

THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE IN INTERNAL INVESTIGATIONS¹

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A. Attorney-Client Privilege and Work-Product Doctrine Compared

1. Standard. "Because the attorney-client privilege and work product doctrine have different standards for waiver, they must be considered separately." *SNK Corp. of Am. v. Atlus Dream Entm't Co.*, 188 F.R.D. 566, 571 (N.D. Ca. 1999).

B. The Attorney-Client Privilege and the Principle of Subject-Matter Waiver

1. General rule of waiver. The general rule is that voluntary disclosure of a privileged attorney-client communication constitutes waiver of the privilege as to all other communications on the same subject. *In re Consol. Litig. Concerning Harvester's Disposition of Wis. Steel Lit.*, 666 F. Supp. 1148, 1150 (N.D. Ill. 1987) (citing *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983)); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984) (referred to as the limited subject matter waiver principle).

2. Rationale. Courts reason that "[a] party cannot selectively divulge privileged information without impairing its attorney-client privilege as to the rest of that information concerning the same subject. The privilege exists in the first instance to encourage communications from a client to his attorney, and for that reason the confidence of such communications must be protected.... [A] party abandons this confidence by submitting a privileged material in a discovery proceeding, insofar as the

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subject matter of the privilege is concerned." *Chinnici v. Cent. DuPage Hosp. Ass'n*, 136 F.R.D. 464, 465 (N.D. Ill. 1991) (quoting *B&J Mfg. Co. v. FMC Corp.*, 21 Fed. R. Serv. 2d 1119, 1119 (N.D. Ill. 1975)).

3. Scope. "There is no bright line test for determining what constitutes the subject matter of a waiver, rather courts weigh the circumstances of the disclosure, the nature of the legal advice sought and the prejudice to the parties of permitting or prohibiting further disclosures." *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1347 (Fed. Cir. 2005) (applying Seventh Circuit law to privilege question, finding limited subject-matter waiver in relation to a patent dispute), *cert. denied*, 547 U.S. 1069 (2006).

C. Who Can Waive the Privilege?

1. Only the corporation can waive its privilege. Because the privilege belongs to the corporation, only the corporation has authority to assert or waive privilege. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (instructing that "the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors"). A dissolved corporation may be unable to assert the privilege. *See City of Rialto v. U.S. Department of Defense*, 492 F. Supp. 2d 1193, 1200 (C.D. Cal. 2007). Transfer of control over a corporation would normally result in a transfer of the attorney-client privilege to the successor entity. *See O'Leary v. Purcell Co., Inc.*, 108 F.R.D. 641, 644 (M.D.N.C. 1985). However, an individual director, officer, or employee generally cannot assert or waive the privilege, absent the corporation's consent. *In re Grand Jury Proceedings*, 219 F.3d 175, 195 (2d Cir. 2000). Employees being interviewed by corporation's counsel should be informed of this condition.

2. Former executives cannot waive a corporation's privilege. *Commodity Futures Trading Comm'n*, 471 U.S. at 378-79; *Allens v. Burns Fry, Ltd.*, No. 83 C 2915, 1987 U.S. Dist. LEXIS 4777, at *3 (N.D. Ill. June 8, 1987).

3. Dissident directors. A dissident director cannot waive a corporation's privilege, as he "is by definition not 'management', and, accordingly, has no authority to pierce or otherwise frustrate the attorney-client privilege when such action conflicts with the will of 'management.'" *Milroy v. Hanson*, 875 F. Supp. 646, 649-50 (D. Neb. 1995).

D. Corporation's Waiver Can Be Implied

1. Individuals. Disclosure by an individual may waive corporate privilege based on the context of the disclosure, the efforts of the corporation to protect the privilege, and the position of the person making the disclosure. *In re Grand Jury Proceedings*, 219 F.3d at 184-90 (2000).

2. Advice-of-counsel defense by corporation may waive privilege as to that subject matter. *See, e.g., In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006) (considering advice-of-counsel defense to willful patent infringement claim). However, the scope of such a waiver is not unlimited. *See Ampex Corp. v. Eastman Kodak Co.*, 2006 U.S. Dist. LEXIS 48702, *11-13 (D. Del. 2006). Nor does an individual's assertion of the defense necessarily imply corporate waiver, especially where, for example, the substance of the advice is not revealed, *United States v. White*, 887

F.2d 267 (D.C. Cir. 1989), or the corporation has made clear its intent to preserve the privilege, *In re Grand Jury Proceedings*, 219 F.3d at 184-85 (2000) (corporate chairman's assertion of defense did not imply waiver of corporate privilege).

E. Disclosing an Investigative Report

1. Waiver depends on subsequent use in litigation. Disclosing an investigative report will not necessarily waive otherwise privileged drafts and other underlying documents, provided that the corporation does not affirmatively rely on the report in subsequent litigation. *See Hollinger Int'l Inc. v. Hollinger Inc.*, 230 F.R.D. 508, 516, 518-19 (N.D. Ill. 2005) (where defendant had not "put the Special Committee counsel's opinion work product at issue in any litigation," disclosure of a final report did not waive "work product protection over the Special Committee counsel's legal analyses, mental impressions, and attorney-client communications involved in the investigative and Report compilation process"); *see also In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2007 U.S. Dist. LEXIS 23164, at *14 (E.D. La. Mar. 5, 2007) (holding report of defendant drug manufacturer nondiscoverable because defendant was not using report offensively; thus, "considerations of fairness do not dictate that the work-product protection be vitiated"), *vacated on other grounds*, 489 F. Supp. 2d 58 (2007).

- (a) However, where the corporation attempts to use the report as a "sword" by affirmatively introducing it in subsequent litigation, courts often hold that the privilege has been waived. *See, e.g., In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D. 274, 283 (S.D.N.Y. 1995) ("Attempting to shield the documents underlying the [report] from discovery while at the same time urging this Court to award it damages in reliance, at least in part, on the [report's] conclusions, the Audit Committee seems guilty of the exact conduct that the subject matter waiver doctrine was formulated to address.").

F. Selective Waiver to Governmental Agencies

1. McNulty Memorandum

- (a) New Guidelines. On December 12, 2006, then-Deputy Attorney General Paul J. McNulty issued a new memorandum outlining the Department of Justice's Charging Guidelines in Corporate Fraud Prosecutions, which supersedes the Thompson memorandum. (Memorandum from Deputy Attorney General Paul J. McNulty to United States Attorneys, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006) [hereinafter McNulty Memorandum], *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.)
- (b) New requirements for seeking waiver. The McNulty Memorandum curtails controversial portions of the Thompson memorandum by adding restrictions for prosecutors seeking privileged information from corporations:

- (i) Two categories of information. The McNulty Memorandum divides privileged information into two categories. Prosecutors are instructed to seek Category I information from a corporation first, which consists of purely factual information such as interview memoranda, factual chronologies, or reports containing investigative facts.
- (ii) In order to request waiver of Category I information from a corporation, the prosecutor must obtain written approval from the U.S. Attorney, following the U.S. Attorney's consultation with the Assistant Attorney General for the Criminal Division. The waiver request must be the "least intrusive" possible, and prosecutors must demonstrate a "legitimate need" in order to obtain approval. *See* McNulty Memorandum 8-9.
- (iii) Four factors are considered in determining whether there is a legitimate need for waiver of the privilege:
 - (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 through alternative means that do not require waiver;
 - (3) the completeness of the voluntary disclosure already provided; and
 - (4) (the collateral consequences to the corporation in requesting the waiver.
- (iv) The McNulty Memorandum allows a prosecutor to consider a corporation's response to the government's request for waiver of privilege for Category I information in determining whether the corporation has cooperated with the government's investigation. *Id.* at 9.
- (v) The McNulty Memorandum instructs prosecutors to seek Category II information (such as non-factual work-product or attorney-client communications) only when the Category I information provides an incomplete basis on which to conduct an investigation. *Id.* at 10.
- (vi) In order to request Category II information, the United States Attorney must obtain written authorization from the Deputy Attorney General (unless the waiver relates to an advice-of-counsel defense or the crime-fraud exception).
- (vii) Further, the McNulty Memorandum explains that if a corporation declines to provide a waiver for Category II information, prosecutors must *not* consider this declination against the corporation in making a charging decision. However, the prosecutors may always favorably consider the corporation's acquiescence to the government's waiver request. *Id.*

- (c) Advancement of Attorneys' Fees. The McNulty Memorandum explains that "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment." *See id.* at 11. This change followed the recent holding by Judge Kaplan in the Southern District of New York that the attorneys' fee portion of the Thompson memorandum violated the employees' right to a fair trial and to the effective assistance of counsel under the Fifth and Sixth Amendments. *See United States v. Stein*, 435 F Supp. 2d 330, 336 (S.D.N.Y 2006).
 - (i) The McNulty Memorandum provides that after obtaining prior approval from the Deputy Attorney General, prosecutors may consider the corporation's advancement of fees only in "extremely rare cases...when the totality of the circumstances show that it was intended to impede a criminal investigation." McNulty Memorandum, 11 n.3.
2. Circuit Split on the Attorney-Client Privilege and Selective Waiver to Governmental Agency
- (a) Eighth Circuit's minority position. The Eighth Circuit is the only circuit that has expressly adopted the doctrine of selective waiver. In *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), the court held that defendant's disclosure of privileged documents to the Securities and Exchange Commission in a nonpublic investigation effected a limited waiver. The court reasoned, "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." *Id.* at 611.
 - (b) Majority position. The D.C., Federal, First, Third, Fourth, and Sixth Circuits reject selective waiver, reasoning that the client cannot "be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim" as to others. *See, e.g., Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1415-18 (Fed. Cir. 1997); *United States v. MIT*, 129 F.3d 681 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1417-18 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002). These courts find the concept of limited waiver difficult to reconcile with the policies underlying the common law privilege. The D.C. Circuit reasons, "Voluntary cooperation with the government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a 'friendly' agency." *Permian Corp.*, 665 F.2d at 1220-21 (1981).

- (c) Second Circuit's case-by-case approach. The Second Circuit has declined to adopt a *per se* rule and instead engages in a case-by-case analysis, although the court indicated that it would uphold confidentiality agreements between an agency and a corporation. See *In re Steinhardt Partners, LP.*, 9 F.3d 230, 236 (2d Cir. 1993). While recognizing that "selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage," the court concluded that "[c]rafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis." *Id.* The court reasoned that "[e]stablishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a common interest...or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials." *Id.* District courts in the Second Circuit have recently upheld selective waiver where a confidentiality agreement was in place. See, e.g., *In re Natural Gas Commodity Litig.*, No. 03 Civ. 6186 (VM) (AJP), 2005 U.S. Dist. LEXIS 11950 (S.D.N.Y. June 21, 2005) (protecting disclosures to two government energy commissions from production), *aff'd*, 232 F.R.D. 208 (S.D.N.Y. 2005).
- (d) Seventh Circuit. The Seventh Circuit has supported limited waiver in dicta. *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997) (criticizing decisions rejecting selective waiver, and characterizing waiver of the privilege as a "harsh sanction").
- (e) Recent decision in the Tenth Circuit. The Tenth Circuit recently declined to adopt the selective waiver doctrine, while leaving open the question of whether a sufficient confidentiality agreement would preserve the privilege. See *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 450 F.3d 1179 (10th Cir.) (finding the language of the confidentiality agreement at issue was too broad to be consistent with the attorney-client privilege), *cert. denied*, 127 S. Ct. 584 (2006).
- (f) Selective waiver remains an open question in the Ninth Circuit. *United States v. Bergonzi*, 403 F.3d 1048, 1050 (9th Cir. 2005) (quoting *Bittaker v. Woodford*, 331 F.3d 715, 720 n.5 (9th Cir. 2003)). District courts have generally upheld a limited application of the selective waiver doctrine where a confidentiality agreement was in place and disclosure resulted from compulsion by the government. See, e.g., *In re McKesson HBOC, Inc. Sec. Litig.*, No. C-99-20743 RMW, 2005 U.S. Dist. LEXIS 7098 (N.D. Cal. Mar. 31, 2005) (upholding a confidentiality agreement based on the policy rationale of encouraging companies to cooperate with government investigations); *Louen v. Twedt*, No. 1:04-CV-6556, 2006 WL 1581901, at *4 (E.D. Cal. June 6, 2006) (noting that waiver must occur in response to compulsion by the government); *but see United States v. Reyes*, 239 F.R.D. 591, 603 (N.D. Cal. 2006) (rejecting selective waiver "[i]n accord with every appellate court that has considered the issue in the last twenty-five years"); *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 647-48 (C.D. Cal. 2005) (listing — arguably in dicta — three reasons for categorically denying selective privilege).

3. Circuit Split on the Work-Product Doctrine and Selective Waiver

- (a) Fourth Circuit's minority position. The Fourth Circuit is the only circuit that has adopted selective waiver in the context of work-product immunity, despite its rejection of the doctrine in the attorney-client privilege context. In *Martin Marietta*, 856 F.2d. at 625 (1988), the court found that the company waived non-opinion work-product by making testimonial use of it and disclosure to the government. However, the court declined to find waiver with respect to opinion work-product, relying on the special protection that both case law and the Fed. R. Civ. P 23(b)(3) afford to opinion work-product. *Id.* at 626.
- (b) Majority position. The majority of other circuits have found waiver of the work-product doctrine. *See, e.g., Westinghouse Elec. Corp.*, 951 F.2d at 1429 (1991) (opining that the "standard for waiving the work product doctrine should be no more stringent than the standards for waiving the attorney-client privilege"); *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 306-07 (2002) ("Even more than attorney-client privilege waiver, waiver of the protections afforded by the work product doctrine is a tactical litigation decision...[W]hether or not to 'show your hand' is quintessential litigation strategy.").
- (i) These courts base their reasoning on the principle that disclosure "to an actual or potential adversary waives work product protection as to the material disclosed." *MIT*, 129 F.3d at 687 (1997). Given the circumstances of the investigation, these courts treat the government as an actual or potential adversary and accordingly find waiver. *Id.*
- (ii) These courts reject application of the common interest doctrine to prevent waiver, reasoning that the corporation's "stated interests in pinpointing the sources of the alleged accounting misdeeds and those of the government's [are] not sufficiently aligned to consider them non-adverse or to characterize their relationship as necessarily operating toward a common legal interest." *Id.* at 686.

4. Presence of Confidentiality Agreements

- (a) Split on presence of confidentiality agreement. Some courts have adopted a blanket rejection of selective waiver, even where a confidentiality agreement is in place. *See, e.g., In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 289 (2002) (confidentiality agreement served only to obfuscate truth finding process); other circuits, while not foreclosing the possibility that a confidentiality agreement could be valid, have found waiver given the particularly broad language of the agreement in issue. *See, e.g., Qwest Commc'ns Int'l Inc.*, 450 F.3d at 1179 (2006) (declining to adopt selective waiver, and finding that the confidentiality agreement insufficiently limited future disclosure of privileged materials). Finally, other courts have upheld selective waiver with a confidentiality agreement in place, reasoning that the party took steps to protect the privilege. *See, e.g., Lawrence E. Jaffe Pension Plan v. Household Int'l*,

Inc. (Jaffe II), No. 02 C 5893, 2006 U.S. Dist. LEXIS 88826, at *65-66 (N.D. Ill. Dec. 6, 2006) (holding that the party preserved its work-product protection through a confidentiality agreement with the SEC which properly limited future disclosure); *McKesson*, 2005 U.S. Dist. LEXIS 7098 (2005) (holding the work-product protection was preserved by an agreement that properly limited future disclosure, and emphasizing the policy rationale of encouraging companies to cooperate with government investigations); *see also In re Natural Gas Commodity Litig.*, 2005 U.S. Dist. LEXIS 11950 (2005) (giving considerable weight to confidentiality agreement in upholding work-product protection).

(b) Reasoning of Sixth Circuit in adopting a blanket rejection of selective waiver.

- (i) The Sixth Circuit "reject[s] the concept of selective waiver, in any of its various forms...even that which stems from a confidentiality agreement," as it "transforms the attorney-client privilege into 'merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage.'" *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 303 (2002) (quoting *Steinhardt*, 9 F.3d at 325 (1993)).
- (ii) Troubled by the policy implications, the court expressed its concern as to "whether the Government should assist in obfuscating the 'truth-finding process' by entering into such confidentiality agreements at all. The investigatory agencies of the Government should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain." *Id.* at 305.

(c) Reasoning of Tenth Circuit in declining to adopt selective waiver, and rejecting the confidentiality agreement at issue.

- (i) While the Tenth Circuit declined to adopt selective waiver, the court did not foreclose the possibility of a confidentiality agreement protecting the privilege. In *Qwest Communications*, the corporation entered into confidentiality agreements with the Securities and Exchange Commission and the Department of Justice that did "little to restrict the agencies' use of the materials they received from [the corporation]. The agencies [were] permitted to use the Waiver Documents as required by law in furtherance of the discharge of their obligations. The DOJ [was] specifically permitted to share the Waiver Documents with other agencies, federal, state, and local, and make use of them in proceedings and investigations." *Qwest Commc'ns Int'l, Inc.*, 450 F.3d at 1195 (2006). The privileged documents at issue had already been introduced into evidence in a criminal trial, produced as discovery in three separate criminal proceedings, and used in exhibits to the Securities and Exchange Commission investigative testimony. *Id.* The agreement did not require the agency to "segregate material obtained from [the corporation], file it under seal, keep records of its use, or otherwise deal with the information in any special way." *Id.* On those facts, the court found

that the agreements conferred too much discretion on the agencies to use the privileged documents as they wished and accordingly found that the corporation had waived the privilege.

- (d) Reasoning of courts that have upheld confidentiality agreements.
- (i) The majority of federal courts that have upheld confidentiality agreements have done so on the basis of work-product protection. In *McKesson*, the corporation entered into confidentiality agreements with the Securities and Exchange Commission and the U.S. Attorney's office, and later relied on the agreements when the lead plaintiff in a securities litigation sought production of a report and supporting materials compiled by the corporation's lawyer. *McKesson*, 2005 U.S. Dist. LEXIS 7098, at *45 (2005). The plaintiff argued that the corporation had waived the privilege and work-product protection by disclosing the report and materials to the government. The court held that the corporation had not waived its work-product privilege by disclosing these reports to the government, and based its decision on the confidentiality agreement in place.
- (1) The court found Judge Boggs's dissent in *In re Columbia/ HCA Healthcare Corp.* persuasive with regard to recognizing a distinction between disclosure to a private entity (properly resulting in waiver) and disclosure to a government entity pursuant to a confidentiality agreement (properly preserving the privilege). *Id.* at 45. The court reasoned that "[p]ermitting disclosure to the government under a confidentiality agreement would not undermine the underlying principles of the work product doctrine." *Id.*
- (2) With regard to the common interest analysis and the likelihood that the information would reach adverse parties, the court reasoned, "While the alignment of issues and goals may be insufficient to constitute a common interest where, as here, the disclosing and receiving parties are potentially on opposite side of the litigation, the presence of a confidentiality agreement ensures, to the extent possible under the law, that disclosure of the protected materials will not reach adverse parties." *Id.* at 46.
- (3) Finally, the agreement provided that the government could disclose the privileged material pursuant to its regulatory duties and as otherwise required by law. The court found that this language properly limited the government's ability to re-disclose the privileged information, and concluded that "the re-disclosure is no broader than required to make voluntary disclosure by [the corporation] useful to the government. The re-disclosure provisions

are logical preconditions for the government's agreeing to treat the materials as privileged and confidential." *Id.* at 48.

5. Recent Legislative Action

(a) Proposed Fed. R. Evid. 502 and Limitations on Waiver

(i) At the June 2006 meeting of the Federal Judicial Conference's Advisory Committee on Evidence Rules, a new Federal Rule of Evidence was approved and later published for comment in August 2006. On April 13, 2007, the Advisory Committee developed a revised version of the proposed rule, which will be submitted to the Standing Committee in June 2007. *See* Fed. R. Evid. 502 (proposed), *available at* <http://www.uscourts.gov/rules>.

(1) Significantly, the proposed Rule 502 provides that a party effects a subject matter waiver only if such waiver is intentional, and the disclosed and the undisclosed communication ought in fairness to be considered together. *Id.*

(2) In addition, the proposed Rule 502 provides that inadvertent disclosure does not constitute a waiver of the privilege where the holder of the privilege took reasonable and prompt steps to prevent the disclosure and to rectify the error. *Id.*

(ii) On April 13, 2007, the Advisory Committee removed the proposed Rule's language regarding selective waiver, and separated it into an independent statute for congressional review. The Advisory Committee took no position on the merits of selective waiver. The proposed selective waiver legislation goes against the prevailing weight of authority in the Courts of Appeals by adopting the doctrine of selective waiver, and provides in the proposed subsection (a):

(1) "Selective waiver — In a federal [or state] proceeding, the disclosure of a communication or information protected by the attorney-client privilege or as work product — when made for any purpose to a federal office or agency in the course of any regulatory, investigative, or enforcement process — does not waive the privilege or work-product protection in favor of any person or entity other than a federal office or agency."

6. U.S. Sentencing Commission

(a) On April 15, 2006, the U.S. Sentencing Commission deleted the controversial language in Section 8C2.5 of the Sentencing Guidelines, which became effective November 1, 2006. *See* U.S. Sentencing Guidelines, Final Amendments 2006, *available at* <http://www.usc.gov/2006guid/Finalamend2006.pdf>.

(b) Section 8 formerly provided that a waiver of attorney-client privilege and of work-product protections is not a prerequisite to a reduction in culpability score for a

corporation, "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." The amendment deletes the language addressing waiver of the privilege in its entirety.

- (c) The Commission explains that public comment and testimony on November 15, 2005, and May 15, 2006 indicated that the sentence could be misinterpreted to encourage waiver of the attorney-client privilege and work-product protection.

7. Proposed Attorney-Client Privilege Protection Act of 2007

- (a) The U.S. Senate Committee on the Judiciary is currently considering proposed legislation, the Attorney-Client Privilege Protection Act of 2007, introduced by Senator Arlen Specter on January 4, 2007 (S. 196). *See* Attorney-Client Privilege Protection Act of 2007 (proposed), *available at* <http://thomas.loc.gov/>.
- (b) Senator Specter praised the Department of Justice for its effort to revise the Thompson Memorandum, but characterized the McNulty Memorandum as "inadequate in its protection of the attorney-client privilege," as it "continues to threaten the viability of the attorney-client privilege by allowing prosecutors to request privilege waiver upon a finding of 'legitimate need.'" *Id.*
- (c) The proposed legislation prohibits any U.S. agent or attorney from demanding, requesting, or conditioning treatment upon the disclosure of communications protected by the attorney-client privilege or work-product protection. *Id.* Further, the proposed legislation prohibits the government from making charging decisions or determining the level of cooperation based on assertion of attorney-client privilege or attorney work product, a corporation's provision of counsel or payment of legal fees to employees, the entry of joint defense and other agreements with employees, information sharing or the failure to terminate or sanction an employee under investigation. *Id.* On September 21, 2007, the Senate Judiciary Committee held a hearing to discuss approaches to corporate fraud prosecutions and, in particular, the state of the attorney-client privilege under the McNulty Memorandum. A House Judiciary subcommittee heard testimony on March 6, 2008 from lawyers and former federal prosecutors as to whether the newly revised corporate fraud reporting guidelines adequately protect the attorney-client privilege.

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