FROM THE CHAIR

by Elizabeth S. Stong

On behalf of the Business and Corporate Litigation Committee, I invite you to attend our Fall Meeting at Le Parker Meridien Hotel, at 118 West 57th Street (between Sixth and Seventh Avenues) on November 29 and 30, 2001, in New York City. We will present two exceptional programs, including mock oral arguments before five judges of the Delaware Chancery and Supreme Courts and a report on ethics for business lawyers, as well as an update on developments in bankruptcy. We will also enjoy a reception hosted by Willkie Farr & Gallagher and a splendid wine-tasting dinner. This is an extraordinary time for our profession and New York City, and we hope you will make a special effort to attend.

The Reception and Dinner

Our opening event, on November 29 from 6:00 to 8:00 PM, is a reception hosted by Willkie Farr & Gallagher, at 787 Seventh Avenue (at 51st Street). The reception is followed by our Committee dinner at Michael’s, 24 West 55th Street (between Fifth and Sixth Avenues), just a few blocks from the Parker Meridien, starting at 8:15 PM. One reviewer has described Michael’s as an “airy, art-filled ... Midtown Californian“ with a “mouthwatering menu.” Locals simply describe it as terrific. We will enjoy a gourmet wine tasting menu (with selections for appetizer, main course, and dessert) with special wines paired with each course.
The Programs

What’s a Board To Do?
Reviewing the Standard of Review under Delaware Corporation Law (3.0 MCLE hours requested)

Six current or former members of the Delaware Judiciary and distinguished corporate practitioners will explore some of the cutting issues in Delaware corporate law today, including the current debate surrounding judicial standards of review of the actions of corporate boards of directors. Former Delaware Chancellor William T. Allen will serve as our moderator. The program will kick off with a mock oral argument before Vice Chancellor Leo E. Strine, Jr. and will pit Jay Kasner of Skadden Arps Slate Meagher & Flom LLP against Paul Rowe of Wachtell, Lipton, Rosen & Katz, who will argue their clients' respective positions on the appropriate standard of review and the validity of certain deal protection mechanisms in a hypothetical takeover situation. The scene will then shift to the Supreme Court of Delaware, where Chief Justice Norman Veasey and Justice Myron T. Steele will be joined by Vice Chancellor Jack B. Jacobs. This Supreme Court panel will hear argument in the context of an expedited appeal from a Court of Chancery decision ordering the board of directors of the target corporation to redeem its rights plan.

Finally, Rob Spatt, Faiza Saeed, Betsy McGeever and Stuart Grant will debate the pros and cons of applying the business judgment rule when a self-interested merger has been approved by an informed and uncoerced majority of the minority vote or by an effective and uncoerced special committee of independent directors. Justice Randy J. Holland and former Chancellor Allen will comment on the debate.

Ethics for Breakfast: An Update on Hot Topics for Business Lawyers (2.0 Ethics MCLE hours requested)

Developments in the area of ethics raise questions for business lawyers including where, how, and with whom they can practice, and even whether they can count on being paid. Major changes in the ethics rules governing conflicts of interest, fee and retainer agreements, and other fundamental aspects of the lawyer-client relationship, are under consideration. Special issues arise for in-house lawyers, for employment lawyers, and for lawyers who work across state and national borders.

These and other issues will be addressed by our panel, including speakers Frank Blue, Daniel J. McAuliffe, Charles McCallum, Rosanne Model, and Pearl Zuchlewski, among others; and moderators: Heidi Staudenmaier and Andrew Halaby. This program will help you fulfill your ethics CLE requirements and, more importantly, provide valuable and current information on hot topics in the ethics arena.

Early Bird Update on Bankruptcy Developments

Our Bankruptcy Litigation Subcommittee will present a special informal pre-meeting discussion on developments in bankruptcy, including the record bankruptcy filing numbers, prospects for bankruptcy legislation, turmoil in the courts over venue issues, and related subjects. Led by William Zewadski of Trenam Kemper Scharf Barkin Frye O'Neill & Mullis of Tampa, this discussion will also consider the indicators for a long or short recovery, with highlights for particular business segments.

If you have attended this meeting before, you know that it is an outstanding event. If you have not, it is a terrific way to become active and involved with our Committee. So register today! We look forward to seeing you in New York City.
## ABA Business and Corporate Litigation Committee
### Fall Meeting
#### November 29-30, 2001
#### Schedule of Events

### November 29, 2000 – Reception and Dinner

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>6:00 PM</td>
<td>Committee Reception</td>
<td>Willkie Farr &amp; Gallagher</td>
</tr>
<tr>
<td></td>
<td></td>
<td>787 Seventh Avenue</td>
</tr>
<tr>
<td></td>
<td></td>
<td>New York, New York</td>
</tr>
<tr>
<td>8:15 PM</td>
<td>Committee Dinner</td>
<td>Michael's</td>
</tr>
<tr>
<td></td>
<td></td>
<td>24 West 55th Street</td>
</tr>
<tr>
<td></td>
<td></td>
<td>New York, New York</td>
</tr>
</tbody>
</table>

### November 30, 2001 – Registration and Meeting

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>7:30 AM</td>
<td>Registration and Breakfast</td>
<td>Le Parker Meridien Hotel</td>
</tr>
<tr>
<td></td>
<td></td>
<td>118 West 57th Street</td>
</tr>
<tr>
<td></td>
<td></td>
<td>New York, New York</td>
</tr>
<tr>
<td>7:45 AM</td>
<td>Early Bird Update on Bankruptcy Developments</td>
<td></td>
</tr>
<tr>
<td>8:00 AM</td>
<td>Program: Ethics for Breakfast – An Update on Hot Topics for Business Litigators</td>
<td></td>
</tr>
<tr>
<td>9:45 AM</td>
<td>Break</td>
<td></td>
</tr>
<tr>
<td>10:00 AM</td>
<td>Program: What’s a Board To Do? Reviewing the Standard of Review under Delaware Corporation Law</td>
<td></td>
</tr>
</tbody>
</table>

### Administrative Information – Fall Meeting

**Continuing Legal Education** – Continuing legal education accreditation has been requested for the programs from every state with mandatory continuing legal education requirements for lawyers. Please be aware that each state has its own rules and regulations, including its own definition of “CLE”. Attorneys seeking Pennsylvania MCLE credit must pay state accreditation fees directly to the Pennsylvania CLE Board. Written materials will be distributed at the meeting.

**Meeting Registration** – To register for the meeting, submit the enclosed meeting registration form and check for $165.00 to the ABA Section of Business Law as promptly as possible. Due to space limitations, on-site registration may be limited.

**Willkie Farr & Gallagher Reception** – To attend the reception, which is hosted by Willkie Farr & Gallagher, please RSVP indicating whether you will be accompanied by a spouse or guest to Katherine Szot at kszot@willkie.com or (212) 728-8486.

**Committee Dinner** – To register for the Committee dinner, submit the enclosed dinner registration form and check for $110.00 to Linda Daly at Paul Weiss Rifkind Wharton & Garrison as promptly as possible. Spouses and guests are welcome to attend. Please direct questions concerning the dinner to Linda Daly, ldaly@paulweiss.com, or (212) 373-3576.
**Hotel Reservations** – Arrangements have been made with Le Parker Meridien Hotel for a limited number of rooms for the evenings of Thursday and Friday, November 29 and 30, at a special rate of $290 per night. Reservations may be made by calling the hotel directly at (212) 245-5000 and requesting the “ABA Business Law Section Group” rate. **Please make your reservations early to avoid disappointment!**

---

**A personal note from the Chair on the events of September 11, 2001**

As many of you know, our Committee was in contact by e-mail shortly after the World Trade Center and Pentagon attacks on September 11, 2001. Many of our members live and work in New York and Washington, D.C.; and all of our members undoubtedly have contact with those legal and business communities. Speaking for myself, the outpouring of expressions of concern and support in those early days after the attacks, and the ongoing support from lawyers around the country and around the world, has been very moving. For those who do not receive e-mail, I have noted below the message that I sent that week, as well as one of the many responses that I received from around the world.

* * *

To the Committee: As this week of unimaginably horrible events draws to a close, I want to express my hope that all of you are well, and to pass along my thoughts and prayers for you knowing that no-one in the law, in New York City, or indeed anywhere in the world, is unaffected by this tragedy. To those who have lost loved ones or friends, I send heartfelt sympathy and condolences, prayers and tears. While so many people feel helpless now, I am certain that our profession will have many opportunities to respond to this situation in the weeks and months to come. Please be assured that all of our scheduled events, including our November 29 and 30 committee dinner and meeting in New York will continue as planned.

---

**On a personal note, I want to thank so many of you who have been in contact to ask about me and my family. Fortunately, my husband John, who works two blocks from the WTC, telecommutes from home on Tuesdays. Knowing he was at home with our baby girl was a great comfort on a long and difficult day.**

Response from a member: I am a Mexican lawyer, associate member of ABA and member of the Committee. This is the first time I mail you, unfortunately to present through you my condolence to all the colleagues who have lost a loved one and of course to the American people. We, the humanity, must fight violence, only work and law may redeem society’s problems, not violence. All the best wishes ever to you American colleagues. Jorge Vargas Morgado.

---

**FEATURE ARTICLES**

**JOINT DEFENSE AGREEMENTS IN CRIMINAL CASES**

by Martin Klotz

In any multi-defendant criminal case -- or in any criminal investigation involving multiple parties -- you are likely to consider the desirability of entering into a joint defense agreement with one or more other parties. A joint defense agreement allows all parties to it to share information that is protected by the attorney-client or work product privilege without having this disclosure constitute a waiver of privilege. Obviously, a joint defense agreement is a powerful tool that allows an actual or prospective defendant to have access to information that would otherwise be withheld because of concerns about privilege waiver. At the same time, there are significant potential disadvantages to entering into a joint defense agreement, especially for counsel representing a corporate client. In a breaking criminal investigation, under intense pressure to learn the facts and properly advise the client, defense counsel’s decision whether
or not to enter into a joint defense agreement is one of the earliest and most important decisions to be made. Making the wrong decision can be a costly mistake.

United States v. Henke, 222 F.3rd 633 (9th Cir. 2000) notwithstanding, the better view, and the one usually adopted by courts, is that a joint defense agreement does not create a new privilege, much less a new attorney-client relationship running between each attorney and each client in the joint defense group. Instead, the joint defense “privilege” is simply an exception to the doctrine that the voluntary disclosure of otherwise privileged information to an unaffiliated or even potentially adverse party constitutes a waiver of the privilege. A joint defense agreement allows the parties to it to share information without waiving claims of privilege in the event that the government, or another adverse party, seeks to compel disclosure of the information.

While each situation is different and may call for unique special provisions, the main provisions of a joint defense agreement are standard. Indeed, although the practice is not recommended, defense attorneys often enter into joint defense agreements orally, confident that all parties to the agreement understand its basic terms. A typical joint defense agreement provides that each party to it is free to disclose privileged and confidential information to the other party or parties but is not obligated to do so. Each party is free to pick and choose what confidential information to disclose and each recipient of confidential information should understand that they have not been promised the whole truth.

The key provision to a joint defense agreement is each party’s undertaking not to disclose another party’s confidential information outside the joint defense group without the consent of the disclosing party. (Of course, each party remains free to disclose its own confidential information to whomever it likes.) A joint defense agreement should require each party to notify a disclosing party if anyone (usually the government) seeks to compel disclosure of the confidential information. That way, each party has the opportunity to defend its own confidential information and is not limited to relying on the best efforts of the member from whom the information is sought.

While each party is prohibited from disclosing another party’s confidential information without that party’s consent, each party should nonetheless be free to use confidential information to develop its own independent evidence. A provision expressly recognizing this right is standard.

Joint defense agreement usually recite that they are intended to be retroactive. This is because, in the heat of an investigation, parties who agree to exchange information often need to do so quickly, before an agreement can be reduced to writing.

In any joint defense agreement, the possibility always exists that one or more parties will develop interests adverse to the others, either because they have decided to cooperate with the government and provide information voluntarily or because the government has elected to compel their testimony through a grant of immunity. Typically, a joint defense agreement provides that the party who has developed an adverse interest must notify the other parties and withdraw from the joint defense agreement. The withdrawing party remains bound not to disclose confidential information obtained while it was a party to the agreement. It is common to require a withdrawing party to return all confidential written materials.

A joint defense agreement should provide an exception to the prohibition against disclosure of confidential information obtained pursuant to the agreement. The exception allows any party to use confidential information to examine or cross-examine any party who testifies at trial, whether or not the testifying party remains party to the agreement or has withdrawn. This allows each attorney to avoid the untenable position of being prohibited at trial from using evidence helpful to his client’s defense. The inclusion of such a provision, together with a further provision in which each party acknowledges that the agreement does not create an attorney-client relationship between itself and any other party’s attorney, should solve the Henke problem, which arose when the Ninth Circuit held that attorneys for defendants proceeding to trial did have an attorney-
client relationship with a former joint defense group member who had become a cooperating witness, were prohibited from using confidential information to cross-examine the witness, and consequently had a conflict of interest requiring their disqualification.

Courts generally will enforce a joint defense agreement even if it has not been reduced to writing. This is a comfort to the practitioner who is forced to act quickly and does not have time to prepare a written agreement. On the other hand, putting the agreement in writing once time allows is good practice because it avoids disputes over some of the finer terms of the agreement.

When do you need a joint defense agreement and when is it best avoided? The advantage of a joint defense agreement is that it gives you access to information that you would not otherwise have, allowing you to assess better and more quickly your client’s criminal and civil exposure. The disadvantage is that you are prohibited from disclosing this information to others, especially the government, which is likely to insist on complete disclosure as evidence of cooperation. The tension between these two considerations is particularly acute for a corporate client.

In general, the government looks on joint defense agreements with disfavor, especially agreements between corporate clients and their employees. If the government is investigating possible criminal conduct by a corporate employee, it is likely to view a joint defense agreement between the company and the employee as an effort by the company to protect a wrongdoer and prevent the government from learning the truth. Such a perception can have serious consequences for the course of the investigation, affecting everything from the scope of the investigation to others, especially the government, which is likely to insist on complete disclosure as evidence of cooperation. The tension between these two considerations is particularly acute for a corporate client.

For these reasons, if you represent a company, one or more employees of which is under criminal investigation, it is important to decide quickly whether a joint defense agreement with the employee(s) is a good idea or not. This generally requires answering two questions. At the end of the day, are you likely to find yourself standing behind the employee’s conduct? And what resources short of a joint defense agreement do you have for getting sufficient facts to answer the first question?

If your employee’s conduct is not defensible, then a joint defense agreement is plainly a bad idea. Your corporate client is best served by giving the government the full cooperation it expects and, undoubtedly, will insist on. A joint defense agreement will likely only be appropriate if you have concluded that the government is misguided and that the company should defend the case to the end. In this case, usually rare, the company needs a joint defense agreement to protect its own interest.

But how do you learn the facts you need in order to make this judgment without offering the employees you need to interview the protection of a joint defense agreement? While the employees’ attorneys will undoubtedly ask that any interviews be conducted pursuant to a joint defense agreement, few are in a position to demand this protection. The company certainly has the right to demand, on pain, if necessary, of termination of employment, the full cooperation of all employees with the company’s investigation. For this reason, it is likely to get the information it needs without entering into an agreement likely to anger the government. And the employee who accepts termination rather than cooperate without the protection of a joint defense agreement has probably told you what you need to know about whether, at the end of the day, you will wind up standing behind his or her conduct.

The more difficult case is where the employee cannot be terminated because of his or her position with the company and, at the same time, has unique information about the conduct under
investigation. In this circumstance you may have no alternative but to agree to a joint defense agreement in order to learn the relevant facts. If you do, however, you act at your peril.

Martin Klotz is an attorney with Willkie Farr & Gallagher. This article is a summary of remarks made at a panel presentation entitled "The Promises and Perils of Joint Defense Agreements" given at the ABA Annual Meeting in Chicago.

I. Introduction

There is a common generalization about the government's view of joint defense agreements, and the view is that the government "hates them". In our view, there is no simple per se rule that can fairly be used to describe the government's opinion of joint defense agreements, or more narrowly, a Federal agency's opinion of joint defense agreements. Instead, each joint defense agreement must be assessed in the light of the facts that caused the parties to join together. This does not mean that the law is altogether unpredictable in this area, however. There are certain general principles that may be applied to each special set of circumstances. In some situations, the government may well draw certain adverse inferences about the parties from their having entered into the joint defense agreement. In still other situations, the government may reach for the legal principles underlying the joint defense concept to facilitate the sharing between the supervised and the supervisor of attorney/client or work product material. In this note, we will elaborate on those general principles.

One issue facing supervised corporations is whether they can maintain their attorney-client and work-product privileges against third parties if they share privileged material created or developed by their counsel with a supervisory agency. Consider a situation where a bank supervisor might be interested in a bank's handling of the legal risk associated with a new product, or perhaps a major transaction. To assess whether the bank adequately assessed its legal risk, the supervisor will need to analyze, using its own legal experts, the same material that the bank's management analyzed. This may involve a review of advice from the bank's attorneys to management, and it may also involve a review of work product materials, like legal due diligence. Another common situation occurs when there is a significant event, and independent counsel is brought into the bank, by bank management, to conduct a review.

There is conflict in the case law as to whether a limited waiver applies to the disclosure of attorney/client and work product material to the supervisor. Supervisors like the Federal Reserve have sought to address this issue by entering into agreements that rely on the "common legal interest" doctrine to permit the corporation to disclose information that is protected by the attorney-client and work-product privileges without the disclosure working a waiver. These agreements are especially appropriate in situations where there is a substantial risk of civil litigation by third parties against the bank, and the supervisor does not want its supervisory conduct to destroy a legal privilege that might otherwise exist. In this respect, the agreement can be seen as maintaining the status quo; "but for" the non-waiver agreement, the third party litigant would be the inadvertent beneficiary of the bank lawyer's advice or work product. Bank management understandably will argue that it should not be penalized because its supervisor was thorough in performing a supervisory function.

Another complicated situation occurs where employees are targets of a supervisor's investigation. Here, a corporation's refusal to enter into a common legal interest agreement can be perceived by the supervisor as an indication of the corporation's involvement in, or prior knowledge of, the employees' unlawful conduct. This perception is likely to be enhanced if a corporation decides to enter into a joint defense agreement with its targeted employees,
especially because that decision may preclude future cooperation between the corporation and its supervisor in connection with the investigation. This, in turn, can have serious consequences for the corporation, including the risk of sanctions against the corporation itself and not just the targeted employees.

While there are those who would argue that the pressure on corporations to cooperate with the government is sounding a death knell for traditional concepts of corporate privilege, the use of common legal interest agreements in the appropriate situations can serve as a tool to keep the corporate privileges alive.

II. Voluntary Disclosure to Supervisors: Does it Waive Privilege?

The basic concepts of the attorney-client and work-product privileges are well grounded in United States jurisprudence. The attorney-client privilege is premised on the idea that society is best served when a client is able to openly communicate with an attorney who will then be able to provide fully informed legal advice. United States v. Fisher, 425 U.S. 391, 403 (1976). The attorney work product doctrine is founded on the simple notion that, in an adversary system, an attorney should not be required to share his work with his client's adversary. Hickman v. Taylor, 329 U.S. 495, 510 (1947).

Because the assertion of a privilege has the ability to limit the fact finding process and the search for truth, privileges are narrowly construed by the courts. See, e.g., University of Pennsylvania v. EEOC, 493 U.S. 182 (1990); Trammel v. United States, 445 U.S. 40 (1980). Voluntary disclosure to a third party of purportedly privileged communications has long been considered inconsistent with the assertion of privilege. See United States v. Rockwell Int'l, 897 F.2d 1255, 1265 (3d Cir. 1990). The waiver doctrine states that when a client voluntarily discloses privileged communications to a third party, the privilege is waived. See 8 Charles Wright & Arthur Miller, Federal Practice and Procedure 2016, at 127 n.71 (1969). Once a party allows an adversary to share otherwise privileged information, the privilege disappears and is considered waived as to other parties. United States v. Nobles, 422 U.S. 225, 239 (1975).

Thus, in In re Penn Central Commercial Paper Litigation, the United States District Court for the Southern District of New York rejected the argument that voluntary disclosure to the government in the course of an investigation could give rise to a limited waiver. 61 F.R.D. 453 (S.D.N.Y. 1973). The court reasoned that, although a witness might be less likely to cooperate with a government agency if such cooperation effected a waiver of privilege, this factor alone failed to justify departing from the well-established traditional waiver rule. Id. at 464.

Four years later, however, in Diversified Industries v. Meredith, the Eighth Circuit held that Diversified's voluntary disclosure to the SEC resulted only in a limited waiver of privilege for purposes of the SEC investigation, not for purposes of subsequent litigation. 572 F.2d 596, 611 (8th Cir. 1977). The Diversified Court expressed the view that the policy of upholding the effectiveness of the SEC's Disclosure Program outweighed third parties' interests in subsequent discovery. The Court did not want the law to discourage corporations from cooperating with government investigations.

A number of other courts that considered the issue adopted the limited waiver rule set out in Diversified Industries. See In re LTB Sec. Litig., 89 F.R.D. 595 (N.D. Tex. 1981) (upholding limited waiver rule); Byrnes v. IDS Realty Trust Co., 85 F.R.D. 679 (S.D.N.Y. 1980) (same); In re Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368 (E.D. Wis. 1979) (same). Many others have disagreed with the Eighth Circuit's rationale. See, e.g., United States v. Massachusetts Inst. Tech., 129 F.3d 681, 685-86 (1st Cir. 1997) ("Anyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage. It would be perfectly possible to carve out some of those disclosures and say that, although the disclosure itself is not necessary to foster attorney-client communications, neither does it forfeit the privilege. With rare exceptions, courts have been unwilling to start down this path — which has no

In one of the earlier cases to consider the Diversified Industries holding, Permian Corp. v. United States, the United States Court of Appeals for the District of Columbia Circuit flatly rejected the limited waiver rule as applied to the attorney-client privilege. 665 F.2d 1214, 1222. The Court distinguished, however, the attorney-client privilege from the work-product doctrine concluding that “while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work-product privilege.” Id. at 1219. With respect to work product material, the key to waiver is disclosure to a party that is an adversary.

The Permian court noted that the justification for the attorney-client privilege disappears once it is clear that the client no longer desires to maintain confidentiality. Id. at 1220. It went on to find that while “[v]oluntary cooperation with government investigations may be a laudable activity . . . it is hard to understand how such conduct improves the attorney-client relationship.” Id. at 1221. The court also expressed concern that the limited waiver rule set out in Diversified Industries would enable litigants to “pick and choose” third parties to whom they will disclose confidential information and stated that “courts have been vigilant to prevent litigants from converting the privilege into a tool for selective disclosure.” Id.

In In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993), the Second Circuit adopted the D.C. Circuit’s reasoning in Permian and applied it to work-product material, holding that the voluntary disclosure by a corporation to the Securities and Exchange Commission (“SEC”) of a memorandum protected by the work-product privilege waived the privilege as to third parties. 9 F.3d at 234-36. Steinhardt involved a private civil class action suit alleging manipulation of the treasury market. The plaintiffs sought to compel production of a memorandum prepared by Steinhardt’s attorneys and previously submitted to the SEC in connection with the SEC’s investigation of the treasury market. Id. at 232. The memorandum, prepared at the SEC’s request, analyzed the facts, issues and legal theories relevant to the SEC’s investigation. Id. Significantly, Steinhardt did not enter into any agreement with the SEC requiring the SEC to keep the memorandum confidential. Steinhardt did, however, stamp the memorandum “FOIA Confidential Treatment Requested.” Id.

Affirming the district court, the Second Circuit first determined that Steinhardt had produced the memorandum to the SEC voluntarily and was not compelled to do so. Id. at 234. The Court went on to find that, at the time of the disclosure, Steinhardt and the SEC were clearly adversaries and, therefore, Steinhardt’s disclosure to the SEC was a voluntary disclosure to an adversary that constituted a waiver of the work-product privilege. Id. at 234-36.

### III. Common Legal Interest Agreements Between Corporations and Their Supervisors: Can They Preserve Privilege?

The Steinhardt Court, however, expressly declined to “adopt a per se rule that all voluntary disclosures to the government waive work product protection.” Id. at 236. Clearly, two key facts underlying the Steinhardt Court’s decision were that (1) Steinhardt and the SEC were adversaries when Steinhardt voluntarily disclosed the work-product memorandum to the SEC and (2) there was no agreement between Steinhardt and the SEC requiring the SEC to maintain the memorandum’s confidentiality. It would follow then, that where a supervisor and a corporation can establish a common legal interest and where an agreement is in place requiring that documents produced to the supervisor be kept confidential, the work-product privilege would not be waived.

This leads us to the first situation contemplated in our introduction. When a bank
launches a new product, it is important for the legal risk associated with the new product to be thoroughly understood, and that prudent steps be taken to minimize legal risk or the liability which might result from legal risk. One of the more fundamental principles of governance is that the management of the banking organization, and its board of directors, is mindful of these basic principles with respect to risks that might be material. This is one facet of a bank’s “safe and sound” operation. Safe and sound operation is also a concern of the bank supervisor, in part because of the special nature of the banking franchise and in part because some or all of the bank’s deposit liabilities are Federally insured. In this regard, the bank supervisor has an interest common to the bank’s board of directors – safe and sound operation. In the pursuit of appropriate legal risk management, the bank supervisor is usually allied with the board of directors. The bank supervisor, and the board of directors, are not in an adversarial relationship with each other in all but the most exceptional case.

It is with these concepts in mind that bank supervisors have increasingly sought to enter into “Confidentiality and Non-Waiver Agreements” between the supervisors and the supervised financial institutions, premised on the notion of a common legal interest, specifically the common interest in safe and sound operation of the financial institution. Because the “Confidentiality and Non-Waiver Agreements” rely on the common legal interest doctrine and are, therefore, analogous to the joint defense privilege, these agreements should protect not only work-product materials, but also attorney-client communications. See North River Ins. Co. v. Columbia Cas. Co., No. 90 civ. 2518 (mul), 1995 WL 5792, at *2 (S.D.N.Y. 1995); In re Megan-Racine Assocs., Inc., 189 B.R. 562, 570 n.4 (Bankr. N.D.N.Y. 1995).

The joint defense privilege has been recognized in United States courts for over 100 years. See Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 842 (1871). The joint defense privilege is not actually a privilege in its own right. Rather, it serves as an exception to the traditional waiver rule that disclosure to a third party of material otherwise protected by the attorney-client or work-product privileges destroys those privileges. Id. Joint defense communications are an exception because members of the joint defense group are not treated as a third party for purposes of waiver. See Daniel J. Capra, Attorney-Client Privilege When Parties Share Interests, N.Y.L.J., Mar. 9, 1990, at 1.

In order to establish the joint defense privilege, the parties must show that the communications or materials were: (1) intended to be kept confidential; (2) made in pursuit of a joint legal effort; and (3) intended to advance the common legal interests of the co-parties. United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989). It is essential to assertion of a joint defense privilege that the parties have some common interest, but it is not essential that the parties interests be completely congruent. United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir.), cert. denied, 44 U.S. 833 (1979). Indeed, courts have recognized the privilege even where the parties interests were antagonistic in some respects. See, e.g., Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 394 (S.D.N.Y. 1975) (potential adverse interests involved).

Unlike the joint defense privilege, the common interest doctrine does not require that the information exchange occur within the context of actual or threatened litigation. DuPlan Corp v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974). “The third parties receiving copies of the communication and claiming a community of interest may be distinct legal entities from the client receiving the legal advice and may be a non-party to any anticipated or pending litigation. The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial. The fact that there may be an overlap of a commercial and a legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest.” Id. Courts have not articulated a consistent definition of what constitutes a common legal interest and the DuPlan Court offers little explanation for its view although it is widely cited. Another widely quoted definition of common interest is found in United States v.
American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).

We acknowledge that there is a risk that what starts as a common interest could well end in adversity. Further, there are some broad judicial statements suggesting that the potential for adversity is destructive of privilege. United States v. Massachusetts Inst. Tech., 129 F.3d 681 (1st Cir. 1997) (disclosure to an adversary, real or potential, forfeits work product protection). In our view, the potential for adversity should not work a waiver, because if this is the law, then there can never be an effective joint defense. In a multiple defendant litigation, where the defendants agree on a joint defense, is it not always a “potential” that one of the defendants will later decide to settle? Does this potential destroy the joint defense privilege? In our view, adversity should be determined at the time the disclosure is made, and the future potential for change should not be considered.

IV. Why Should A Corporation Enter A Common Legal Interest Agreement With Its Supervisors?

The question remains, however, as to why a financial institution, or any other corporation, is better served by entering into a common legal interest agreement with its supervisor rather than a joint defense agreement with its targeted employees? The answer lies with the true nature of the corporation’s interest.

If a corporation whose employees are the targets of an agency investigation is truly interested in ensuring that it is operating lawfully, then its interests do not align with the targeted employees, but rather with its supervisor. The supervisor will always be interested in legal compliance. First, that is a part of its mandate. Second, the supervisor will have an interest in fair competition. The institution that does not comply with the law is a cheat, and it obtains an unfair competitive advantage over those institutions who turn square corners and incur the additional costs which always attend strict compliance.

The corporation will be interested in compliance for different reasons, described more fully below. But to assess compliance, a corporation will first need to have a complete understanding of the facts. The corporation can and most likely will begin an internal investigation, usually conducted by outside counsel. The outside counsel may interview employees, including those that are targets of the investigation. Because any privileges belong to the corporation and not the employees, the employees will be told that the corporation may waive its privilege at any time.

Once the corporation has learned what happened, it may then share the facts it has learned with its supervisor. Here, too, there is the possibility of a non-waiver agreement. With the agreement in place, the corporation may not be considered to waive its privileges as to third parties. This would place it in a better position should any civil litigation arise as a result of the conduct at issue. Moreover, the supervisor will perceive the corporation as “cooperative” and will be more inclined to look favorably upon it and, therefore, the corporation is in a better position with respect to any penalties that may be imposed. Cooperation will be important to a banking organization facing an enforcement action, and it is more than just a public perception problem. In setting the amount a civil penalty, for example, an agency is obliged to consider “other matters as justice may require.” 12 U.S.C. § 1818(l)(2)(G)(iv). The cooperation exhibited by the banking organization is one of those “other matters”. If, on the other hand, the corporation refuses to enter into a common legal interest agreement with its supervisor and instead chooses to enter into a joint defense agreement with its targeted employees, the supervisor may perceive that the corporation’s interests are aligned with employees who are thought to be wrongdoers. On the other hand, the agency might also pause and reflect on its own position, and consider again whether its views about the situation are soundly based.

In the worst case, where the supervisor has “the goods” on the targeted employees (but the banking organization just does not have the same information sources) the joint defense agreement may cause the supervisor to see a corporation that is not interested in its own lawful operation. Instead, the
corporation will be seen as attempting to conceal the facts related to that operation from the supervisor. Moreover, once the corporation’s outside counsel learns facts from its employees in the context of a joint defense agreement, the counsel may not be able to share those facts with its supervisor in the future, unless there is some kind of withdrawal provision. Even with withdrawal clauses, once a joint defense agreement is entered, the “targeted employee” controls what information he discloses to the corporation after the agreement has been executed. Corporations cannot by agreement forbid employees from cooperating with lawful government inquiries. The employee also controls the exercise of his/her Fifth Amendment rights against self-incrimination. Thus, a corporation may withdraw from a joint defense agreement upon disclosure of troubling information by the targeted employee, but it may be up to the employee to determine whether that information is disclosed to the supervisor.

Adverse consequences can also arise from an “oral” joint defense agreement between a bank and its targeted employees. The common explanation for using an oral, rather than a written, joint agreement relates to the possibility that a supervisor will draw an adverse inference about cooperation from the existence of the agreement. Some counsel use the oral agreement in the hope, mistaken in our view, that the supervisor will not learn of its existence. In our practice, we routinely inquire about such agreements, and we require substantiation when privilege is asserted. When a bank tries to conceal the existence of a joint defense agreement from its supervisor, the attempted concealment says something about the culture of the organization. Further, one of the mitigating factors that the agency is required to consider in fashioning a civil penalty is the “good faith” of the organization. 18 U.S.C. § 1818(1)(2)(G)(i). Concealment is evidence of bad faith not good faith, and is an aggravating factor not a mitigating factor. Furthermore, concealment will taint the supervisors assessment of the organization’s credibility. Once credibility is lost, it is extremely difficult to regain.

The benefits to a corporation that chooses to cooperate with its supervisor are reflected in the positions taken by federal prosecutors and the federal Sentencing Guidelines. In calculating a corporate sentence, the Guidelines give credit to companies that have engaged in “self-reporting, cooperation, and acceptance of responsibility.” U.S.S.G. § 8 (2001). Cooperation must be “both timely and thorough” for the corporation to benefit under the Guidelines. U.S.S.G. § 8C2.5(g) (2001). To be timely, the cooperation must “begin essentially at the same time as the organization is officially notified of a criminal investigation.” U.S.S.G. § 8C2.5 cmt. n.12 (2001). To be thorough, a corporation must disclose “all pertinent information known by the organization.” Id.

Federal prosecutors consider these same factors in deciding whether to charge a corporation in the first place. In a Justice Department Memorandum entitled Federal Prosecution of Corporations, U.S. Attorneys are given guidance as to what factors to consider in making the decision as to whether to charge a corporation in a particular case. The Memorandum states that among the factors to be considered are “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work-product privileges.” See Memorandum from Eric H. Holder, Jr., Deputy Attorney General, to All United States Attorneys (June 16, 1999).

Similarly, a corporation that is willing to cooperate with its supervisor is far more likely to receive favorable treatment than one that seeks to hide behind a joint defense agreement with targeted employees.

V. Conclusion

A corporation’s decision to enter into a common legal interest agreement with its supervisor puts it in a favorable position with the supervisor, is likely to reduce the severity of any potential sanctions and still enables the corporation to assert privileges in litigation with third parties. Counsel should consider the utility of such agreements whenever a supervisor expresses interest in attorney-client or work product material.
Martin Grant is an attorney with the Federal Reserve Board in New York. This article was presented as a part of the panel presentation entitled "The Promises and Perils of the Joint Defense Agreements."

FELLOW APPOINTED TO BUSINESS AND CORPORATE LITIGATION COMMITTEE

by Heidi M. Staudenmaier, Co-Chair
Business Law Section Fellows Program

For the fourth straight year, the Business & Corporate Litigation Committee has had the good fortune of having one of the Section of Business Law Fellows appointed to the Committee. Jeff Paskert, a partner with the Tampa, Florida office of Fowler, White, Gillen, Boggs, Villarel & Banker, P.A., has been appointed a Fellow to the Committee for 2001-2003. Jeff received both his undergraduate and law degrees from the University of Florida. He is a past Chair of the Young Lawyers Division. Jeff’s mentor is former Committee Chair Jim Holzman.

Patrick Clendenen, a partner with the Boston firm of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., is also a current Fellow appointed to the Committee. Patrick’s term ends in August, 2002. His mentor is Hon. Alvin Thompson. Past Fellows to the Committee include Tate London and Heidi Staudenmaier.

The selection of Fellows is a three-stage process. First, the candidate must be nominated by a member of the YLD or the Section. Second, the candidate must complete an application describing his or her practice, involvement in the YLD, professional goals, and plans for the Business Law Fellows program. Applications are reviewed by the Co-Chairs of the Fellows Program, who then make recommendations to the Section Chair. The Section Chair will make the final selections.

If you have any questions about the Fellows program or would like additional information concerning nominations for the 2002-2004 Fellows class, please contact Fellows Program Co-Chairs Heidi McNeil Staudenmaier (602/382-6366 or hstaudenmaier@swlaw.com) or Barbara Mendel Mayden (615/742-6208 or bmayden@bassberry.com). Nominations are due by April 1, 2002. Applications are due by May 15, 2002. Fellows will be notified of their appointment in September, 2002.

SUBCOMMITTEE REPORTS

ANTITRUST AND TRADE REGULATION SUBCOMMITTEE

by Hilary E. Ware

The Subcommittee on Antitrust and Trade Regulation, along with the Subcommittee on Criminal and Enforcement Litigation, sponsored a forum at the ABA Annual Meeting on “The Promises and Perils of Joint Defense Agreements.” The panelists included civil litigators, criminal defense attorneys, government counsel, and a federal district judge. The panel discussed -- and not infrequently disagreed over -- legal and policy considerations involved in entering into joint defense agreements. The implications of the recent 9th Circuit Henke decision, establishing an implied attorney-client relationship among all counsel and co-defendants participating in such an agreement, were also considered, along with practical suggestions for crafting joint defense agreements to eliminate or minimize some of the risks discussed during the presentation.

PUBLICATIONS SUBCOMMITTEE

by Heidi M. Staudenmaier

The Publications Subcommittee is already busy at work on soliciting materials for the 2001 Annual Survey of Developments in Business and Corporate Litigation. In the past, the materials have been prepared for the Annual Review program held at the Section of Business Law's Spring Meeting.
However, commencing with the 2000 Survey, the Committee was successful in seeing those materials published by the ABA Publications Office and available for purchase by the general public.

By way of background, the Annual Survey entails a comprehensive update of the law at a very high level of interest to business and corporate lawyers. Traditionally, all of the Business & Corporate Litigation Committee's substantive subcommittees have been responsible for preparing materials specific to their subspecialty practices. At present, the anticipated chapters for the 2001 Survey will include ADR, bankruptcy, business torts, class action law, corporate law, derivative litigation, director liability/indemnification, directors' and officers' liability insurance, employment law, environmental law, financial institution litigation, general partnerships, intellectual property, labor law, securities litigation, antitrust, criminal and enforcement litigation, and ERISA.

Based upon "set in stone" ABA deadlines, the materials are due from the respective chapter authors by January 15, 2001. Jim Hawkins, Greg Varallo and Heidi Staudenmaier will be responsible for collecting and compiling the various chapters. Heidi will then work with the ABA Publications personnel to compile the materials into book format. Jim and Greg have graciously agreed to once again chair the actual program at the Spring meeting where the various topics will be addressed in a panelist format.

The first book version of the Annual Survey has been a great success so we are looking for bigger and better things in 2001, with everyone's assistance. Thank you in advance to the multiple authors who will contribute to this undertaking. If you would like to volunteer to participate in this project, please contact one of the subcommittee chairs or vice chairs listed at the end of this newsletter in the substantive area of your interest.

**AUTHOR! AUTHOR! – “BUSINESS LAW TODAY” ARTICLES REQUEST**

_by Heidi M. Staudenmaier_

“Business Law Today” is the national magazine of the Section of Business Law of the American Bar Association. The magazine is published six times a year as a membership benefit for approximately 60,000 Section members. “Business Law Today” is a magazine, not a law review. We are looking for articles that are enjoyable to read. We publish basic articles directed to business lawyers unfamiliar with a substantive area as well as articles on technical legal issues, but the presentation should be direct and comprehensible.

Articles run around 2,000 to 3,000 words. Manuscripts must not have been published previously. However, seminar materials that have been revamped into simple, readable articles are acceptable. Additionally, any articles previously published in an ABA newsletter (such as Network) or firm newsletters are acceptable. The complete author guidelines are available through the Business Law Section's Website, or Heidi M. Staudenmaier directly at “Business Law Today,” Editor-in-Chief, Snell & Wilmer, Phoenix, (602) 382-6366, hstaudenmaier@swlaw.com.

The Business and Corporate Litigation Committee newsletter is published four times a year by the American Bar Association, Section of Business Law, Business and Corporate Litigation Committee. The views expressed in the Business and Corporate Litigation Committee newsletter are the authors' only and not necessarily those of the American Bar Association, the Section of Business Law or the Business and Corporate Litigation Committee. If you wish to comment on the contents, please write to the Business and Corporate Litigation Committee, Section of Business Law, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611.
### SUBCOMMITTEE ROSTER

#### VICE-CHAIR:

- **Daniel C. Girard**  
  Girard & Green, PC  
  160 Sansome Street, Ste. 300  
  San Francisco, CA 94104  
  e-mail: dcg@classcounsel.com  
  (415) 981-4800  
  FAX: (415) 981-4846

#### CHAIR:

- **Elizabeth S. Stong**  
  Willkie Farr & Gallagher  
  787 7th Avenue  
  New York, NY 10019  
  e-mail: estong@willkie.com  
  (212) 728-8272  
  FAX: (212) 728-8111

#### PAST-CHAIR:

- **James L. Holzman**  
  Prickett Jones & Elliott  
  1310 King Street  
  P.O. Box 1328 (19899)  
  Wilmington, DE 19801  
  e-mail: jholzman@prickett.com  
  (302) 888-6509  
  FAX: (302) 658-8111

### ALTERNATIVE DISPUTE RESOLUTION

#### CHAIR:

- **Michael J. Crane**  
  Ernst & Young  
  787 Seventh Avenue  
  New York, NY 10119  
  e-mail: michael.crane@ey.com  
  (212) 773-3815  
  FAX: (212) 773-6299

#### VICE-CHAIR:

- **Abigail Pessen**  
  Mediation Services  
  26 Broadway, 20th Floor  
  New York, NY 10004  
  e-mail: pessenadr@earthlink.net  
  (212) 961-0668  
  FAX: (212) 961-0669

### ANTITRUST & TRADE LITIGATION

#### CHAIR:

- **Peter E. Halle**  
  Morgan Lewis & Bockius  
  1800 M. Street, N.W.  
  Washington, DC 20036  
  e-mail: hall7225@mlb.com  
  (202) 467-7225  
  FAX: (202) 467-7176

#### VICE-CHAIR:

- **Hilary E. Ware**  
  Heller Ehrman White & McAuliffe LLP  
  333 Bush Street  
  San Francisco, CA 94104-2878  
  e-mail: hware@hewm.com  
  (415) 772-6000  
  FAX: (415) 772-6268

### BANKRUPTCY LITIGATION

#### CO-CHAIR:

- **Philip S. Warden**  
  Pillsbury Madison & Sutro  
  235 Montgomery Street  
  San Francisco, CA 94104  
  e-mail: warden_ps@pillsburylaw.com  
  (415) 983-7260  
  FAX: (415) 983-1200

#### VICE-CHAIR:

- **The Honorable Margaret A. Mahoney**  
  Bankruptcy Judge  
  United States Bankruptcy Court for the  
  Southern District of Alabama  
  201 St Louis Street  
  Mobile, AL 36602  
  e-mail: mahoney@als.uscourts.gov  
  (334) 441-5612  
  FAX: (334) 441-5612

### BUSINESS COURTS

#### CHAIR:

- **Mitchell L. Bach**  
  Fineman & Bach, PC  
  1608 Walnut St., 19th Fl.  
  Philadelphia, PA 19103-5413  
  e-mail: mbach@finemanbach.com  
  (215) 893-9300  
  FAX: (215) 893-8719

#### CO-CHAIR:

- **Jan P. Helder, Jr.**  
  Stueve Helder Siegel, LLP  
  330 West 47th Street, Ste. 250  
  Kansas City, MO 64112  
  e-mail: Helder@Litigation-Results.com  
  (816) 714-7100  
  FAX: (816) 714-7101

#### VICE-CHAIR:

- **Jay W. Eisenhofer**  
  Grant & Eisenhofer  
  1220 N. Market St., Suite 500  
  Wilmington, DE 19801-2599  
  e-mail: jeisenhofer@gelaw.com  
  (302) 622-7000  
  FAX: (302) 622-7055

### CLASS AND DERIVATIVE ACTIONS

#### CO-CHAIR:

- **Anne P. Wheeler**  
  Johnson Barton Proctor & Powell, LLP  
  2900 Amsouth/Harbert Plaza  
  1901 Sixth Avenue North  
  Birmingham, AL 35203-2618  
  e-mail: apwheeler@jbpp.com  
  (205) 459-9400  
  FAX: (205) 459-9500
CLASS AND DERIVATIVE ACTIONS
CO-CHAIR
Gregory P. Williams
Richards Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899
e-mail: williams@rlf.com
(302) 651-7734
FAX: (302) 658-6548

CLASS AND DERIVATIVE ACTIONS
VICE-CHAIR
Robert L. Gegios
Von Briesen Purtell & Roper
411 E. Wisconsin Avenue, Suite 700
Milwaukee, WI 53202-4470
e-mail: rgegios@vonbriesen.com
(414) 273-7000
FAX: (414) 276-6281

CORPORATE COUNSELING &
LITIGATION CHAIR
Peter J. Walsh, Jr.
Potter Anderson & Corroon
1313 N. Market St., 6th Floor
Hercules Building, P.O. Box 951
Wilmington, DE 19899
e-mail: pwalsh@pacdelaware.com
(302) 984-6000
FAX: (302) 658-6821

CORPORATE COUNSELING &
LITIGATION VICE-CHAIR
Anne C. Foster
Richards Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899
e-mail: foster@rlf.com
(302) 651-7744
FAX: (302) 658-6548

CRIMINAL AND ENFORCEMENT
LITIGATION CO-CHAIR
Elizabeth K. Ainslie
Schnader Harrison Segal & Lewis, LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103-7286
e-mail: eainslie@schnader.com
(215) 751-2000
FAX: (215) 751-2205

CRIMINAL AND ENFORCEMENT
LITIGATION VICE-CHAIR
Martin Grant
Federal Reserve Bank of New York
33 Liberty Street
New York, NY 10045
e-mail: martin.grant@ny.frb.org
(212) 720-5032
FAX: (212) 720-1530

EMPLOYMENT LITIGATION CHAIR
Rosemary Daszkiewicz
Cairncross & Hempelmann
524 Second Avenue
Suite 500
Seattle, WA 98104-2323
e-mail: rdaszkiewicz@cairncross.com
(206) 587-0700
FAX: (206) 587-2308

EMPLOYMENT LITIGATION VICE-CHAIR
Stacey A. Campbell
Sonnenschein Nath & Rosenthal
4520 Main Street, Ste. 1100
Kansas City, MO 64111-7700
e-mail: 3sc@sonnenschein.com
(816) 932-4610
FAX: (816) 531-7545

ENVIRONMENTAL LITIGATION CHAIR
Seth R. Lesser
Bernstein Litowitz Berger & Grossman
1285 Avenue of the Americas
New York, NY 10019
e-mail: slesser@blbglaw.com
(212) 554-1400
FAX: (212) 554-1444

ENVIRONMENTAL LITIGATION VICE-
CHAIR
Steven Russo
Sive Paget & Riesel, PC
460 Park Avenue
New York, NY 10022-1906
e-mail: sprlaw@aol.com
(212) 421-2150
FAX: (212) 421-1891

ERISA & PENSION LITIGATION CHAIR
Jerome V. Bolkom
Jorden Burt Berenson & Johnson, LLP
Suite 400 East
1025 Thomas Jefferson Street, N.W.
Washington, DC 20007-0805
e-mail: jvb@wdc.jordenusa.com
(202) 965-8100
FAX: (202) 965-8104

ERISA & PENSION LITIGATION
VICE-CHAIR
Jeanne L. Bakker
Montgomery McCracken Walker &
Rhoods LLP
123 S. Broad Street
Philadelphia, PA 19109
e-mail: jbakker@mmwr.com
(215) 772-7521
FAX: (215) 772-7620

FINANCIAL INSTITUTION LITIGATION
CHAIR
Marsha G. Rydberg
Foley & Lardner
100 N. Tampa St., Ste. 2700
P.O. Box 3391
Tampa, FL 33601-3391
e-mail: mrydberg@foleylaw.com
(813) 229-2300
FAX: (813) 221-4210

FINANCIAL INSTITUTION LITIGATION
VICE-CHAIR
John P. Whittington
Bradley Arant Rose & White
Suite 2000, 420 North 20th Street
Birmingham, AL 35203
e-mail: jpw@barw.com
(205) 521-8242
FAX: (205) 521-8500

INDEMNIFICATION & INSURANCE
CHAIR
William D. Johnston
Young Conaway Stargatt & Taylor
Rodney Square North, 11th Floor
P.O. Box 391 (19899)
Wilmington, DE 19801-0391
e-mail: wjohnston@ycst.com
(302) 571-6679
FAX: (302) 571-1253
## PRO BONO CO-CHAIR

**Patrick T. Clendenen**
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
email: ptclendenen@mintz.com
(617) 348-1827
FAX: (617) 542-2241

**La Ronda D. Barnes**
Supreme Court of Georgia
244 Washington Street, Room 572
Atlanta, GA 30334
email: barnesl@supreme.courts.state.ga.us
(404) 656-3430
FAX: (404) 463-6542

## ADMINISTRATIVE SUBCOMMITTEES

### MEMBERSHIP CHAIR

**J. Tate London**
Cairncross & Hempelmann
524 Second Avenue
Suite 500
Seattle, WA 98104-2323
email:tlondon@cairncross.com
(206) 587-0700
FAX: (206) 587-2308

### NEWSLETTER CHAIR

**Paul J. Masinter**
Stone Pigman Walther Wittmann & Hutchinson, LLP
546 Carondelet Street
New Orleans, LA 70130-3588
email: pmasinter@stonepigman.com
(504) 581-3200
FAX: (504) 581-3361

### PROGRAMS CHAIR

**Daniel C. Girard**
Girard & Green, LLP
160 Sansome Street, Suite 300
San Francisco, CA 94104
email: dcg@classcounsel.com
(415) 981-4800
FAX: (415) 981-4846

### PUBLICATIONS CHAIR

**Heidi M. Staudenmaier**
Snell & Wilmer, LLP
One Arizona Center
Phoenix, AZ 85004-2202
email: hstaudenmaier@swlaw.com
(602) 382-6366
FAX: (602) 382-6070

### SMALL FIRMS CHAIR

**James R. Hawkins, II**
Finn Dixon & Herling
One Landmark Square, Ste. 1400
Stamford, CT 06901
email: jhawkins@fdh.com
(203) 325-5042
FAX: (203) 325-5042

---

### INDEMNIFICATION & INSURANCE VICE-CHAIR

**Michael L. Gassmann**
Drinker Biddle & Reath
1500 K Street, NW, Suite 1100
Washington, DC 20005-1209
e-mail: gassmaml@dbr.com
(202) 842-8846
FAX: (202) 842-8465

### INTELLECTUAL PROPERTY CHAIR

**Cindy A. Elliott**
Wolf and Solis-Cohen, L.L.P.
1650 Arch Street
22nd Floor
Philadelphia, PA 19103-2097
e-mail: celliott@wolfblock.com
(215) 977-2049
FAX: (215) 977-2334

### INTELLECTUAL PROPERTY VICE-CHAIR

**Andrew F. Halaby**
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004-2202
e-mail: ahalaby@swlaw.com
(602) 382-6000
FAX: (602) 382-6070

### PARTNERSHIPS & ALTERNATIVE BUSINESS ENTITIES CHAIR

**Vernon R. Proctor**
The Bayard Firm
222 Delaware Avenue, Ste. 900
P.O. Box 25130 (19899)
Wilmington, DE 19801
e-mail: vproctor@bayardfirm.com
(302) 429-4202
FAX: (302) 658-6395

### PARTNERSHIPS & ALTERNATIVE BUSINESS ENTITIES VICE-CHAIR

**Kevin R. Shannon**
Potter Anderson & Corroon LLP
Hercules Plaza, 1313 N. Market Street, P.O. Box 951
Wilmington, DE 19899-0951
e-mail: kshannon@pacdelaware.com
(302) 984-6000
FAX: (302) 658-1192

### SECURITIES LITIGATION CO-CHAIR

**Lisa K. Wager**
Morgan Lewis & Bockius
101 Park Avenue
New York, NY 10178
e-mail: wage6113@mlb.com
(212) 309-6113
FAX: (212) 309-6273

### SECURITIES LITIGATION CO-CHAIR

**James R. Hawkins, II**
Finn Dixon & Herling
One Landmark Square, Ste. 1400
Stamford, CT 06901
e-mail: jhawkins@fdh.com
(203) 325-5042
FAX: (203) 348-5777

### SECURITIES LITIGATION VICE-CHAIR

**Stephen D. Poss**
Goodwin, Procter & Hoar, L.L.P.
Exchange Place
Boston, MA 02109-1000
e-mail: sposs@gph.com
(617) 570-1886
FAX: (617) 523-1231

### PRO BONO VICE-CHAIR

**Kevin A. Elliott**
Wolf and Solis-Cohen, L.L.P.
1650 Arch Street
22nd Floor
Philadelphia, PA 19103-2097
e-mail: celliott@wolfblock.com
(215) 977-2049
FAX: (215) 977-2334

### PRO BONO VICE-CHAIR

**Andrew F. Halaby**
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004-2202
e-mail: ahalaby@swlaw.com
(602) 382-6000
FAX: (602) 382-6070

### PARTNERSHIPS & ALTERNATIVE BUSINESS ENTITIES CHAIR

**Vernon R. Proctor**
The Bayard Firm
222 Delaware Avenue, Ste. 900
P.O. Box 25130 (19899)
Wilmington, DE 19801
e-mail: vproctor@bayardfirm.com
(302) 429-4202
FAX: (302) 658-6395

### PARTNERSHIPS & ALTERNATIVE BUSINESS ENTITIES VICE-CHAIR

**Kevin R. Shannon**
Potter Anderson & Corroon LLP
Hercules Plaza, 1313 N. Market Street, P.O. Box 951
Wilmington, DE 19899-0951
e-mail: kshannon@pacdelaware.com
(302) 984-6000
FAX: (302) 658-1192

### PROGRAMS CHAIR

**Daniel C. Girard**
Girard & Green, LLP
160 Sansome Street, Suite 300
San Francisco, CA 94104
e-mail: dcg@classcounsel.com
(415) 981-4800
FAX: (415) 981-4846

### PUBLICATIONS CHAIR

**Heidi M. Staudenmaier**
Snell & Wilmer, LLP
One Arizona Center
Phoenix, AZ 85004-2202
e-mail: hstaudenmaier@swlaw.com
(602) 382-6366
FAX: (602) 382-6070

### SMALL FIRMS CHAIR

**James R. Hawkins, II**
Finn Dixon & Herling
One Landmark Square, Ste. 1400
Stamford, CT 06901
e-mail: jhawkins@fdh.com
(203) 325-5042
FAX: (203) 348-5777
TASK FORCE ON LITIGATION REFORM AND RULES REVISION
CO-CHAIR
Gregory V. Varallo
Richards Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899
e-mail: varallo@rlf.com
(302) 651-7772
FAX: (302) 658-6548

JUDICIAL DESIGNEES
The Honorable Alvin W. Thompson
United States District Judge
United States District Court for the
District of Connecticut
U. S. Courthouse
450 Main Street
Hartford, CT 06103
e-mail: alvin_thompson@ce2.uscourts.gov
(860) 240-3224
FAX: (860) 240-3465

The Honorable Myron T. Steele
Justice
Delaware Supreme Court
Supreme Court Building
57 The Green
Dover, DE 19901
e-mail: msteele@state.de.us
(302) 739-4214
FAX: (302) 739-2004

SECTION FELLOW DESIGNEES
Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.
501 East Kennedy Boulevard
Suite 1700
Tampa, FL 33602
e-mail: jpaskert@fowlerwhite.com
(813) 222-1110
FAX: (813) 229-8313

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
e-mail: ptclendenen@mintz.com
(617) 348-1827
FAX: (617) 542-2241

LIAISON TO DIVERSITY COMMITTEE
Danielle B. Gibbs
Young Conaway Stargatt & Taylor
Rodney Square North, 11th Floor
P.O. Box 391 (19899)
Wilmington, DE 19801-0391
e-mail: dgbibs@ycst.com
(302) 571-6600
FAX: (302) 571-1253

LIAISON TO TECHNOLOGY COMMITTEE & CYBERSPACE COMMITTEE
Bruce E. Jameson
Prickett Jones & Elliott
1310 King Street
P.O. Box 1328 (19899)
Wilmington, DE 19801
e-mail: bejameson@prickett.com
(302) 888-6532
FAX: (302) 658-8111
MEETING REGISTRATION FORM

Name: 
Firm: 
Address: 
City: State: Zip: 
Telephone: Fax: E-mail: 
Spouse/Guest: 

<table>
<thead>
<tr>
<th>Qty.</th>
<th>Price</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$165.00</td>
<td></td>
</tr>
</tbody>
</table>

Are special arrangements needed for the physically challenged? If yes, please explain.

_________________________________________________________________________________________

Please list any special dietary needs:

_________________________________________________________________________________________

Payment method

Check (made payable to the American Bar Association)
Credit card: _____ MasterCard _____ Visa _____ American Express
Card Number: Exp. Date
Signature: ____________________________

Please return this form and your payment no later than November 15, 2001 to:
Donald Quarles
American Bar Association • Section of Business Law
750 North Lake Shore Drive • Chicago, Illinois 60611
Phone: (312) 988-5564 • Fax: (312) 988-5578

(Faxed registrations without credit card payment will not be processed)

Refunds for registration fees will be granted for anyone who cannot attend the meeting. However, due to the need to give guarantees, refunds for luncheon fees will only be granted for written requests received by November 26, 2001. Registrations received after November 15, 2001 cannot be processed in advance of the meeting.
Committee Dinner Registration Form

(Please photocopy this page and mail per instructions below.)

American Bar Association
Section of Business Law
Business and Corporate Litigation Committee Dinner

Thursday, November 29, 2001, 8:15 p.m. to 11:00 p.m.

The Committee dinner is at Michael’s, 24 W. 55th Street (immediately following the Willkie Farr & Gallagher Reception). Spouses and guests are welcome to attend. Please direct questions concerning the dinner to Linda Daly, ldaly@paulweiss.com, or (212) 373-5576.

Complete this registration form, enclose a check (payable to Paul Weiss Rifkind Wharton & Garrison) for $110/person and mail to:

Linda Daly
Paul Weiss Rifkind Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064

I/we (circle one) will attend the Committee Dinner on Thursday, November 29.

Name: ____________________________________________________________

Company/Affiliation: ______________________________________________

ABA Membership ID: _______________________________________________

Address: _________________________________________________________

City/State/Zip: ____________________________________________________

Phone: ___________________________  Fax: ____________________________

E-mail: __________________________________________________________

Spouse/Guest’s Name: _____________________________________________
Section of Business Law
Application for Membership

☐ I, ____________________________________________, hereby apply for membership in the ABA Section of Business Law (formerly Section of Corporation, Banking and Business Law) and enclose $45.00 as my annual membership dues for the year 2001-2002. I understand that Section dues include $20 for a basic subscription to The Business Lawyer for 1 year and $14 for a basic subscription to Business Law Today for 1 year; these subscription charges are not deductible from the dues, and additional subscriptions are not available at these rates.

Membership in the American Bar Association is a prerequisite to enrollment in the Section of Business Law.

☐ Please send me an application to join the American Bar Association.

☐ Please enroll me in the Business Law Section's Committee on Business and Corporate Litigation.

☐ I am interested in joining the following Business and Corporate Litigation Subcommittees:

☐ Alternative Dispute Resolution ☐ Criminal and Enforcement Litigation ☐ Pro Bono
☐ Antitrust & Trade Litigation ☐ Employment Litigation ☐ Securities Litigation
☐ Bankruptcy Litigation ☐ Environmental Litigation ☐ Membership
☐ Business Courts ☐ ERISA & Pension Litigation ☐ Newsletter
☐ Business Torts ☐ Financial Institution Litigation ☐ Programs
☐ Class & Derivative Actions ☐ Indemnification & Insurance ☐ Publications
☐ Corporate Counseling & Litigation ☐ Intellectual Property ☐ Small Firms
☐ Partnerships & Alternative Business Entities Litigation

☐ Please send information about the Business Law Section's Committee on Business and Corporate Litigation and its subcommittees.

Complete and return to: ABA Section of Business Law
750 North Lake Shore Drive
Chicago, IL  60611

For further information, call (312) 988-5588.

Name ____________________________________________ Date ________________

Firm ____________________________________________ State _____________ Zip ____________

City ____________________________ State _____________ Zip ____________

Phone: Business (______) ______________________ Home (______) ______________________

☐ Payment enclosed. (Make check payable to American Bar Association.)

☐ VISA ☐ MasterCard

Card No. ____________________________ Exp. Date ____________________________

Signature ________________________________________________

Please sign and date this application.

NOTE: Membership dues in the American Bar Association and ABA Sections, Divisions and Forums are not deductible as charitable contributions for federal income tax purposes. However, such dues may be deductible as business expenses.