



Atlantic Legal Foundation

Conference Report

The Attorney-Client Privilege: Erosion, Ethics, Problems and Solutions.

MAY 2005

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conference I have
attended in years...”*

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More than 140 practitioners and regulators gathered in Washington, D.C. on March 9-10, 2005 to consider “The Attorney-Client Privilege: Erosion, Ethics, Problems and Solutions.” Sponsored by Atlantic Legal Foundation, the conference featured presentations by University of Pennsylvania Law Professor Geoffrey C. Hazard and former Solicitor General Theodore B. Olson. Senator Arlen Specter, Chairman of the Judiciary Committee, was the keynote speaker.

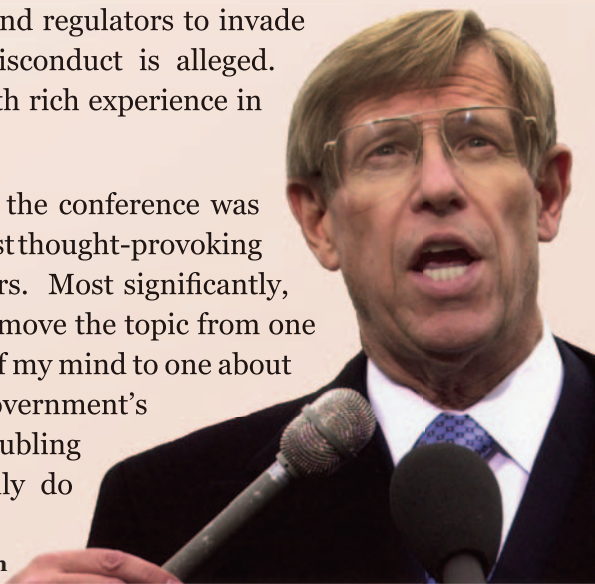


Senator Specter welcomed by (L to R) Dan Fisk, Steve Harmelin and Bill Slattery.

The conference included panel discussions focusing on aspects of efforts by prosecutors and regulators to invade the privilege where corporate misconduct is alleged. Panels were staffed by experts with rich experience in government and private practice.

One participant’s assessment of the conference was typical: “It was undoubtedly the most thought-provoking conference I have attended in years. Most significantly, perhaps, the conference served to move the topic from one that had been vaguely in the back of my mind to one about which I am quite agitated... The government’s efforts to erode the privilege are troubling and counter-productive, and really do need to be stopped.”

Theodore B. Olson



Professor Geoffrey C. Hazard, Jr. : Invoking the Privilege — An “Uphill Task”

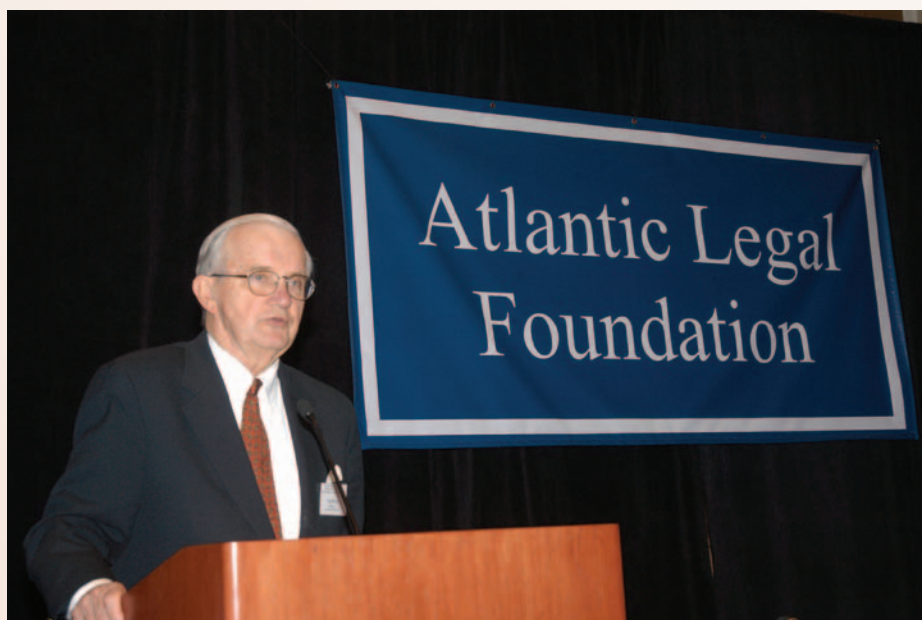
Professor Hazard, the nationally recognized authority on legal ethics, gave a brief overview of the application of the privilege under federal and state law—pointing out that the technical distinctions which exist under state law have been straightened out on the federal level by the Supreme Court’s *Upjohn* decision—and noted that transparency not secrecy is in popular favor. Counsel may have an “uphill task” in sustaining the privilege, Hazard said: “...the attorney-client privilege is the opposite of transparency. Let us not mince words about it. The attorney-client privilege is designed to permit people to have conversations about very serious subjects without the possibility of exposing those frank discussions to other people who would love to know what had been said. This goes against the grain of a broadly and deeply held American political sentiment that is expressed every day in the media.”

This bias toward transparency is evident in the academic world, he said: “...most of the academic community has been relatively hostile not only to the attorney-client privilege when asserted by corporations, but to business corporations as such.”

Attorney-client privilege problems arise, he observed, in areas that do not involve legitimate corporate activity, such as money laundering, drug trafficking, tax abuse and terrorism, fostering the “...popular sentiment...that our profession is helping corporate wrongdoers in money-laundering for the terrorists and drug dealers.” These sentiments require law departments and law firms to work more intensively on educating

their personnel in the problems of attorney-client privilege and attorney-client confidentiality.

Asked if it is fair to have a link between the sentencing guidelines and the waiver of the privilege, Professor Hazard responded, “Either you believe in the privilege, as I do and all or most of you, or you don’t. It is maddening in the political arena to have people professing to respect the privilege, and invoking it themselves (for example, the Department of Justice), but then demanding its waiver by others.”



Professor Geoffrey Hazard opening the conference.

Summing up, Professor Hazard said that although he did not think the privilege had been eviscerated, “I think it has been frayed and challenged. The problem, to be blunt, is whether the company wants to stand up for the privilege.”

Theodore B. Olson: Forced Waiver Attacks Right to Counsel

Former United States Solicitor General Theodore Olson in his address focused on the pernicious effect of so-called voluntary privilege waivers following which formerly privileged materials make their way into the hands of civil plaintiffs.



Luncheon speaker Ted Olson greeted by Bill Ide and John Olson.

Citing recent policies of the Department of Justice, Olson said: “Government authorities are essentially telling companies—who, let us not forget, though perhaps criminally liable under principles of vicarious liability, they and their shareholders are, for the most part, the victims of their employees’ malfeasance and essentially blameless as an institution—‘You are not required to waive the privilege, but if you don’t you may get indicted. And if you get indicted, well, it’s curtains. Remember Arthur Andersen?’”

Olson compared the “Hobson’s choice” presented to a corporation with the case of an individual defendant: “The individual defendant is not expected to waive his attorney-client privilege. His attorney is not expected to testify and tell the government what his client told him. That, I expect, would be construed by the courts as depriving the defendant of his Sixth Amendment

right to counsel, and would render any subsequent plea bargain both coercive and not voluntary.”

The demand for corporate privilege waivers, Olson said, “effectively deputizes the company’s in-house and outside counsel as agents for prosecutors and regulators, and this makes many employees understandably reluctant to talk to an internal investigator... employees quite naturally have started viewing the company’s investigators with the same level of suspicion and apprehension that they hold toward government agents investigating a crime.”

The practice of the forced privilege waivers, Olson continued, had a “deleterious effect on corporate compliance programs, the ability of companies to self-regulate, and most ironically, their ability effectively to cooperate with the government.”

Olson noted that a retreat by prosecutors and regulators was unlikely, and set forth possible solutions. He believes that Congress has the authority to craft a selective waiver statute, that counsel disclose only facts in any disclosure and that a written confidentiality agreement should be obtained.

At bottom, Olson said, routine demands for privilege waivers attack the Sixth Amendment right to counsel—an attack that would not be tolerated in the case of an individual defendant. Olson concluded: “the justification for using that tactic against corporations, where it would be impermissible in dealing with individuals, is by no means unassailable.”

Panel Presentations

Panelists and Samplings of Views Expressed

GOVERNMENTAL PROCEEDINGS

Holder (Thompson) Memorandum; New Sentencing Guidelines; SEC pronouncements and Practices; Preservation of Privilege (as to Third Parties) of Materials Submitted to Regulators.

Panelists

Alan Charles Raul

Moderator

Sidley Austin Brown & Wood LLP

David Aufhauser

General Counsel, UBS Global Investment Bank; former General Counsel, Department of the Treasury; former Partner, Williams & Connolly LLP

Mary Beth Buchanan

United States Attorney for the Western District of Pennsylvania and Director of the Executive Office for United States Attorneys, U.S. Department of Justice

Jamie Conrad

Assistant General Counsel, American Chemistry Council

Eileen J. O'Connor

Assistant Attorney General, Tax Division, U.S. Department of Justice

George J. Terwilliger, III

White & Case LLP; former Deputy Attorney General of the United States

“From our perspective, the corporation should report that wrongdoing immediately. If you report it immediately, and you let the government conduct the investigation, then you’re not necessarily in the circumstances of gathering all the information yourself, and then deciding whether you’ve created either work product or attorney-client privilege material.” (Buchanan).



“Government Proceedings” Panel moderated by Raul with (L to R) panelists Aufhauser, Buchanan, Conrad, O’Connor and Terwilliger.

ney-client privilege material.” (Buchanan).

“And privilege really provides the comfort zone, such as it is, to allow those kinds of conversations to happen frankly and effectively, so that legal counsel can figure out what the obligations of the company are, and make sure the folks take the right steps...and in the Upjohn case, the Supreme Court said that an uncertain privilege is a little better than no privilege at all.” (Conrad).

“People who are not lawyers begin to become their own lawyers because they really don’t want to raise issues with lawyers. And so they just kind of make their own judgment about what the right answer is, or when they put things in writing and express them, they do them in nice gray ways that can’t cause any problems.” (Conrad).

“You’re foolish to think that limited waiver protects you in any manner. And you shouldn’t be counseling your board or your CEO that you’ve contained the disclosure of confidences.” (Aufhauser).

“Before an attorney in the course of litigation is authorized to subpoena information or testimony from another attorney who’s representing the other side, or



Mary Beth Buchanan, U.S. Attorney for the Western District of Pennsylvania and Director of the Executive Office for U.S. Attorneys, Department of Justice.

actually any attorney at all, they must show that the information is necessary and relevant to the investigation. That it's not available from any other means. That requesting it from the attorney strikes the appropriate balance between getting information from an attorney and the sanctity of attorney-client privilege and that no privileges can be asserted." (O'Connor).

"The attorney-client privilege is best preserved when it is asserted only with respect to information to which it really applies. Every conversation with an attorney is not privileged." (O'Connor).

"We want the lawyers in the room. The government should want lawyers in the room when business people are making tough decisions. We want them to speak freely with their counsel, not send euphemisms in e-mails to mask what the real issues are. We need lawyers in the middle of business decisions now more than ever. And what's going on with the privilege waiver question is pushing that away. That's a bad thing." (Terwilliger).

"I think what has happened as a result of the Holder and Thompson Memos and a general slide toward privilege

waiver being the expectation and a requirement of what Larry Thompson called genuine cooperation is simply wrong." (Terwilliger).

"The corporations who are doing the best job with their compliance programs, are not being prosecuted. And that is really the heart of the matter. What the government wants to look at are those entities that are not creating the culture of ethics, that are not creating an environment where employees understand their obligation to report wrongdoing." (Buchanan).

"If the corporation can tell us who we need to talk to and we can conduct those interviews, then no waiver is necessary. On the other hand, if the corporation is creating this culture that discourages individual employees to report wrongdoing and to report it accurately, then I suggest that not only do you run the risk of failing to cooperate with the government, but you also run the risk of not having an effective compliance program." (Buchanan).

"We're cutting new edges on a lot of things when it comes to regulating businesses through the use of criminal law and criminal procedure." (Terwilliger)



Eileen J. O'Connor, Assistant Attorney General, Tax Division, U.S. Department of Justice and George J. Terwilliger, III, White & Case LLP.

SARBANES-OXLEY'S EFFECTS ON THE PRIVILEGE

Reporting up; Reporting out/Noisy Withdrawal; QLCCs; Outside Audit Disclosure.

Panelists

Robert Pietrzak

Moderator

Sidley Austin Brown & Wood LLP

John Olson

Gibson, Dunn & Crutcher LLP

Charles Raeburn

Senior Corporate Counsel, Pfizer Inc

“I think there has been an evolving feeling that corporations aren't quite as entitled to the privilege as individuals might be.” (Pietrzak).

“I don't think that reporting out or noisy withdrawal, which is a sort of softer version of reporting out, is going to be mandated by the SEC.” (Olson).

“The problem with qualified legal compliance committees is it's one more burden on the board. And how do they discharge their obligation to make decisions about one of these things without having counsel? And if the counsel that reported to them wants to get out of the picture, then who advises them? They've got to go out and hire somebody else.” (Olson).

“Sarbanes-Oxley, I think, has had an impact because prosecutors are demanding more of that sort of thing, and they have put pressure on you for various reasons to produce it. And the courts are not recognizing, as much as we'd hope they might, the limited waiver doctrine.” (Olson).



Charles Raeburn, reviewing Sarbanes-Oxley's Effects on the Privilege.

INSIDE VS. OUTSIDE COUNSEL

In the United States; Overseas; Common Law vs. Civil Law Jurisdictions; Bar Admitted vs. Non-Bar Admitted Inside Counsel.

Panelists

Martin S. Kaufman
Moderator
General Counsel, Atlantic Legal Foundation

Thierry Blackman
Regional Counsel – Europe, Rohm and Haas Company

Hayward D. Fisk
Vice President, General Counsel and Secretary,
Computer Sciences Corporation; Chairman, Atlantic Legal Foundation

Philip C. Korologos
Boies, Schiller & Flexner LLP

Peter Oliver
Legal Advisor, European Commission

evaluate what the impact of the waiver might be... for prosecutors and regulators to realize that these requests for waivers ... are the exception.” (Korologos).

“If you look at the map of Europe, roughly half of the jurisdictions recognize in-house ...privilege, half of them don’t. And even in the few jurisdictions where they now recognize privilege for in-house lawyers, the extent of the privilege is not clear.” (Blackman).

“An area of the law around Section 205 and up the ladder reporting that is unclear begs the question...at what point does the in-house lawyer become aware of evidence of a potentially material violation? If you receive an e-mail reciting some rumor ...are you then in a position where you need to take action. The law doesn’t really spell that out for us, and I would as a practical matter suggest to you that, twenty-twenty hindsight, could put you at risk if you haven’t taken action.” (Fisk).

“We lawyers now have to not only look after our clients’ interests, but we have to look after our own. Because if we don’t follow the procedures here that are mandated by the SEC we can be subject to sanctions.” (Fisk).

“If we continue to have prosecutors and regulatory agencies intent on seeking waivers I think that it is incumbent upon them to realize what clients and companies face when those waiver requests come in. Those waiver requests are typically very early in investigations when the client has not had a sufficient opportunity to



Philip Korologos discussing Inside vs. Outside Counsel

SCOPE OF APPLICABILITY OF PRIVILEGE TO NON-LAWYER MEMBERS OF THE TEAM

PR Professionals, Accountants, etc., and Interplay of Fiduciary Duties vs. the Privilege.

Panelists

Mark Hopson
Moderator and Panelist
Sidley Austin Brown & Wood LLP

Clark Judge
White House Writers Group

Michael M. Levy
McKee Nelson LLP

“**M**artha Stewart’s looking pretty good. The company’s doing well, she’s back, I have never seen better publicity on somebody getting out of jail. I wasn’t around when Gandhi got out, but I can’t imagine it was any better. And, she may have lost the battle, but she won the war. And the war was not won by her lawyers, it was won by the public relations

consultants, the media people who are an integral part of her legal team.” (Hopson).

“The court said, ‘Well, there is a difference between the advisors, the communications advisors to the case, and the communications advisors to the company.’ The advisors to the case came under the privilege, ruled the court. The advisors to the company did not.” (Judge).

“**Y**ou want to make sure that it’s the attorney who retains the consultant, not the client, because the advice has got to be to the attorney. You’ve got to try to make sure, whenever you possibly can, that it’s frankly somebody who the company has not worked with before.” (Levy).

“The more you can structure the relationship to look like that of a translator to facilitate your communications with your client, the more likely you are to be able to keep these things privileged.” (Levy).



Bob Lonergan, Mark Hopson, Clark Judge and Michael Levy.

JOINT DEFENSE AGREEMENTS/COMMON INTEREST PRIVILEGE

Across state jurisdictions under Sentencing Guidelines.

Panelists

William H. Graham
Moderator
Connell Foley LLP

Richard A. Hibey
Miller & Chevalier

Earl J. Silbert
DLA Piper Rudnick Gray Cary US LLP;
former U.S. Attorney, District of Columbia

“**T**he government hates these things. No surprise there...the government has always taken the view that this is really nothing more than a euphemistic predicate to the obstruction of their investigations and, therefore, the obstruction of justice. And, where these agreements are known to government investigators, they become a flash point for discussion with lawyers as to the degree of cooperation.” (Hibey).

“If there is some particularly sensitive point with

respect to your client that you don’t wish others to be familiar with, then you do not include that as part of the information that you agree to share.” (Silbert).

“Once a company has crossed that bridge and decided that they are going to cooperate, should they advise their employee of that fact before they question him and obtain information from him?” (Graham). “Yes. I think so.” (Hibey).

“The dilemma is the more you disclose to the employees and alert them or put them on potential notice that their own interests may be at jeopardy in the course of an interview that company counsel or outside counsel for the company is requesting, the less likely that employee is to be willing to be interviewed.” (Silbert).

“There’s not an experienced practitioner in this room who has not, at one or more times in our careers, advised a client to assert the Fifth Amendment privilege when we ourselves have no doubt, are totally confident of the innocence of that client.” (Silbert).

“**C**ooperation should not hinge on whether that person testifies or not. That is, the cooperation of the corporation as perceived by the Justice Department should not hinge on the exercise of an individual employee’s constitutional right. I think that point has to be made to the government.” (Hibey).

“Doesn’t the company counsel, knowing that you’re going to be turning over the statements to the government, aren’t you in effect acting as an agent, de facto agent, for the government? And I think there’s a very strong argument that you are ...that may well enhance, increase the extent of the warning you should give to your employees, out of basic fairness, if nothing else, but certainly so as not to mislead and deceive.” (Silbert).



Richard Hibey, Earl Silbert and Moderator Bill Graham.

SHOULD THE ATTORNEY-CLIENT PRIVILEGE BE ABOLISHED?

Panelists

Robert A. Lonergan

Moderator

Vice President and General Counsel, Rohm and Haas Company

Hon. Samuel A. Alito, Jr.

U.S. Court of Appeals of the Third Circuit

Lawrence J. Fox

Drinkler Biddle & Reath LLP

R. William Ide

McKenna Long & Aldridge, LLP; Chair, ABA Task Force on Attorney/Client Privilege; former President, ABA

Richard F. Scruggs

The Scruggs Law Firm



Richard Scruggs,
The Scruggs Law Firm



William Ide, McKenna Long &
Aldridge, LLP; Chair, ABA Task
Force on Attorney/Client Privilege.



Lawrence Fox,
Drinkler Biddle & Reath LLP



“Should the Attorney-Client Privilege Be Abolished?”

Bob Lonergan, Moderator, Richard Scruggs, William Ide, Judge Samuel Alito and Lawrence Fox.

“**B**ecause if the privilege is abused by corporations, then that’s going to undermine the privilege overall. So, there’s a real need for education and if people are playing games on the corporate side, that’s got to be cleaned up.” (Ide).

“General Counsel of large, multi-national companies have sat down with their colleagues, as general counsel, and contrived ways to essentially cycle scientific research, marketing documents designed not for litigation, but to inprivilege them to either attorney-client privilege or work product privilege, for purposes

where they can pretend and meet the straightface test.” (Scruggs).

“There’s a great deal of cynicism in the trial bar that the privilege is being abused.” (Scruggs).

“This is a very honored profession. I think that the privilege is a very key part of that and should be preserved. The best way to get rid of it is to abuse it.” (Scruggs).

“There is nothing more undermining of our ability as a profession to defend the privilege than lawyers who overreach when they try to say that things are privileged which, in fact, are not.” (Fox).

“Let us walk away from here with one lesson. If we are going to protect the privilege, we have got to make sure that that which we believe is privileged, is separately indicated to be privileged, and that which is not privileged, should not be labeled by us as privileged, or we will have lost our birthright.” (Fox).

“It is hard, except for Geof Hazard, to find anybody in the academic community who likes lawyers, let alone is prepared to defend the privilege ... the government likes it because they want our help, because they want to make us junior G-men, because they want to make us investigators for them. And we have lapsed into that role.” (Fox).

“And I have listened here today to lawyers tell me that they have become government agents. That’s what’s happened and it’s only going to increase.” (Fox).

“The federal government is not honoring our professional responsibilities when it seeks to invade the privilege, however it gets there.” (Fox).

POSSIBLE SOLUTIONS TO THE PROBLEM OF THE EROSION OF THE PRIVILEGE

Legislative Remedies; Other.

Panelists

Stephen J. Harmelin
Moderator
Dilworth Paxson LLP

Thomas C. Baxter, Jr.
General Counsel and Executive Vice President,
Federal Reserve Bank of New York

Lewis H. Ferguson
General Counsel
Public Company Accounting Oversight Board

Susan Hackett
Senior Vice President and General Counsel
Association of Corporate Counsel

“The focus that I would encourage you to keep, is that this is not just a conversation about lawyers. We need to make sure that people understand this is a conversation about clients.” (Hackett).

“So, I don’t believe that there is going to suddenly be an epiphany that the DOJ and those memorandums are going to be pulled.” (Hackett).

“I am espousing the solution of a selective waiver, and that we can achieve the solution, either through case law or through statute.” (Baxter).

“We look at legal advice. We look at work product. And we do it for a particular purpose, not to pierce privilege, not to invade privilege, but to better understand how the control structure in a bank is operated and to better understand how it’s managing its risk. That’s the objective. The objective is not to offend privilege.” (Baxter).

“If our objective is to better inform the highest constituent body in the bank, namely its board of directors, why should that work a waiver? And when you think about it, that is an important point. There’s no adversity, there should be no waiver, because we’re all working in a common interest. What is that common interest? It’s the safe and sound operation of the banking organization.” (Baxter).



“Possible Solutions,” Moderator Harmelin and (L to R) Panelists Baxter, Ferguson and Hackett.

“I think the case law should focus on real adversity at the time of production. If that were the case, we might get to a point where the production of privileged information doesn’t work a waiver. That would be a good thing. That would be a solution. But because the case law is so bad, I don’t think that that is practical, as much as I would wish it to be so. So, I think we’re left with a statutory solution.” (Baxter).

“So, there is basically a scheme put in place to make sure that the documents that the PCAOB gets cannot be discovered.” (Ferguson).

Atlantic Legal Foundation: Mission and Programs

The full proceedings of the Conference are available on compact disk, together with continuing legal education materials and speakers, moderators and panelists professional biographies, and include Professor Geoffrey Hazard's and Ted Olson's addresses on the erosion of the privilege, from Atlantic Legal Foundation for \$295. Please contact:

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The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm with a demonstrable history of advancing the rule of law. As described by Theodore B. Olson, former Solicitor General of the United States, Atlantic Legal is "an organization that does so much important work in promoting limited government, free enterprise, individual liberty, common sense, and the orderly, rational development of the law." To accomplish its goals, Atlantic Legal provides legal representation and counsel, without fee, to parents, scientists, educators, and other individuals, corporations, trade associations and groups. The Foundation also undertakes educational efforts in the form of handbooks and conferences on pertinent legal matters.

Atlantic Legal's Board of Directors and Advisory Council include the active and retired chief legal officers of some of America's most respected corporations, distinguished scientists and academicians and members of national and international law firms.

The Foundation currently has a focus on four areas: representing prominent scientists and academicians in advocating the admissibility in judicial and regulatory proceedings of sound expert opinion evidence; parental choice in education; corporate governance; and, equal protection under the law by government agencies.

Atlantic Legal's cases in the past year alone have resulted in the protection of the rights of thousands of schoolchildren, employees, independent businessmen, and entrepreneurs. In case after case, Atlantic Legal brings about favorable resolutions for individuals and corporations who continue to be challenged by those who use the legal process to deny fundamental rights and liberties. Please visit www.atlanticlegal.org where the Foundation's most recent activities are detailed.



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