I think, Pat, your -- let me just try and put your hat on as an Ethics Officer Association director. Are you aware that some of the member companies are more skittishness about issues that have been admitted?

MR. GNAZZO: Sure, absolutely. But, again, you have to go back to the argument of what's the whole intent here. I mean, I'm going to put dos and don'ts on a web site for antitrust because I'm trying to prevent. If somebody wants to use those dos and don'ts against me then -- I'm a big company. I can protect myself to a large extent, and I have a lot of people that get

involved in those dos and don'ts. I've got a lot of talent coming up with those dos and don'ts, so I feel very good about putting dos and don'ts up. But if I -- if I get sued based on it, then I get sued based on it. But I am hopefully preventing things from occurring, so I'm not going to stop doing dos and don'ts.

I don't publicize public hangings. I mean, we discipline people, and then when we want to go out and we want to train people, we use scenarios. Now the scenarios may look like what actually happened, but I don't go out and say that Joe or Mary did X. I will use false names and I will use false companies and false divisions, but I will do training based on that. I have to train. I have 190 ethics officers around the world. I have to train them. The best way to train them is to give them scenarios, give them examples of things that have happened and how to investigate it. So I can't stop doing that, even though Joe -- Joe is right. You make

yourself open, and that's the point I was trying to make with respect to the road map.

MR. BERRY: I need to leave, but I wanted to make one comment in response to Mr. Johnson's comments. I don't think probably the Department of Justice would disagree that -- in fact, I'm certain they wouldn't. That it's very important to encourage compliance programs. But to give a blanket confidentiality promise would raise that to the level of a (inaudible) privilege or a medical privilege or the attorney-client privilege and so I would -- I would think that probably it doesn't rise to that level, the importance of that kind of a confidentiality.

MR. JOHNSON: I appreciate that, and I anticipate that. I think the thing to -- where this resurfaces kind of thing gets into is that I think it may well in some ways. In other words, the amount of knowledge of things that are broken in organizations, the amount that actually gets

out is certainly a small amount. I think with a little bit of privilege that would say come forward and we'll keep it -- I think the amount of information can more than outweigh it.

MR. BERRY: Well, that may well be, but I think Mr. Horowitz is correct that we would, you know -- someone needs to look at it then and develop some numbers somehow, and I'm not even sure how. But just without something to hang the hat on, it would seem that it wasn't the time yet for that.

I thank you very much, and I enjoyed speaking with you.

MR. SWENSON: Thank you for being here. I would say I think this is -- whatever the outcome of this is, whatever the next steps the Advisory Group might take, will be a next step and not probably a leap and a bound. These are pretty complicated questions. Thanks for being here.

MR. GNAZZO: Do you have any other

questions of me because I --

MR. SWENSON: You need to go too?

MR. GNAZZO: I have to catch a flight.

MR. SWENSON: Chuck, do have anything else?

MR. LARSON: I was just going to say that, Patrick, maybe if he's the head of the association, maybe a panel -- one of your annual meetings of panel U.S. attorneys, it would be helpful.

MR. GNAZZO: I would love to.

MR. LARSON: Because we do work with confidentiality and it's life and death with big time drug dealers on a regular basis. People are beat up, we've got people higher. Wood chippers are going to come down killing Mormons, so we view it as a serious business and they would want to work with any informants. We like informants.

MR. HOROWITZ: I was actually going to jump in on those points and just say that we talk about continuum of issues, and we probably have

the least difficulty convincing people of the importance of confidentiality. Probably the toughest case you have to make is for privilege because, as you said, a lot doesn't favor privilege. You were talking at the start -- you start off with some big issues which was immunity which is obviously a very significant privilege in how far you go there. So I do think there is serious question on gathering data on more significant proposals of the Privilege Act. Although, frankly, it sounded like from what most of what Pat says, you're more on the confidentiality, far away from the privilege issue.

MR. GNAZZO: Just remember from a government contractor's perspective, we've been living under a qui tam situation for many, many years. Yet, you know, if you look at most of the qui tam cases, many of them -- 90 percent of them the Justice Department walks away from. We have strong programs where employees feel comfortable

about bringing things to the attention of management, but we live under this world of employees going outside the company and filing lawsuits at any time, and we still keep our programs going for that -- for the very reason that we're still trying to prevent this activity from occurring, illegal activity from occurring. So we're accustomed to qui tams and we still have strong programs and we encourage our employees to come forward. They come to us because they believe in the company rather than going out to the Justice Department or filing a lawsuit. So knowing that we live with these qui tams, we still get good results from employees because we do everything we can to maintain confidentiality for them.

MR. SWENSON: You have to go. Before we lost Joe, and there's no rule that says we can't adjourn a little bit early. Does anybody else want to add anything, ask anything of those who are remaining?

UNIDENTIFIED SPEAKER: Do you want to ask?

UNIDENTIFIED SPEAKER: No, I was just going to say thank you.

MR. SWENSON: Thank you. Then why don't we stand adjourned. Thanks to everybody. Everybody, thanks for being here.

(Breakout Session adjourned 3:51 p.m.)