

Assault on the Shrine: the Demise and Possible Revival of the Attorney-Client Privilege

by

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Recent Congressional testimony summarized the results of the federal government's sustained assault on the attorney-client privilege over the past decade:

“We are forced to practice in a world where we cannot expect that any privilege will be respected by government investigators. The government now expects a waiver as an inherent right.”²

These sentiments reflect growing concern over the Department of Justice's (“DOJ's”) policies governing the role of attorney-client privilege and work product protection in federal prosecutions of business corporations. The DOJ policies, contained in a December 2006 Memorandum issued by then-Deputy Attorney General Paul McNulty (“the McNulty memo”),³ have been the subject of much recent debate and have generated calls for reform from, among others, Congress, former prosecutors, and corporate executives and lawyers.⁴ What began as a trickle of criticism is now more aptly characterized as a flood, placing DOJ on the defensive.

The concerns with DOJ's policies and practices in white-collar investigations have focused on two critical issues: whether a corporation will be seen as non-cooperative -- and therefore punished -- 1) if it does not waive the attorney-client privilege, and 2) if it indemnifies directors and officers and advances expenses to cover costs of representation in criminal investigations. While both of these issues are important, the focus of this article is on the attorney-client privilege.

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² Coalition to Preserve the Attorney-Client Privilege, *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results* at 14-22 (2006), as cited in *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. comm. on the Judiciary, 110th Cong. 6 (2007) (statement of Richard White, Chairman of the Board of Directors of the Association of Corporate Counsel) (“White Testimony”).

³ Memorandum from Paul J. McNulty to Heads of Department Components and United States Attorneys, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006) (“McNulty memo”), available at: www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

⁴ See Thomas P. Vartanian and Michael R. Bromwich, *Justice Dept. Eases Push on Firms' 'Cooperation,'* American Banker (Dec. 22, 2006).

This article builds on our previous article and describes the developments that led to the McNulty memo, the McNulty memo's key provisions, and responses and reactions to the McNulty memo since its issuance 18 months ago. It concludes with an analysis of recent proposals for reforming the DOJ policies governing the attorney-client privilege and work product protection.

What Led to the McNulty Memorandum?

Prior DOJ Policies

The McNulty memo was designed to remedy prior DOJ policies that had come under sustained attack for having, in the eyes of many, legitimized the right of prosecutors to demand waivers of attorney-client privilege and work product protections. The McNulty memo was the latest chapter in DOJ's recent history of trying to provide guidance to its own personnel and to the corporate world concerning the standards that would determine whether to prosecute a company or other business organization. In 1999, DOJ for the first time listed factors that prosecutors should consider in deciding whether to charge a corporation.⁵ DOJ refined this charging policy in a January 20, 2003 memo issued by then-Deputy Attorney General Larry Thompson ("the Thompson memo").⁶ This memo provided, among other things, that prosecutors "should consider the willingness of a corporation to waive" its attorney-client privilege and work product protections "in evaluating the corporation's cooperation" with the government's investigation.

"Culture of Waiver"

According to many, the Thompson Memo led to prosecutors over time coming to treat as routine the demand that corporations under investigation waive their privileges, or risk exposing their companies to costly indictments. For example, in a recent survey of over 1,200 in-house and outside corporate counsel, almost 75% of the respondents stated that they believed that, in the wake of the new government policy reflected in the Thompson Memo, a "culture of waiver" evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections.⁷ Notably, this "culture of waiver" has extended beyond the Justice Department. In

⁵ This guidance is entitled "Federal Prosecution of Corporations" and is informally referred to as "the Holder Memorandum" after former Deputy Attorney General, Eric Holder, Jr. The memo lists various factors to be considered in making the corporate charging decision, including 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 attorney-client and work-product privileges. Memorandum from Eric H. Holder to Heads of Department Components and United States Attorneys, *Federal Prosecution of Corporations* (June 16, 1999), available at: <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>.

⁶ Memorandum from Larry D. Thompson to Heads of Department Components and United States Attorneys, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), available at: http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

⁷ Letter from former senior Justice Department officials to Attorney General Alberto Gonzales (Sept. 5, 2006) (citing study available at <http://www.acca.com/Surveys/attyclient2/pdf> and noting that corporate counsel

November 2004, the U.S. Sentencing Commission added language to the Commentary to the Federal Sentencing Guidelines that authorized and encouraged prosecutors to seek privilege waivers as a condition for cooperation in cases involving companies and other organizations.⁸ Similarly, the Securities and Exchange Commission (SEC), the Commodities Futures Trading Commission (CFTC), the Department of Housing and Urban Development (HUD), and other agencies also adopted similar privilege waiver policies.⁹

This “culture of waiver” has very substantial costs for individual companies and for the entire system of criminal and regulatory investigations. When corporations decide to waive privileges in exchange for avoiding indictment, individual employees’ statements are in many cases turned over to the government. Although these employees never have the opportunity to assert their Fifth Amendment rights to the government, they risk prosecution for the statements they have made to the company’s lawyers.¹⁰ As a result, according to in-house counsel who have to deal with the fallout on a regular basis, employees are less likely to seek from corporate counsel “the advice that is crucial to maintaining law abiding businesses.”¹¹

Moreover, once a corporation waives privileges with respect to the government, the privileges will also arguably be waived with respect to potential third party litigation adversaries, exposing the corporation to potential, and probably costly, litigation. This is particularly relevant in the financial services area where typical enforcement matters may involve multiple bank regulatory agencies, the SEC, DOJ, and multiple class action and derivative lawsuits.¹²

indicated that when prosecutors gave a reason for requesting a privilege waiver, the DOJ memos were among the reasons most frequently cited).

⁸ *The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. comm. on the Judiciary, 110th Cong. 4 (2007) (statement of Karen J. Mathis, President of the American Bar Association) (citing Commentary to Section 8C2.5 of the Federal Sentencing Guidelines).

⁹ *See, e.g.* Securities and Exchange Commission, *Report of Investigation Pursuant to Section 21(a) of the Securities and Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions* (Oct. 23, 2001), available at: <http://www.sec.gov/litigation/investreport/34-44969.htm>; Commodities Futures Trading Commission Division of Enforcement, *Cooperation Factors in Enforcement Division Sanction Recommendations* (Aug. 11, 2004), available at: <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>; Department of Housing and Urban Development, *Notice PIH 2006-8* (Feb. 3, 2006), available at: <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.

¹⁰ Letter from former representatives of the Department of Justice to Senator Patrick Leahy (June 20, 2008) available at: <http://online.wsj.com/public/resources/documents/leahy.pdf>.

¹¹ *See* White Testimony, *supra* note 2.

¹² For this reason, the bank regulatory agencies obtained an attorney-client waiver exemption at 12 U.S.C. § 1828(x) which states: "The submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority."

As this “culture of waiver” developed and then accelerated in the post-Enron era, the American Bar Association (“ABA”) and other industry groups began challenging the Justice Department’s policies. The ABA formed a Task Force on Attorney-Client Privilege and a Coalition to Preserve the Attorney-Client Privilege, consisting of, among others, the U.S. Chamber of Commerce, the National Association of Criminal Defense Lawyers and the American Civil Liberties Union, was also formed.¹³ These groups gathered information to determine the pervasiveness of coercive waiver requests, issued statements criticizing the government policy, sent letters to the Attorney General, arranged for former DOJ officials to “decry[] DOJ waiver tactics as unnecessary and harmful to compliance” and lobbied Congress to “invalidate provisions of the Thompson Memorandum and similar policies at other federal agencies that prevent executives and employees from freely, candidly, and confidentially consulting their attorneys.”¹⁴

These sustained efforts at lobbying and persuasion had an impact. For example, on April 5, 2006, the Sentencing Commission voted unanimously to remove the privilege waiver language from the Sentencing Guidelines. DOJ, however, responded by merely instructing each U.S. Attorney and Component Head to adopt a “written waiver review process for” his district or component.¹⁵ This development was widely regarded as insufficient because rather than restricting all prosecutors’ ability to demand privilege waivers, it merely provided for different waiver policies being established throughout the country.¹⁶ Nor was there any method for assessing whether this new requirement was followed or how seriously it was taken. Defense lawyers and companies under investigation failed to notice any difference.

Proposed Legislation

The criticisms of DOJ’s practice in this area culminated when, on December 7, 2006, shortly before the issuance of the McNulty memo, Senator Arlen Specter introduced the “Attorney Client Privilege Protection Act of 2006” in an attempt to legislate out of existence many of the Thompson Memo’s objectionable provisions. The proposed legislation would prohibit prosecutors from requesting privilege waivers and, among other things, from conditioning charging decisions on whether a corporation waives its privileges.¹⁷

¹³ See *Coerced Waiver of the Attorney-Client Privilege: The Negative Impact for Clients, Corporate Compliance, and the American Legal System*, Hearing Before the S. Jud. Comm., 109th Cong. (2006) (submission of the Coalition to Preserve the Attorney-Client Privilege).

¹⁴ See *id.*; Association of Corporate Counsel, *Report of the Association of Corporate Counsel. Attorney-Client Privilege: Erosion, and Yet, Progress* (Jan. 2007), available at: www.acc.com/public/reference/acpriv/adcom2006privilegeassessmt.pdf.

¹⁵ Memorandum from Robert D. McCallum to Heads of Department Components and United States Attorneys, *Waiver of Corporate Attorney-Client and Work Product Protection* (Oct. 21, 2005) (“McCallum Memo”), available at: www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

¹⁶ Letter from Former Senior Justice Department Officials to Alberto Gonzales, *supra* note 7.

¹⁷ The Attorney Client Protection Act of 2006 (Introduced December 7, 2006), available at: lawprofessors.typepad.com/.../files/attorneyclient_privilege_protection_act_12_6_06_hen06g74_xml.pdf.

The McNulty Memorandum

On December 12, 2006, DOJ issued the McNulty memo to address “concerns that [its] practices may be discouraging full and candid communications between corporate employees and legal counsel.”¹⁸ The new memo, which replaced the Thompson memo, recognized the “extremely important function” of the attorney-client privilege and work product protection, and stated that waiver of these protections was “not a prerequisite to a finding that a company has cooperated in the government’s investigation.” The memo provided that prosecutors may only request waivers of these protections “when there is a legitimate need¹⁹ for the privileged information, and should seek the “least intrusive waiver necessary to conduct a complete and thorough investigation” and “follow a step-by-step approach to requesting information,” that involves obtaining specific authorizations to request privilege waivers.

The memo explained that prosecutors should first request “purely factual information” (called “Category I” information), and, only if the factual information provides an incomplete basis to conduct a thorough investigation, can consider requesting attorney-client communications or non-factual attorney-client work product (“Category II” information).²⁰ The memo required that prior to requesting Category I information, prosecutors obtain written authorization from the local U.S. Attorney, who must in turn consult with the Assistant Attorney General for the Criminal Division. Prior to requesting Category II information, which should be sought only in “rare circumstances,” the U.S. Attorney must obtain written authorization from the Deputy Attorney General.

According to the memo, a corporation’s response to a request for waiver of Category I information may be considered in determining whether that corporation has cooperated in the government’s investigation, but a corporation’s declining to provide a waiver for Category II information cannot be considered against that corporation. In any event, the memo provided, prosecutors “may always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether the corporation has cooperated in the government investigation.”

Critiques of the McNulty Memorandum and its Implementation

From the outset, the McNulty Memo was widely criticized. The ABA, for example, complained that the new guidelines “fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections.” The core of the

¹⁸ McNulty memo, *supra* note 3.

¹⁹ The memo explains that whether there is a “legitimate need” depends on: (1) the likelihood and degree to which the privileged information will benefit the government’s investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) collateral consequences to a corporation of the waiver.

²⁰ Thomas P. Vartanian and Michael R. Bromwich, *supra* note 4.

criticism was that the memo continued to permit prosecutors to ask for waivers, to consider a company's refusal to waive in various circumstances and to give "cooperation credit" to those companies that do waive their privileges.²¹ Moreover, because many federal enforcement officials rely almost exclusively on *informal* demands to coerce corporations to waive their privileges, many claim the memo's restrictions on formal waiver demands would do little to restrain prosecutors' routinely seeking and/or expecting privilege waivers.²²

The McNulty Memo's Language

Criticisms have also been aimed at the specific language of some of the memo's provisions. For example, some have challenged the memo's description of Category I information as "purely factual," noting that "in practice . . . the line between what is 'purely factual' and what contains attorney work product is rarely clear cut" and that what the memo alleges to be "purely factual" is material that is generally protected by the attorney-client and/or work product privileges.²³ The "legitimate need" language has also been challenged, as the memo is unclear about when a prosecutor will have demonstrated such a need, and the "legitimate need" determination is made by prosecutors in their sole discretion without any third party review or appeal process.²⁴

Implementation of the McNulty Memo

In addition to criticizing the language of the memo's provisions, many have condemned the memo's efficacy, claiming that even its limited improvements are not being implemented. Anecdotal reports from corporate attorneys, including our own experiences, suggest that local prosecutors in many instances lack familiarity with and therefore ignore the memo's requirement to seek authorization before requesting disclosures. Thus, many lawyers practicing in the area believe that the memo has not significantly reduced the incidence of coerced waivers or changed the culture of waiver that permeates actual practices around the country. Some reports suggest that in the wake of the McNulty memo, prosecutors have become even more abusive in their requests, threatening that companies that ask them to take a formal waiver request "up the ladder" will be particularly harshly treated.²⁵ Numerous anecdotes about coercive prosecutor

²¹ *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. comm. on the Judiciary, 110th Cong. 4-5 (2007) (statement of Andrew Weissman, Jenner & Block, LLP).

²² White Testimony, *supra* note 2 (Mr. White also complained that the memo, by merely clarifying how privilege waivers should be sought, ratifies the premise that DOJ, as opposed to courts, has a right to determine when a corporate client's privilege rights deserve protection. Mr. White believes that this alters the long-standing principle that courts should make this determination). Other structural concerns about the memo's provisions include that it does not provide for legislative or judicial oversight over charging decisions, or even for these decisions to be reviewed in Washington by "main justice." *Id.* (statement of Andrew Weissman, Jenner & Block, LLP).

²³ *Id.*

²⁴ *Id.* (statement of William M. Sullivan, Jr., Winston & Strawn, LLP).

²⁵ White Testimony, *supra* note 2 at 8-9

conduct after the McNulty memo are included in the letter that E. Norman Veasey, the former Chief Justice of the Delaware Supreme Court, sent to the Senate Judiciary Committee on September 13, 2007.²⁶

Recent Developments

This widespread criticism of the McNulty memo led to renewed attempts to legislate to address DOJ's privilege waiver policies.²⁷ In July 2007, HR 3013 was introduced in the House of Representatives. This bill is identical to the legislation that Senator Specter had introduced in December 2006, and reintroduced in January 2007 after concluding that the McNulty Memo had not provided sufficient protection of the attorney-client privilege so as to obviate the need for legislation on this issue. These bills would prohibit federal agencies from pressuring companies to waive their privileges and from giving cooperation credit for corporations' taking punitive actions against their employees. The House Bill passed in November 2007, and the Senate bill is pending.

Within the past month, on June 20, 2008, 32 former United States Attorneys wrote to Senate Judiciary Committee Chairman Patrick Leahy asking him to support this legislation.²⁸ The former prosecutors stressed that the legislation was necessary because the McNulty memo was inadequate to fix, "the widespread practice of requiring waiver [that] has led to the erosion not only of the privilege itself, but also of the constitutional rights of employees who are caught up, often tangentially, in business investigations." They emphasized that the proposed legislation is "consistent with good corporate governance" because strengthening the privilege will encourage employees to cooperate with internal business investigations.

A few days later, Senator Specter introduced a slightly modified version of the legislation, S.3217.²⁹ On the same day, Senator Leahy warned the Justice Department that he

²⁶ Letter from E. Norman Veasey to Senate Judiciary Committee (Sept. 13, 2007), *available at*: <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>. Some of the conduct recounted in this letter is particularly egregious. For example, when one corporation mentioned the process required by the McNulty memo, the prosecutor responded, "I don't give a flying --- about the policy." *See also* White Testimony, *supra* note 2.

²⁷ The Complaints also caused some government agencies to reverse their privilege waiver policies. For example, in March 2007, the CFTC eliminated the privilege waiver language from its cooperation standards. The CFTC's new cooperation standards are available at: <http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html>.

²⁸ Letter from former representatives of the Department of Justice, *supra* note 10.

²⁹ According to Senator Specter's floor statement, the "improvements" in the revised bill include extending the ban on privilege waiver demands to include administrative proceedings and adjudications, and making clear that the bill's prohibition on informal privilege waiver demands is far from unprecedented. "Attorney-Client Privilege Protection Act of 2008," Floor Statement of the Honorable Arlen Specter (June 26, 2008), *available at*: <http://www.acc.com/resource/v9857>.

would focus on quick legislative action if the department failed to modify its policy by the time Congress returned from its July 4th recess on July 7.³⁰

The Filip Letter

As a direct result of this pressure, and in an effort to avert legislative action, on July 9, 2008, Deputy Attorney General Mark Filip sent a letter to Senators Leahy and Specter (“the Filip letter”) about “certain changes to the Principles that the Department intends to make in the coming weeks to address issues you [the Senators] raised.” In his testimony before the Senate Judiciary Committee the next day, Attorney General Michael Mukasey referred to this letter, saying that it addresses proposed changes that would replace the McNulty memo.³¹

Mr. Filip’s letter proposes that (1) corporate cooperation should be measured by the extent to which a corporation discloses relevant facts and evidence, and not whether it waives privileges in making its disclosures; (2) federal prosecutors not demand in any case the disclosure of Category II information as a condition for cooperation credit; (3) federal prosecutors not consider whether a corporation has advanced attorney’s fees to its employees in evaluating cooperation; (4) federal prosecutors not consider whether a corporation has entered into a joint defense agreement in evaluating cooperation; and (5) federal prosecutors not consider whether a corporation has retained or sanctioned employees in evaluating cooperation.

These proposed changes address many of the central concerns about the McNulty memo, most notably in their restriction of waiver demands for Category II information and the inclusion of protection for joint defense agreements. However, these proposed changes are unlikely to fully satisfy critics of the McNulty memo, and therefore are unlikely to obviate the call for legislative action in this area, for the following reasons:

- Under the McNulty memo’s definition, “Category I information” could include information protected by the attorney-client privilege or work product doctrine. The proposed guidelines do not prohibit prosecutors from demanding disclosure of this type of privileged information.
- The new guidelines do not provide any oversight mechanism for reviewing prosecutors’ decisions on demanding waivers.

³⁰ Ralph Lindeman, *Specter Introduces New Measure to Outlaw Controversial DOJ Policy on Privilege Waivers*, Daily Report for Executives, June 30, 2008, at A20, also available at: <http://ippubs.bna.com/ip/BNA/DER.NSF/9311bd429c19a79485256b57005ace13/c31f4585d956093b852574760012542a?OpenDocument>.

³¹ Pedro Ruz Gutierrez, *AG Mukasey Hints at Revision of McNulty memo, Spars with Senators at Hearing*, Legal Times (July 10, 2008), available at: <http://www.law.com/jsp/article.jsp?id=1202422864034&rss=newswire>. This was a change from the Attorney General’s statement only a month earlier that, “We think and continue to think that the McNulty memo is working and has worked.” Joe Palazzolo, *Former U.S. Attorneys Assail McNulty Memo*, Legal Times (June 23, 2008), available at: <http://www.law.com/jsp/article.jsp?id=1202422462137>.

- Whereas the proposed legislation restricts all agents and attorneys of the United States from engaging in the restricted practices, the proposed DOJ guidance affects only DOJ prosecutors. While the Justice Department cannot mandate conduct by other agencies, those seeking to remedy the “culture of waiver” that was created by DOJ policies and that has, as noted above, permeated other agencies, may prefer a legislative remedy that extends beyond DOJ to other regulatory agencies.

Conclusion

Whether the proposed new DOJ guidance set forth in the Filip letter is sufficient to stave off legislative action will become clear in the near future. In any event, it is likely that, either through legislative action or internal DOJ revisions, the McNulty memo will not be the controlling authority on privilege waiver and related issues for much longer.

However, even if the McNulty memo is formally superseded, pressure for privilege waivers to gain cooperation credit for disclosing relevant information (which would still be permitted under the proposed DOJ guidelines) will remain part of the fabric of government investigations of corporations, at least to some extent, for the foreseeable future. The privilege waiver demands facilitated by the Thompson memo, and ameliorated only to some degree by the McNulty memo, have in recent years become embedded in the expectations, sometimes unstated, between prosecutors and white-collar defense lawyers. Neither the issuance of a new memo nor even the passage of legislation, will change those expectations overnight because the very same practices previously approved in writing may now instead be undertaken with an unreviewable wink and a nod rather than through explicit DOJ authorization. It will take a sustained period of time for the damage done to the attorney-client privilege to be fully repaired, but it is a project very much worth the time and the effort.