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The McNulty Memo—Continuing the Disappointment

*Keith Paul Bishop**

In late December 2006, Deputy Attorney General Paul McNulty announced the publication of a revised set of guidelines for federal criminal prosecutions of business organizations.¹ In issuing these guidelines, the Deputy Attorney General was not breaking new ground. Rather, he was simply adjusting the previously announced policies of his predecessors. Yet, these new guidelines, set forth in what is known as the “McNulty Memorandum,” have been widely criticized. To understand why, it is necessary to put the McNulty Memorandum in historical context with its antecedents. It is only by understanding Department of Justice policy for the last seven years that one can know why the publication of the McNulty Memorandum has been viewed with such disappointment.

The story of the McNulty Memorandum begins in June 1999 when Deputy Attorney General Eric Holder issued a memorandum addressed to all Component Heads and U.S. Attorneys.² The ostensible purpose for the memorandum was to provide guidance to prosecutors in making the decision whether to charge a corporation in a particular case. According to the memorandum, guidance was necessary because “[m]ore and more often, federal prosecutors are faced with criminal conduct committed by or on behalf of corporations.”³ On its face the memorandum was thus nothing more than bureaucratic guidance. As such, it could

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¹ Memorandum from Paul McNulty, Deputy Attorney General to Heads of Dep’t Components and U.S. Attorneys (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf [hereinafter McNulty Memorandum].

² Memorandum from Deputy Attorney General to All Component Heads and U.S. Attorneys (June 16, 1999), *available at* <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> [hereinafter Holder Memorandum]. In the parlance of the U.S. Justice Department, a “Component head means the official who directs the administration and operations of each Office, Board, Division, and Bureau, i.e., the principal organizational units of the Department of Justice.” U.S. Dep’t of Justice, Human Resources Dictionary (Sept. 23, 2004), <http://www.usdoj.gov/jmd/ps/appendix1.htm>.

³ Holder Memorandum, *supra* note 2.

have been expected to attract little attention outside the walls of the Justice Department. The memorandum, which soon earned the eponym the “Holder Memorandum,” proved to be the father of a series of highly controversial memoranda issued by Mr. Holder’s successors.

What has made the Holder Memorandum and its progeny so controversial? The core of the Holder Memorandum was its enumeration of factors that federal prosecutors should consider in determining whether to bring criminal charges against a corporation.⁴ In this regard, the idea of charging corporations, while unknown at common law,⁵ was not a new idea. Indeed, over ninety years ago the U.S. Supreme Court had found “no valid objection in law, and every reason in public policy” to hold corporations criminally liable.⁶ Moreover, the Supreme Court found that the government’s ability to regulate business transactions would be vitiated if corporations could not be criminally regulated because of “the old and exploded doctrine that a corporation cannot commit a crime.”⁷ Given that the notion of criminal prosecutions of corporations was well settled by 1999, it might have been expected that the idea of providing guidance to federal prosecutors in making the decision to charge corporations was both appropriate and reasonable. As it turned out, it was not the idea of prosecuting corporations or even the idea of providing guidance on the decision to prosecute that was controversial; it was the content of the guidance itself.

The Holder Memorandum enumerated eight factors that prosecutors should consider in deciding whether to charge a corporation.⁸ One of these factors—the corporation’s willingness to

⁴ *Id.* at II.

⁵ WILLIAM BLACKSTONE, 1 COMMENTARIES *464 (“A corporation cannot commit treason, or felony, or other crime, in [its] corporate capacity: though [its] members may, in their distinct individual capacities.” (citation omitted)).

⁶ *N.Y. Cent. R.R. v. United States*, 212 U.S. 481, 495 (1909).

⁷ *Id.* at 496.

⁸ The eight factors were:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. The corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. 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;
5. The existence and adequacy of the corporation’s compliance program;
6. The corporation’s remedial actions, including any efforts to implement

cooperate—became the principal lightning rod for criticism of the Holder Memorandum and its progeny.⁹ The concept of cooperation was not so controversial in and of itself. Rather, it was the Holder Memorandum's express reference to the corporation's waiver of the attorney-client and work product protections as an element of cooperation that proved to be the problem.¹⁰ The Holder Memorandum made it clear that a waiver of the attorney-client protections extended to internal investigations as well as specific communications with counsel by individuals within the corporation.¹¹

Deputy Attorney General Holder advanced two justifications for including a waiver of attorney-client protections as an element of cooperation.¹² Neither justification is assailable if only the interests of the prosecutor are considered. However, both fail to take into account countervailing interests. Thus, the Holder Memorandum was in this respect unbalanced.

First, Deputy Attorney General Holder noted that "[s]uch waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements."¹³ From a prose-

an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

7. Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and

8. The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.

Holder Memorandum, *supra* note 2, at II (citations omitted).

⁹ See, e.g., American College of Trial Lawyers, Report, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307 (2003); Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111 (2003).

¹⁰ The Federal Rules of Evidence do not enumerate specific evidentiary privileges. Under Rule 501, privileges are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" except as otherwise provided by the Constitution, federal statute, or rules adopted by the Supreme Court pursuant to statutory authority. FED. R. EVID. 501. The attorney-client privilege protects from disclosure communications by a client that are made in confidence for the purpose of seeking legal advice from a legal advisor. *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). The work product doctrine is separate and distinct from the attorney-client privilege. The work product doctrine protects documents and materials prepared by an attorney in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 509–10 (1947). In this article, the attorney-client privilege and the work product doctrine are referred to collectively as the "attorney-client protections."

¹¹ Holder Memorandum, *supra* note 2, at VI.

¹² *Id.*

¹³ *Id.* The U.S. Attorneys' Manual defines a "target" as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." U.S. Attorneys' Manual § 9-11.151, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm (last visited Mar. 29, 2007). A "subject" of an investigation is defined

cutor's perspective, using corporations to interrogate individuals makes good sense. Individuals, unlike corporations, have the benefit of the constitutional right against self-incrimination.¹⁴ Moreover, it is likely that individuals will become aware of their Fifth Amendment right. The fact that law enforcement is asking questions may in many cases be sufficient to cause an individual to call his or her lawyer. If the individual is subpoenaed to testify before a grand jury as a target, it is the Justice Department's policy to send a "target letter" warning the individual that he "may refuse to answer any question if a truthful answer to the question would tend to incriminate you."¹⁵ Even if not advised by counsel, the fact that questioning is being performed by law enforcement is likely to alert an individual to the potential ramifications of the interrogation. Once apprised of their Fifth Amendment right, individuals are unlikely to waive that right without at least attempting to get something in exchange.

On the other hand, individuals may view internal corporate investigations as having less serious consequences than investigations conducted by federal prosecutors.¹⁶ Given the private nature of the inquiry, they may fail to consult with legal counsel and may believe that the Fifth Amendment right against self-incrimination is inapplicable. Moreover, employees may believe, with some real justification, that failure to cooperate in their employer's internal review will lead to the loss of their jobs. For example, Smithfield Foods, Inc., has adopted a corporate code of business conduct that provides in part:

Full cooperation with internal investigations is a condition of each employee's employment with Smithfield. Any effort by an employee to hinder an investigation with false or misleading information, or by refusing to provide information that he or she has, will be addressed with disciplinary action up to and including termination of employment.¹⁷

as "a person whose conduct is within the scope of the grand jury's investigation." *Id.* A witness is simply someone who may have relevant information. Generally, a target faces a higher risk of prosecution than a subject or witness, but a subject or witness may become a target and eventually a criminal defendant.

¹⁴ U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . ."). See, e.g., *Bellis v. United States*, 417 U.S. 85, 90 (1974) ("[N]o artificial organization may utilize the personal privilege against compulsory self-incrimination . . ."); *United States v. White*, 322 U.S. 694, 699 (1944) ("Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation.").

¹⁵ U.S. Attorneys' Manual, *supra* note 13, § 9-11.151.

¹⁶ "Employees often are unaware of the potential personal consequences of cooperating with lawyers hired by their employers." *United States v. Stein*, 463 F. Supp. 2d 459, 462 (S.D.N.Y. 2006).

¹⁷ Smithfield Foods, Corporate Governance: Business Conduct, at Part V, http://www.smithfieldfoods.com/Governance/BusinessConduct/PartV_Training.asp (last visited Mar. 29, 2007).

For all of these reasons, persons conducting internal corporate investigations can expect to face fewer obstacles than federal prosecutors when questioning employees. Recognizing this reality, the Holder Memorandum dangles the carrot of leniency before corporations in order to encourage them to do the questioning for the prosecution. Prosecutors can then use the information gathered in these “internal” investigations to charge individuals with crimes.¹⁸ The Holder Memorandum’s justification for seeking waivers therefore simply articulates a pragmatic approach to making an end-run around the Fifth Amendment.¹⁹

Second, Deputy Attorney General Holder justified seeking waivers of the attorney-client protections on the basis that waivers are “often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.”²⁰ From the perspective of a prosecutor, this justification is also plausible. However, it ignores other countervailing policies and values that have long justified the application of the attorney-client protections.

It should be remembered that the Holder Memorandum predates the headline-grabbing collapses of Adelphia, Enron, and WorldCom.²¹ It also predates the Sarbanes-Oxley Act and Presi-

¹⁸ That federal prosecutors use the information gathered by counsel in the course of internal investigations in charging individual defendants is indisputable. In 2006, for example, the government filed a criminal complaint against George Reyes, the former Chief Executive Officer of Brocade Communications, and Stephenie Jensen, its Vice President of Human Resources, for securities fraud in connection with alleged backdating of stock options. The U.S. Attorney’s criminal complaint cited interviews of the defendants conducted by Brocade’s audit committee. The complaint includes such allegations as “[w]hen interviewed by the attorneys representing Brocade’s Audit Committee at the end of 2004, JENSEN stated . . .” and “[w]hen interviewed by the attorneys representing Brocade’s Audit Committee in early 2005, REYES admitted . . .” Affidavit in Support of Complaint by FBI Special Agent Joseph Schadler, *United States v. Reyes*, 239 F.R.D. 591 (N.D. Cal. 2006), available at <http://www.usdoj.gov/usao/can/press/2006/ReyesJensenCRIMINALComplaint.PDF>. In response to a survey of federal prosecutors concerning requests or demands for waiver of privileges from organizational defendants, the U.S. Attorney’s office for the Southern District of New York stated that “the purpose in seeking such waivers is to obtain evidence, which we believe may assist us in prosecuting appropriate individuals or entities.” REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES 99 (2003), available at http://www.ussc.gov/corp/advgrprpt/AG_Final.pdf [hereinafter AD HOC REPORT].

¹⁹ This approach is constitutionally suspect.

This Court finds that the government, both through the Thompson Memorandum and the actions of the USAO [U.S. Attorney’s Office], quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights. There is a clear nexus between the government ‘and the *specific* conduct of which’ the Moving Defendants complain.

Stein, 440 F. Supp. 2d at 337 (quoting *Desiderio v. Nat’l Ass’n of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (1999)).

²⁰ Holder Memorandum, *supra* note 2, at VI.

²¹ Adelphia Communications, Enron Corp., and WorldCom, Inc. filed voluntary peti-

dent Bush's establishment in 2002 of a Corporate Fraud Task Force.²² Thus, the Holder Memorandum constituted the principal guidance for U.S. Attorneys during a period of heightened public awareness of criminal prosecutions of corporations and their executives.²³

In January 2003, Deputy Attorney General Larry D. Thompson updated the Holder Memorandum by issuing what soon became known as the "Thompson Memorandum."²⁴ Although the Thompson Memorandum largely copied the Holder Memorandum, the Thompson Memorandum did contain at least one key difference (at least in the minds of its interpreters): The Thompson Memorandum was viewed as binding upon prosecutors, whereas the Holder Memorandum was viewed as simply advisory.²⁵ For example, the Thompson Memorandum added the injunction that "prosecutors and investigators in every matter involving business crimes *must* assess the merits of seeking the conviction of the business entity itself."²⁶ In contrast, the Holder Memorandum spoke of providing "guidance as to what factors should generally inform a prosecutor."²⁷ Despite the Thompson Memorandum's apparent binding nature, it retained the Holder Memorandum's statement that waiver of the attorney-client protections is not an "absolute requirement" of cooperation.²⁸

The Thompson Memorandum's continuing inclusion of waiver of the attorney-client protections as an element of coop-

tions seeking relief under Chapter 11 of the Bankruptcy Code. *In re Adelphia Business Solutions, Inc.*, 280 B.R. 63 (Bankr. S.D.N.Y. 2002); *In re Enron Corp.*, No. 01-16034 (A.J.G.), 2001 Bankr. LEXIS 1563 (Bankr. S.D.N.Y. 2001); *In re Worldcom, Inc.*, No. 02-13533 (A.J.G.), at 2 (Bankr. S.D.N.Y. 2007), http://www.nysb.uscourts.gov/opinions/ajg/54767_18686_opinion.pdf.

²² Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); Exec. Order No. 13,271, 3 C.F.R. 245 (2003).

²³ In fact, prosecutorial efforts largely focused on individuals, with a few notable exceptions, such as the criminal conviction of Arthur Andersen LLP, which had been Enron Corporation's public auditor. Ultimately, the U.S. Supreme Court overturned that conviction. *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129 (2005).

²⁴ Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf [hereinafter Thompson Memorandum].

²⁵ *United States v. Stein*, 435 F. Supp. 2d 330, 338 (2006) ("Unlike its predecessor [the Holder Memorandum], however, the Thompson Memorandum is binding on all federal prosecutors."); Carmen Couden, Note, *The Thompson Memorandum: A Revised Solution or Just a Problem?*, 30 J. CORP. L. 405, 416 (2005) ("[I]t is more appropriate for corporations to consider the provisions set forth in the Thompson Memorandum as government 'rules' rather than discretionary 'guidelines' and prepare for an investigation accordingly.");

²⁶ Thompson Memorandum, *supra* note 24, para. 1 (emphasis added).

²⁷ Holder Memorandum, *supra* note 2.

²⁸ *Id.* While this statement makes it clear that a waiver is not always required, the phraseology of the memorandum suggests that a decision to not to seek a waiver was to be the exception rather than the rule.

eration was consistent with policies adopted by other federal agencies in the wake of the Holder Memorandum. For example, in October 2001, the U.S. Securities and Exchange Commission issued a Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and SEC Statement on the Relationship of Cooperation to Agency Enforcement (the “21(a) Report”).²⁹ The report announced the settlement of a cease-and-desist proceeding against the former corporate controller of a subsidiary of Seaboard Corporation.³⁰ The SEC, however, took no action against Seaboard itself. The SEC cited Seaboard’s cooperation, including Seaboard’s decision not to invoke the attorney-client privilege, as the basis for not pursuing the corporation.³¹

Nonetheless, the private bar’s reaction to the Thompson Memorandum was decidedly negative. In November 2003, the Corporations Committee of the Business Law Section of the California State Bar issued a public commentary decrying the pressure on clients to waive the attorney-client and work product protections.³² The public commentary cited the Thompson Memorandum as one example of this type of pressure. The following year, American Bar Association President Robert Gray, Jr. established a Presidential Task Force to advocate for the attorney-client privilege (the “Task Force”).³³ The Task Force’s work resulted in the American Bar Association’s House of Delegates’ adopting resolutions in August 2005 opposing the routine practice by government officials of requesting waivers of the attorney-client and work product protections:

RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice; and

²⁹ Report of Investigation, Exchange Act Release No. 34-44969, 76 SEC Docket 220 (Oct. 23, 2001).

³⁰ *Id.*

³¹ *Id.* at 220–21.

³² CORPORATIONS COMM. BUS. LAW SECTION, THE STATE BAR OF CAL., AT EVERY PERIL: NEW PRESSURES ON THE ATTORNEY-CLIENT RELATIONSHIP 1 (2003), available at http://calbar.ca.gov/calbar/pdfs/sections/buslaw/corporations/2003-11-18_public-commentary.pdf.

³³ AM. BAR ASSOC., TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, REPORT TO THE HOUSE OF DELEGATES 3 (2006), available at <http://www.acca.com/public/attyclientpriv/abahodreportemployee.pdf>.

FURTHER RESOLVED, that the American Bar Association opposes policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections.

FURTHER RESOLVED, that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.³⁴

In apparent reaction to this criticism, Acting Deputy Attorney General Robert McCallum issued a memorandum in October 2005 (the "McCallum Memorandum").³⁵ The McCallum Memorandum did not revise the Thompson Memorandum. Rather the McCallum Memorandum imposed two new limitations on prosecutors seeking waivers of the attorney-client protections. First, the McCallum Memorandum established supervisory review as a pre-condition to any request for a waiver.³⁶ Second, each U.S. Attorney's Office was directed to institute a written waiver review policy governing such requests.³⁷ The McCallum Memorandum did not require that these policies be made publicly available. Further, the McCallum Memorandum specifically disclaimed any requirement of consistency among the various U.S. Attorney's Offices around the country.³⁸ Thus, corporations continued to be in a position in which they could only guess as to prosecutorial expectations.³⁹ From the perspective of the bar, moreover, the McCallum Memorandum did little to reduce pressure to waive the attorney-client protections.

In late 2006, both the Senate and the House of Representatives held hearings on the attorney-client privilege and the Thompson Memorandum.⁴⁰ In connection with this hearing, a coalition of business and bar associations submitted a report of a survey of in-house and outside counsel.⁴¹ The report unequivocally

³⁴ *Id.*

³⁵ Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Dep't Components and U.S. Attorneys (Oct. 21, 2005), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 130 (2006) (statement of Edwin Meese III, Ronald Reagan Distinguished Fellow in Pub. Policy and Chairman, Ctr. for Legal and Judicial Studies, The Heritage Found.).

⁴⁰ *Id.*; *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2006).

⁴¹ THE COAL. TO PRES. THE ATTORNEY-CLIENT PRIVILEGE, SUBMISSION TO THE U.S. SENATE JUDICIARY COMMITTEE REGARDING HEARINGS ON COERCED WAIVER OF THE

cally cites the Holder, Thompson, and McCallum Memoranda as the reasons for waiver demands. The coalition also reported that nearly 75% of the respondents agreed with the statement that a “culture of waiver” has evolved.⁴²

Three months later, on December 8, 2006, Senator Arlen Specter introduced the “Attorney-Client Privilege Protection Act of 2006” which, among other things, would prohibit federal prosecutors from conditioning a civil or criminal charging decision on an assertion of the attorney-client and work product protections.⁴³ Perhaps like King Belshazzar, seeing the handwriting on the wall, the Department of Justice replaced the Thompson Memorandum less than a week after the introduction of Senator Specter’s bill.⁴⁴ This new memorandum was penned by Deputy Attorney General Paul McNulty and, like its predecessors, it shares the name of its author.⁴⁵

If the intent of the McNulty Memorandum was to quiet criticism of Department of Justice policies regarding waiver of the attorney-client protections, the memorandum has been a failure. The private bar has been highly critical of the McNulty Memorandum. For example, American Bar Association President Karen Mathis stated that “[t]he Justice Department’s new corporate charging guidelines for federal prosecutors fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations.”⁴⁶

Disappointment with the McNulty Memorandum in part stems from the decisive and less nuanced action taken last year by the U.S. Sentencing Commission.⁴⁷ A little over a year after

ATTORNEY-CLIENT PRIVILEGE: THE NEGATIVE IMPACT FOR CLIENTS, CORPORATE COMPLIANCE, AND THE AMERICAN LEGAL SYSTEM (Sept. 12, 2006), *available at* <http://www.acca.com/public/attyclientpriv/coalitionsenjudtestimony.pdf> [hereinafter COALITION SUBMISSION]. The coalition consists of the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, the Financial Services Roundtable, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, and the U.S. Chamber of Commerce. *Id.* at 1.

⁴² *Id.* at 11–12.

⁴³ S. 30, 109th Cong. (2006).

⁴⁴ *Daniel* 5:5–6 (King James) (“In the same hour came forth fingers of a man’s hand, and wrote over against the candlestick upon the plaister of the wall of the king’s palace: and the king saw the part of the hand that wrote. Then the king’s countenance was changed, and his thoughts troubled him . . .”).

⁴⁵ McNulty Memorandum, *supra* note 1.

⁴⁶ Press Release, Karen J. Mathis, President, Am. Bar Assoc., Statement Regarding Revisions to the Justice Department’s Thompson Memorandum (Dec. 12, 2006), *available at* <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59>.

⁴⁷ Congress created the Sentencing Commission as part of the Comprehensive Crime Control Act of 1984, § 217(a), 28 U.S.C. § 991 (2000). The duties of the Sentencing Commission include promulgating and distributing guidelines for use of a sentencing court in

the publication of the Thompson Memorandum, the Sentencing Commission had amended its sentencing guidelines to include the following commentary in relation to corporate cooperation: “[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”⁴⁸ In making this change, the Sentencing Commission was influenced by the Thompson Memorandum and the practices of the Department of Justice.⁴⁹ Despite the fact that the Sentencing Commission pronounced its expectation that “waivers will be required on a limited basis,”⁵⁰ many viewed the change as placing greater pressures on corporations to provide waivers to prosecutors. As a result, an informal coalition was formed to address the issue.⁵¹ In May 2005, the American Bar Association wrote to the Sentencing Commission urging that it “address and remedy the Commentary on an expedited basis.”⁵² A year later, the Sentencing Commission removed the offending footnote.⁵³

If the intent of the McNulty Memorandum was to forestall further legislative efforts to limit prosecutorial decisions based upon assertion or waiver of the attorney-client protections, the memorandum has also failed in that regard. In January 2007, Senator Specter introduced a new bill, S. 186, the Attorney-Client Privilege Protection Act of 2007.⁵⁴ In general, this bill would prohibit an agent or attorney of the United States in any federal investigation or criminal or civil enforcement matter from, among other things, “demand[ing], request[ing], or condition[ing] treatment on the disclosure by an organization, or person affiliated with that organization, of any communication pro-

determining the sentence to be imposed in a criminal case. § 994(a).

⁴⁸ Sentencing Guidelines for United States Courts, 69 Fed. Reg. 28,994, 29,021 (May 19, 2004).

⁴⁹ See *id.* at 29024.

⁵⁰ See *id.* at 29021.

⁵¹ AM. BAR ASSOC. TASK FORCE ON THE ATTORNEY-CLIENT PRIVILEGE, REPORT (2005), available at <http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf>. In addition to the ABA Task Force, the coalition consisted of the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, Frontiers of Freedom, the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Washington Legal Foundation. *Id.* at 16 n.75.

⁵² Letter from Robert D. Evans to The Honorable Ricardo H. Hinojosa, Chairman, U.S. Sentencing Comm. (May 17, 2005), available at http://www.abanet.org/poladv/letters/crimlaw/050517letter_sentencing.pdf.

⁵³ Sentencing Guidelines for United States Courts, 71 Fed. Reg. 28062, 28073 (May 15, 2006).

⁵⁴ Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007), available at <http://www.acc.com/public/attyclientpriv/thompsonmemoleg.pdf>.

tected by the attorney-client privilege or any attorney work product.”⁵⁵ This bill would also prohibit “condition[ing] a civil or criminal charging decision relating to an organization, or person affiliated with that organization, on . . . any valid assertion of the attorney-client [protections].”⁵⁶

The McNulty Memorandum borrows heavily from its antecedents. Yet, it does break some new ground. Rather than stating that a waiver is not an “absolute” requirement, the McNulty Memorandum limits requests for waiver of the attorney-client protections to only those circumstances in which “there is a legitimate need” for privileged information.⁵⁷ Moreover, the McNulty Memorandum makes it clear that a “legitimate need” is not established by the fact that it may be “desirable or convenient” for prosecutors to obtain the information.⁵⁸ According to the McNulty Memorandum, whether a “legitimate need” exists depends upon:

- (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) the collateral consequences to a corporation of a waiver.⁵⁹

While these criteria appear to be far more specific than the Holder and Thompson Memoranda, the reality may be far different. As an initial matter, the requirement that there be a “legitimate need” sets the bar at the lowest possible level. The first criterion is really no criterion at all—the government should not be seeking information unless the information would benefit its investigation. To forbid prosecutors from seeking information that does not benefit their investigations proscribes very little indeed. The second criterion is equally hollow. If the prosecutor can timely and completely obtain the information elsewhere, there is little gained (and little given) by a waiver of the privilege. Presumably, prosecutors seek waivers because they cannot obtain the information easily by other means. This was, in fact, one of the principal justifications for seeking waivers in the Holder Memorandum.⁶⁰ The third criterion underscores the continuing self-interested pragmatism of the Department of Justice’s

⁵⁵ *Id.* § 3(b)(1).

⁵⁶ *Id.* § 3(b)(2).

⁵⁷ McNulty Memorandum, *supra* note 1, at 8.

⁵⁸ *Id.* at 8–9.

⁵⁹ *Id.* at 9.

⁶⁰ Holder Memorandum, *supra* note 2, at VI.

approach to waivers. In effect, the Department is saying that our need for information legitimizes our need for waivers. The final criterion is also problematic. From a societal standpoint, the benefits of the attorney-client protections are undermined whenever they are waived. One of the principal reasons for protecting communications between a client and the attorney is to encourage full and candid communications.⁶¹ If employees know that the government will pressure their employers to turn over the results of communications with corporate counsel, they are more likely to limit their disclosures to counsel.⁶² Ultimately, corporations will be less able to self-police, remediate and prevent legal violations.

The McNulty Memorandum also divides attorney-client protected information into two categories. Prosecutors are authorized to seek so-called "Category I" material with the "written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division."⁶³ The request must specify the "legitimate need" for the information and identify the scope of the waiver sought. The McNulty Memorandum does not explain the extent of consultation required or whether the U.S. Attorney's decision to seek a waiver can be overruled by the Assistant Attorney General. For example, will it be sufficient for a prosecutor to establish a legitimate need by simply reciting why the information will help the investigation, or must the prosecutor provide a balanced analysis of the criteria identified in the McNulty Memorandum? In introducing S. 186, Senator Specter noted these points and observed that "it is difficult to see how the McNulty memo provides better safeguards for Category 1 information than the interim-McCallum memo . . . which mandated a U.S. Attorney-level 'written waiver review process' for all attorney client privilege waiver requests."⁶⁴

Category I information is characterized as "purely factual information" that may or may not be privileged relating to the underlying misconduct.⁶⁵ Under the McNulty Memorandum, examples of Category I information include but are not limited to: (i) key documents; (ii) witness statements; (iii) purely factual interview memoranda regarding the underlying misconduct; (iv) or-

⁶¹ *United States v. BDO Seidman*, 337 F.3d 802, 810 (7th Cir. 2003).

⁶² AD HOC REPORT, *supra* note 18, at 102 ("The possibility that the government may require a waiver, and the fear of both the criminal and civil consequences of such a waiver, create strong disincentives for organizations to conduct thorough internal investigations, as well as for employees to cooperate in such investigations." (citations omitted)).

⁶³ McNulty Memorandum, *supra* note 1, at 9.

⁶⁴ 153 CONG. REC. S182 (daily ed. Jan. 4, 2007) (statement of Sen. Specter).

⁶⁵ McNulty Memorandum, *supra* note 1, at 9.

ganizational charts created by company counsel; (v) factual chronologies; (vi) factual summaries; or (vii) reports containing investigative facts reported to counsel.⁶⁶ Of course, the line between fact and opinion can often be indistinct at best. For example, a report purporting to contain investigative facts reported to counsel may implicitly reflect an attorney's interpretation or opinions about the facts reported.

The McNulty Memorandum clearly authorizes prosecutors to consider a corporation's response to a waiver of Category I information in determining whether the corporation has cooperated in the government's investigation.⁶⁷ Thus, the McNulty Memorandum leaves intact the carrot (and implicit stick) of cooperation that had its genesis in the Holder Memorandum.

If the Category I information provides an incomplete basis to conduct a thorough investigation, the McNulty Memorandum authorizes prosecutors to request a waiver of so-called Category II information.⁶⁸ The McNulty Memorandum cautions that waivers "should only be sought in rare circumstances."⁶⁹ Category II "information includes legal advice given to the corporation before, during, and after the underlying misconduct occurred."⁷⁰ Thus, Category II information can include attorney-client protected information developed in the course of an internal investigation as well as legal advice given after conclusion of the investigation. The McNulty Memorandum cites as examples of Category II information the following:

- (i) Attorney notes, memoranda containing mental impressions and conclusions;
- (ii) legal determinations as a result of an internal investigation; or
- (iii) legal advice given to the corporation.⁷¹

Category II information does not include "legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon an advice-of-counsel defense."⁷² Nor does it include "legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege."⁷³ In either case, the McNulty Memorandum allows prosecutors to follow the procedures for seeking waivers that are applicable to Category I in-

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 10.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

formation.

Before requesting Category II information, a prosecutor must request authorization from the Deputy Attorney General.⁷⁴ Again, any request must set forth the legitimate need and the scope of the waiver sought. "If the request is authorized, the [U.S.] Attorney must communicate the request in writing to the corporation."⁷⁵

If the corporation declines to provide Category II information, prosecutors may not consider a negative response to a request for Category II information in deciding whether to prosecute the corporation.⁷⁶ However, prosecutors "may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation."⁷⁷ Seemingly, therefore, the McNulty Memorandum has removed the "stick" for refusals to provide Category II information while maintaining the "carrot." In practice, however, corporations may simply not see it this way. A benefit denied is likely to be perceived in much the same way as a punishment.

The McNulty Memorandum's bifurcation of information was likely founded upon distinctions made by some courts with respect to attorney work product.⁷⁸ Under this analysis, the "presumption in favor of nondisclosure is shifted with respect to fact work product."⁷⁹ Opinion work-product, on the other hand, is afforded a higher (in some cases, absolute) level of protection.⁸⁰ Even though these distinctions have been made for purposes of the work product doctrine, they have no application to the attorney-client privilege. Yet, the McNulty Memorandum inexplicably conflates these two protections without providing any rationale for doing so.

The McNulty Memorandum appears to strengthen the attorney-client privilege by requiring written authorization before seeking waivers of either Category I or Category II information. In practice, however, prosecutors can easily sidestep these procedures. For example, a prosecutor might still mention the benefits of waiving the privilege while not directly requesting a waiver.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See, e.g., *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986) ("Some courts interpreting [*Hickman v. Taylor*, 329 U.S. 495 (1947),] have defined two types of work product.").

⁷⁹ *Id.*

⁸⁰ See, e.g., *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973).

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Indeed, there have been anecdotal reports of such “subtle” requests even before the McNulty Memorandum was issued.⁸¹

In conclusion, the McNulty Memorandum has disappointed many because it is consistent with its history. Throughout the saga of the Holder/Thompson/McCallum memoranda, the Department of Justice has steadfastly retained the ability to seek, and credit as cooperation, waivers of attorney-client protections. The McNulty Memorandum does not break with this tradition. It sets a very low bar for requests for waivers, and while it purports to impose additional procedural protections, prosecutors can easily circumvent these protections.

⁸¹ COALITION SUBMISSION, *supra* note 41, at 10 (“Other prosecutors cited in our surveys employ other ‘subtle’ tactics such as tossing a copy of the Thompson Memo on the table with the privilege waiver section highlighted and making a statement such as ‘you’d like to qualify for the benefits of cooperation in this investigation, correct?’”).

