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*The McNulty Memorandum: Attorneys' Fees and Waiver of
Corporate Attorney-Client and Work Product Protection*

Charles Doyle, American Law Division

October 14, 2008

Abstract. Corporations are subject to civil and criminal liability for misconduct, committed for their benefit, by their officers, employees and agents. Under most circumstances, they enjoy the right to attorney-client privileges and attorney work product protection in connection with government investigations of possible misconduct. The Justice Department's Thompson Memorandum in describing federal prosecution policies suggested that a corporation faced an increased risk of prosecution if it claimed those privileges or if it paid the business-related litigation costs of its officers and employees. The Thompson Memorandum, subsequently superseded by the McNulty Memorandum, sparked considerable debate before Congress and elsewhere. At least one federal court concluded that the manner of implementing the Thompson Memorandum policy ran contrary to the dictates of the Fifth and Sixth Amendments. Both Houses held hearings on the matter during the 109th Congress and the 110th Congress. The House Judiciary Committee has reported out the Attorney-Client Privilege Protection Act of 2007 (H.R. 3013), H.Rept. 110- 445 (2007), which the House passed under suspension of the rules on November 13, 2007, 153 Cong. Rec. H13564. Comparable legislation was introduced in the Senate (S. 186 and S. 3217). The 110th Congress concluded before further action could be taken, although a related amendment to the Federal Rules of Evidence did pass. This report is a discussion of the legislation as well as the controversy's legal background and chronology.

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CRS Report for Congress

The McNulty Memorandum: Attorneys' Fees and Waiver of Corporate Attorney-Client and Work Product Protection

Updated October 14, 2008

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**Prepared for Members and
Committees of Congress**

The McNulty Memorandum: Attorneys' Fees and Waiver of Corporate Attorney-Client and Work Product Protection

Summary

Corporations are criminally and civilly liable for the misconduct of their officers and employees committed within the apparent scope of their authority for the benefit of the corporation. Corporations frequently direct their attorneys to conduct internal investigations to determine if the corporation is in compliance with regulatory and other legal requirements. Much of the information gathered in these investigations is protected by the attorney-client privilege and the attorney work product doctrine, unless waived. Once waived, the information is often available to private civil litigants. In addition, most corporations advance their officers and employees attorneys' fees relating to job related litigation.

The Justice Department enjoys prosecutorial discretion to bring criminal charges against a corporation, its culpable officers or employees, or both. In some instances, indictment alone can be catastrophic if not fatal for a corporation. The Thompson Memorandum, since revised as the McNulty Memorandum, described the policy factors to be considered in the exercise of this discretion. Two of the factors explicitly mentioned were whether a corporation had waived its privileges and whether it had cut off the payment of attorneys' fees for its officers and employees.

In *United States v. Stein*, a federal district court in New York determined that implementation of the policies in the Thompson Memorandum violated the Fifth Amendment right to due process, the Sixth Amendment right to the assistance of counsel, and the Fifth Amendment privilege against self-incrimination.

The Attorney-Client Privilege Protection Act of 2007, H.R. 3013, introduced by Representative Scott, was reported out of Committee and passed the House under suspension of the rules on November 13, 2007. It would bar the federal investigators, regulators and prosecutors from demanding that corporations waive their attorney-client or attorney work product protection or from cutting off attorneys' fees for their officers or employees. It would also preclude federal authorities from weighing such conduct when deciding whether to bring criminal charges against a corporation. Senator Specter introduced a virtually identical bill in the Senate, S. 186. He later offered a revised version as S. 3217. Both Houses have held hearings on the matter in the 109th and 110th Congresses, but adjourned without taking further action on the proposals.

This report is available in an abridged version, stripped of its footnotes and most of its citations to authority, as CRS Report RS22588, *The McNulty Memorandum In Short: Attorneys' Fees and Waiver of Corporate Attorney-Client and Work Product Protection*, by Charles Doyle.

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The McNulty Memorandum: Attorneys' Fees and Waiver of Corporate Attorney-Client and Work Product Protection

Introduction

Corporations are subject to civil and criminal liability for misconduct, committed for their benefit, by their officers, employees and agents.¹ Under most circumstances, they enjoy the right to attorney-client privileges and attorney work product protection in connection with government investigations of possible misconduct.² The Justice Department's Thompson Memorandum in describing federal prosecution policies suggested that a corporation faced an increased risk of prosecution if it claimed those privileges or if it paid the business-related litigation costs of its officers and employees. The Thompson Memorandum, subsequently superseded by the McNulty Memorandum, sparked considerable debate before Congress and elsewhere. At least one federal court concluded that the manner of implementing the Thompson Memorandum policy ran contrary to the dictates of the Fifth and Sixth Amendments.³ Both Houses held hearings on the matter during the 109th Congress and the 110th Congress. The House Judiciary Committee has reported out the Attorney-Client Privilege Protection Act of 2007 (H.R. 3013), H.Rept. 110-445 (2007), which the House passed under suspension of the rules on November 13, 2007, 153 *Cong. Rec.* H13564. Comparable legislation was introduced in the Senate (S. 186 and S. 3217). The 110th Congress concluded before further action could be taken, although a related amendment to the Federal Rules of Evidence did pass.⁴

¹ *New York Central R.R. v. United States*, 212 U.S. 481, 295-96 (1909); *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006)(internal quotation marks and citations omitted)("a corporation may be held liable for the criminal acts of its agents so long as those agents are acting within the scope of employment. The test is whether the agent is performing acts of the kind which he is authorized to perform and those acts are motivated – at least in part – by an intent to benefit the corporation. . . . The legal rules imputing criminal responsibility to corporations are built upon analogous rules for civil liability").

² *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981)(citations omitted)("this Court has assumed that the privilege applies when the client is a corporation and the Government does not contest the general proposition"); cf., *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

³ *United States v. Stein*, 435 F.Supp.2d 330, 356-72 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008); see also, *United States v. Stein*, 495 F.Supp.2d 390 (S.D.N.Y. 2007).

⁴ F.R.Evid. 502, P.L. 110-322, 122 Stat. 3537 (2008). The new Rule protects against inadvertent waiver of the attorney-client privilege and the attorney work product doctrine and authorizes protective orders for case-specific waivers in both state and federal proceedings. As one point the proposed rule included a provision that allowed for selective waiver of the attorney client privilege in the context of a governmental investigation, Rule

This is a brief discussion of the legislation as well as the controversy's legal background and chronology.

Enterprise Liability

At common law, corporations were considered incapable of committing or of being punished for the criminal misconduct.⁵ That perception has changed, however. Corporate criminal liability is now a matter of legislative choice. And the view of the courts is much the same as it was over a century ago, when the Supreme Court observed:

We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through those bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at. *New York Central R.R. v. United States*, 212 U.S. 481, 495-96 (1909).

Both as a general matter and within individual criminal statutes, federal law leaves little doubt when a criminal proscription applies to corporate entities. The Dictionary Act provides that “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise. . . the words ‘person’ or ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”⁶ With this in mind, criminal statutes ordinarily condemn – “whoever,” or any “person” who – engages in the misconduct they proscribe.⁷ In

502. That feature had disappeared, however, by the time the Judicial Conference recommended the rule to the Congress, see discussion *infra* at 15-6.

⁵ 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 464 (1765)(transliteration supplied)(“A corporation cannot commit treason, or felony, or other crime, in it’s corporate capacity: though it’s members may, in their distinct individual capacities. Neither is it capable of suffering a traitor’s, or felon’s punishment, for it is not liable to corporal punishments, nor to attainder, forfeiture, or corruption of the blood”).

⁶ 1 U.S.C. 1; see e.g., *United States v. A & P Trucking Co.*, 358 U.S. 121, 124 (1958)(citing the Dictionary Act in support of the conclusion that a partnership might be held criminally liable for the improper transportation of explosives under a statute that applied to “whoever” breached its proscriptions).

⁷ E.g., 18 U.S.C. 2 (“Whoever commits an offense against the United States . . . is punishable as a principal”); 18 U.S.C. 371 (“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States. . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined

some instances, the statute goes a step further and supplies an even more expansive crime-specific definition.⁸

When a federal criminal statute applies to corporations, the courts have generally said that a corporation is liable for the violations committed for its benefit by its officers, employees or agents acting, within the apparent scope of their authority,⁹ even if the corporation has either generally or specifically prohibited the misconduct in question.¹⁰ Of course, the officers, employees or agents whose misconduct is imputed to the corporation are usually subject to criminal liability as well.¹¹ It is a matter of prosecutorial discretion whether to prosecute an apparently culpable corporation, or its apparently culpable agents, employees and officers, or

under this title”); 18 U.S.C. 661 (“Whoever, within the special maritime and territorial jurisdiction of the United States, takes and carries away, with intent to steal or purloin, any personal property of another shall be punished as follows. . .”).

⁸ E.g., 18 U.S.C. 1961(3)(“As used in this chapter . . . (3) ‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property”)(relating to racketeering offenses); 15 U.S.C. 7, 12(c) (“The word ‘person’, or ‘persons’ . . . shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, laws of any of the Territories, the laws of any State, or the laws of any foreign country”)(relating to the anti-trust laws).

⁹ *United States v. Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998); *United States v. Investment Enterprises, Inc.*, 10 F.3d 263, 267 (5th Cir. 1994); *United States v. Paccione*, 949 F.2d 1183, 1200 (2d Cir. 1991); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 407 (4th Cir. 1985)(“The term ‘scope of employment’ has been broadly defined to include acts on the corporation’s behalf in performance of the agent’s general line of work. To be acting within the scope of his employment, agent must be ‘performing acts of the kind which he is authorized to perform, and those acts must be motivated – at least in part – by an intent to benefit the corporation’”), quoting, *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982).

¹⁰ *United States v. Potter*, 463 F.3d 9, 25-6 (1st Cir. 2006)(“The case law has rejected arguments that the corporation can avoid liability by adopting abstract rules. . . . Even a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents. Thus the principal is held liable for acts done on his account by a general agent which are incidental or customarily a part of a transaction which the agent has been authorized to perform. And this is the case, even though it is established fact that the act was forbidden by the principal”); *United States v. Twentieth Century Fox*, 882 F.2d 656, 660 (2d Cir. 1989)(“We agree with the District Court that Fox’s compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law and the consent decree. It is settled law that a corporation may be held criminally responsible for antitrust violations committed by its employees or agents acting within the scope of their authority”); *United States v. Portac, Inc.*, 869 F.2d 1288, 1293 (9th Cir. 1989).

¹¹ *United States v. Wise*, 370 U.S. 405, 416 (1962); *United States v. Dotterweich*, 320 U.S. 277, 283 (1943)(rejecting the contention that by establishing corporate liability Congress intended to exempt its culpable agents with the observation that, “It is not credible that Congress [in making it clear that the criminal prohibition applied to corporations] should by implication have exonerated what is probably a preponderant number of persons involved in acts of disobedience . . .”); *United States v. Sain*, 141 F.3d 463, 475 (3d Cir. 1998).

both the corporation and the individuals through whom it has acted.¹² Because their interests are intertwined, corporations often bear the legal costs of defending their agents, employees and officers in litigation arising out of conduct within the apparent scope of their employment.¹³ The corporation in such cases, however, is generally entitled to reimbursement should its agent, officer or employee be convicted or otherwise found at fault.¹⁴

Attorney-Client Privilege and Work Product Protection

The attorney-client privilege and work product protection are federal evidentiary privileges, which means they are “governed by the principles of the common law as . . . interpreted by the courts of the United States in light of reason and experience,” F.R.Evid. 501, unless altered by rule or statute.

Attorney-Client.

The attorney-client privilege is one of the oldest common law privileges.¹⁵ The purpose of the privilege is to encourage “full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.”¹⁶ It protects confidential communications with an attorney made in order to obtain legal advice or assistance.¹⁷

¹² *Wayte v. United States*, 470 U.S. 598, 607 (1985); *United States v. LaBonte*, 520 U.S. 751, 762 (1997).

¹³ *United States v. Stein*, 435 F.Supp. at 353-55, citing inter alia, 3A FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, §1344.10 (2002).

¹⁴ *Id.*

¹⁵ *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

¹⁶ *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); see also, *Upjohn v. United States*, 449 U.S. 383, 389 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *In re EchoStar Communications Corp.*, 448 F.3d 1294, 1301-302 (Fed.Cir. 2006).

¹⁷ *Fisher v. United States*, 425 U.S. 391, 403 (1976); *In re Grand Jury*, 454 F.3d 511, 519 (6th Cir. 2006); *In re Grand Jury: Under Seal*, 415 F.3d 333, 338 n.3 (4th Cir. 2005) (The privilege applies if “(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege as been (a) claimed and (b) not waived by the client”); *United States v. Bisanti*, 414 F.3d 168, 171 (1st Cir. 2005) (“The essential elements of the claim of attorney-client privilege are as follows: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived”).

It is available to corporations as well as to individuals.¹⁸ In the case of a corporation, it now seems beyond dispute that the privilege applies to the confidential communications from its officers, agents, and employees to its attorney for the purpose of supplying the corporation with legal advice or assistance.¹⁹ At one time, however, some courts believed the privilege should be limited to the communications of the “control group of the corporation,” those ultimately responsible for corporate policy. The Supreme Court in *Upjohn* found this reading too limited.²⁰

The case began when officials at Upjohn became concerned that some of its officers or employees might have been involved in the business-related bribery of foreign officials.²¹ Upjohn’s general counsel was instructed to conduct an investigation.²² Following the internal investigation, Upjohn reported suspicious payments to the Securities and Exchange Commission (SEC) and the Internal Revenue Service (IRS).²³ The company also identified which of its officers and employees had been interviewed or had submitted responses to questionnaires as part of the internal investigation.²⁴ Then the IRS issued a summons demanding that Upjohn turn over all its files on the internal investigation including responses to its general counsel’s questionnaires and memoranda and to notes of the investigation’s interviews conducted under his supervision.²⁵ Upjohn refused to comply, claiming attorney-client and attorney work product privileges and the IRS sought judicial enforcement of its summons.²⁶

The Sixth Circuit Court of Appeals rejected Upjohn’s attorney-client claim on the grounds that the communications sought were not those of Upjohn’s control group, thus not those of the client, and therefore not privileged.²⁷ The Supreme Court

¹⁸ *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985); *Upjohn Co. v. United States*, 449 U.S. 383, 389-90 (1981).

¹⁹ *Upjohn Co. v. United States*, 449 U.S. at 390-97 (holding the privilege applicable to employee questionnaire responses as well as interview notes and memoranda collected during the course of an internal investigation conducted under the direction of the company’s general counsel); *In re Allen*, 106 F.3d 582, 606-7 (4th Cir. 1997); *Admiral Insurance Co. v. U.S. District Court*, 881 F.2d 1486, 1492-493 (9th Cir. 1989).

²⁰ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

²¹ *Id.* at 386.

²² *Id.* at 386-87.

²³ *Id.* at 387.

²⁴ *Id.*

²⁵ *Id.* at 387-88.

²⁶ *Id.* at 388.

²⁷ *United States v. Upjohn Co.*, 600 F.2d 1223, 1225 (6th Cir. 1979) (“Upjohn claims that the communications to counsel made by all of its employees including regular and middle management employees as well as top management, are privileged as confidential communications between client and attorney. To the extent that the communications were made by officers and agents not responsible for directing Upjohn’s actions in response to legal advice, we disagree for the simple reason that the communications were not the ‘client’s’”).

found this control group test insufficiently protective. The test failed to recognize the importance of the attorney's fact gathering communications with the corporation's employees conducted in order to provide the corporate client with legal advice or assistance.²⁸ In doing so, it frustrated the very purpose of the privilege by discouraging full and frank disclosures by those associated with the company who were in a position to expose it to civil and criminal liability thereby denying counsel the basis for sound legal advice and assistance.²⁹ Moreover, it chilled communications between counsel and company employees designed to ensure company compliance with the law.³⁰

In a situation like the one in *Upjohn*, the attorney represents the corporation, the privilege that envelops the communications with the attorney belongs to the corporation,³¹ and may be waived by the corporation.³² Although disclosure

²⁸ *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981)(internal citations omitted) (“Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. . . . In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below – ‘officers and agents . . . responsible for directing [the company's] actions in response to legal advice’ – who will possess the information needed by the corporation's lawyers. Middle-level and indeed lower-level-employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties”).

²⁹ 449 U.S. at 392 (1981)(internal citations omitted) (“The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy”).

³⁰ *Id.* (“The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter”).

³¹ Otherwise “[c]ourts have been willing to allow corporate employees to assert a personal privilege with respect to conversations with corporate counsel, despite the fact that the privilege generally belongs to the corporation . . . only by meeting certain requirements. . . . First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they

ordinarily waives the privilege, the circuits are divided over whether the privilege may survive disclosure for limited selective purposes (selective waiver) such as the disclosures in *Upjohn* to government investigators or regulators.³³

The prospect of selective waiver was apparently first raised in *Diversified Industries v. Meredith*, where the Eighth Circuit held voluntary disclosure to the Securities and Exchange Commission (SEC) did not constitute a waiver of the privilege for subsequent purposes.³⁴ To one extent or another the District of Columbia, First, Second, Third, Fourth and Tenth Circuits have declined to accept the Eighth Circuit suggestion that the attorney-client privilege may be claimed following a selective disclosure to a governmental agency.³⁵

The existence of either a common interest or joint defense attorney-client privilege further complicates matters, for either may arise in the course of an investigation of allegations of corporate misconduct. The common interest privilege is created when an attorney simultaneously represents more than one client based on their common interest in the same matter. Under such circumstances, “communications between each of the clients and the attorney are privileged against third parties, and it is unnecessary that there be actual litigation in progress for this privilege to apply.”³⁶ Moreover, two or more clients represented by individual attorneys may agree to work jointly in a common defense of a particular suit or case. In such circumstances, “many courts have held that the attorney-client privilege gives rise to a concomitant ‘joint defense privilege’ which services to protect the confidentiality of communications, passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken

must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company,” *United States v. International Brotherhood of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997); see also, *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001); *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1041 (10th Cir. 1998); *In re Bevell, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 123-25 (3d Cir. 1986).

³² *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. at 348 (1985); *In re Grand Jury Proceedings*, 219 F.3d 175, 184-86 (1st Cir. 2001); *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1371 (10th Cir. 1997).

³³ *In re Qwest Communications International, Inc.*, 450 F.3d 1179, 1186-197 (10th Cir. 2006).

³⁴ *Diversified Industries v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977).

³⁵ *Permian Corp. v. United States*, 665 F.2d 1214, 1219-221 (D.C. Cir. 1981); *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 685-86 (1st Cir. 1997); *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425-426 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988); *In re Qwest Communications International Inc.*, 450 F.3d 1179, 1200 (10th Cir. 2006).

³⁶ *Hanson v. United States Agency for International Development*, 372 F.3d 286, 292 (4th Cir. 2004); see also, *United States v. Doe*, 429 F.3d 450, 453 (3d Cir. 2005).

by the parties and their respective counsel.”³⁷ The courts have generally held – although not universally so – that communications or attorney work product protected by a joint or common defense privileges can only be waived with the consent of all parties.³⁸

Attorney Work Product.

At least since the Supreme Court announced its decision in *Hickman v. Taylor*,³⁹ the federal courts have recognized that an attorney’s work product gathered or created in anticipation of litigation enjoys qualified disclosure protection. The protection has been reenforced by rule both on the civil side⁴⁰ and in criminal cases.⁴¹

“At its core, the work-product doctrine shelters the mental processes of the attorney providing a privileged area within which he can analyze and prepare his client’s case. . . . It is therefore necessary that the doctrine protect material prepared by agents of the attorney as well as those prepared by the attorney himself.”⁴²

The protection can be waived,⁴³ but here too the circuits are divided on the question of whether it can survive a selective waiver in the form of disclosure to a government investigator or regulator. The Fourth Circuit and Federal Circuit have been unwilling to say that the protection afforded attorney opinion work product (work containing the attorney’s analysis of the law, facts and strategy reflecting the

³⁷ *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003); see also, *United States v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005); *In re Grand Jury Subpoena*, 274 F.3d 563, 574-75 (1st Cir. 2001).

³⁸ *In re Grand Jury Subpoenas*, 902 F.2d 244, 248(4th Cir. 1990); *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 555 (8th Cir. 1990); *In re Auclair*, 961 F.2d 65, 70-1 (5th Cir. 1992); but see, *In re Grand Jury Subpoena*, 274 F.3d 563, 572-73 (1st Cir. 2001) (“a party is always free to disclose his own communications . . . a corporation may unilaterally waive the attorney-client privilege with respect to any communications made by a corporate officer in his corporate capacity, notwithstanding the existence of an individual attorney-client relationship between him and the corporation’s counsel”).

³⁹ 329 U.S. 495 (1947).

⁴⁰ F.R.Civ.P. 26; *Upjohn v. United States*, 449 U.S. 383, 396 (1981); *Regional Airport Authority v. LFG, LLC*, 460 F.3d 697, 713 (6th Cir. 2006); *In re Qwest Communications International, Inc.*, 450 F.3d 1179, 1186 (10th Cir. 2006).

⁴¹ F.R.Crim.P. 16; *United States v. Nobles*, 422 U.S. 225, 236-39 (1975).

⁴² *United States v. Nobles*, 422 U.S. at 238-39; see also, *Hickman v. Taylor*, 329 U.S. at 511-14 (“Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial”).

⁴³ *United States v. Nobles*, 422 U.S. at 239.

attorney's mental impressions)⁴⁴ is lost simply because it has been disclosed to governmental entities.⁴⁵ On the other hand, the Third Circuit has said without equivocation that same standard used in the case of attorney-client waivers should apply; that is, disclosure to a governmental entity constitutes complete waiver.⁴⁶ The other circuits that have considered the question have assumed positions at various points between the two.⁴⁷

Deputy Attorney General Memoranda and Related Matters

Four Deputy Attorneys General have issued memoranda to guide the exercise of prosecutorial discretion on the question of whether criminal charges should be brought against a corporation. Each includes provisions concerning the waiver of attorney-client and attorney work product protection and all but one address employee legal costs and joint defense agreements as well. They are the memoranda

⁴⁴ This is distinguished from “non-opinion” or “fact” work product which consists of all other material gathered or produced by or at the direction of an attorney in anticipation of litigation.

⁴⁵ *In re Martin Marietta Corp.*, 856 F.2d 619, 625-26 (4th Cir. 1988); *In re Echostar Communications Corp.*, 448 F.3d 1294, 1301-305 (Fed. Cir. 2006).

⁴⁶ *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991).

⁴⁷ *In re Qwest Communications International, Inc.*, 450 F.3d 1179 (10th Cir. 2006)(refusing to acknowledge survival of the protection under the facts before it rather than as a general rule)(“we conclude the record in this case is not sufficient to justify adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material. . . In short, Qwest’s confidentiality agreements do not support adoption of selective waiver”); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002)(emphasis added)(footnote 30 of the court’s opinion in brackets)(“These and other reasons persuade us that the standard for waiving the work-product doctrine should be no more stringent than the standard for waiving the attorney-client privilege – once the privilege is waived, waiver is complete and final. [*This is especially true as to ‘fact’ work product . . .*]”); *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 688 (1st Cir. 1997)(holding the protection waived under the facts before it but noting that the decision does not address whether “opinion” work product protection might survive disclosure to the government); *In re Steinhardt Partners*, 9 F.3d 230, 235-36 (2d Cir. 1993)(holding the party waived work product production by voluntarily turning material over to the SEC, but “declin[ing] to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection”); *In re Chrysler Motors Corp.*, 860 F.2d 844, 846 (8th Cir. 1989)(holding the party waived work product protection by voluntary disclosure, but noting that the material did not include “opinion” work product “which enjoys a very near absolute immunity and can be discovered only in very rare and extraordinary circumstances”); *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1375 (D.C.Cir. 1984)(emphasis added)(“we cannot see how the developing procedure of corporations to employ independent outside counsel to investigate and advise them would be thwarted by telling a corporation that it cannot disclose the resulting reports to the SEC if it wishes to maintain their confidentiality. The same choice is open under the work product privilege. *Or the company can insist on a promise of confidentiality before disclosure to the SEC*”).

of: Deputy Attorney Generals Holder,⁴⁸ Thompson,⁴⁹ and McNulty⁵⁰ and Acting Deputy Attorney General McCallum.⁵¹

Holder Memorandum.

Signed on June 19, 1999, the Holder Memorandum was designed to provide prosecutors with factors to be considered when determining whether to charge a corporation with criminal activity. It emphasized that “[t]hese factors are, however, not outcome-determinative and are only guidelines.”

The factors consisted of: “1. The nature and seriousness of the offense. . . 2. The pervasiveness of wrongdoing within the corporation. . . 3. The corporation’s history of similar conduct. . . 4. The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents. . . 5. The existence and adequacy of the corporation’s compliance program. . . 6. The corporation’s remedial actions. . . 7. Collateral consequences . . . and 8. The adequacy of non-criminal remedies. . . .”⁵²

In the section devoted to cooperation and voluntary disclosure, the Memorandum stated that “In gauging the extent of the corporation’s cooperation, the

⁴⁸ “Bringing Criminal Charges Against Corporations,” Memorandum from the Deputy Attorney General, to All Component Heads and United States Attorneys, dated as signed on June 16, 1999, (Holder Memorandum), 66 *BNA Criminal Law Reporter* 189 (December 8, 1999).

⁴⁹ “Principles of Federal Prosecution of Business Organizations,” Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys, dated January 20, 2003, (Thompson Memorandum), available on January 26, 2007 at [http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm].

⁵⁰ “Principles of Federal Prosecution of Business Organizations,” Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, undated, (McNulty Memorandum), available on January 26, 2007 at [http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf].

⁵¹ “Waiver of Corporate Attorney-Client and Work Product Protection,” Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Department Components and United States Attorneys, dated October 21, 2005, (McCallum Memorandum) (appeared prior to being superseded in the Justice Department’s Criminal Resource Manual, section 163, but apparently can no longer be found on the Department’s website), available on November 15, 2007 on Westlaw as either SL031 ALI_ABA 1299 or 1571 PLI/Corp 705; *see also*, 78 *BNA Criminal Law Reporter* 183.

⁵² Holder Memorandum, II. Charging Corporations – Factors To Be Considered, A. General Principle. The Sentencing Commission had declared similar considerations appropriate organizational sentencing factors, *United States Sentencing Commission Guideline Manual*, U.S.S.G. §8C2.5 (1991 ed.), 56 *Fed.Reg.* 22791-792 (May 16, 1991)(indicating that a convicted organization’s culpability score should be determined by weighing a corporation’s involvement in or tolerance of criminal activity; its prior history; any evidence of its efforts to obstruct justice; the existence of an organizational compliance program; and the extent to which the organization reported the criminal activity, cooperated with the investigation, and accepted responsibility).

prosecutor may consider the corporation's willingness . . . to waive the attorney-client and work product privileges."⁵³ As the Comment that followed explained:

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors, may, therefore, request a waiver in appropriate circumstances. [This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.] The Department does not, however, consider waiver of a corporation's privileges an absolute requirement, and prosecutor should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation's cooperation. Holder Memorandum, VI. B. (Memorandum's footnote appears in brackets).

The Memorandum also addressed the adverse weight that might be given a corporation's participation in a joint defense agreement with its officers or employees and its agreement to pay their legal fees:

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents either through the advancing of attorneys' fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation. By the same token, the prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty. [Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate.] Holder Memorandum, VI. B. (Memorandum's footnote, signaled after the fee reference, in brackets).

Although several academics and defense counsel expressed concern over the possible impact of the waiver feature of the Holder Memorandum,⁵⁴ a survey of

⁵³ Holder Memorandum, VI.A.

⁵⁴ Zornow & Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AMERICAN CRIMINAL LAW REVIEW 147, 156 (2000) ("Thus unfettered, federal prosecutors are authorized by Justice Department policy to rend the fabric of confidential communications ranging from those that occurred around the time of the conduct at issue to those that occurred during and in connection with the

United States Attorneys conducted in late 2002 indicated that waivers were rarely requested.⁵⁵

Thompson Memorandum.

On January 30, 2003, the Holder Memorandum was superseded by the Thompson Memorandum in a manner which hardly seemed designed to meet the concerns of its critics. The Thompson Memorandum appeared to call for a more aggressive stance. The Thompson Memorandum was essentially a reissuance of its predecessor. Little of the text was new. That portion of the Memoranda devoted to the waiver of attorney-client and work product protections, and cooperation and voluntary disclosure in general – Part VI – was the same in both except for a new paragraph added in the Thompson Memorandum.⁵⁶ The addition said nothing about waivers per se, but made clear the risks that a corporation ran if it failed to be forthcoming early on or continued to support those officers or employees that prosecutors thought culpable:

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include overly broad assertions of corporate

criminal investigation itself. And once these privileges have been waived, they will likely become fair game for plaintiffs in civil suits”); Cole, *Revoking Our Privileges: Federal Law Enforcement’s Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILLANOVA LAW REVIEW 469, 543 (2003)(“These statements in the Holder Memorandum go quite far toward effectively forcing a corporation to waive privilege protections if it hopes to obtain favorable charging treatment at the hands of DOJ prosecutors. In complex corporate criminal cases federal prosecutors have enormous prosecutorial discretion to decide the nature and number of charges, if any, that they will bring against the responsible corporate entity and culpable individuals. Moreover, the manner in which that prosecutorial discretion is exercised is not subject to legal challenges or judicial review. This combination of broad discretion and limited accountability presents the potential for misguided policy decisions and, in the worst cases, even abuses of governmental power”); *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations: A Report Prepared by the American College of Trial Lawyers*, 41 DUQUESNE LAW REVIEW 307 (2003)(“The Justice Department’s policy, as expressed in the Holder Memo Standards, is to obtain waivers of the corporate attorney-client and work-product privilege where, in the government’s view these protections might keep information relevant to a criminal investigation from discovery. Indeed, there is no pretense that the values underlying these privileges are to be sacrificed for any reason other than to make the prosecution’s job easier”).

⁵⁵ Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST LAW REVIEW 587, 597-98 (2004); United States Sentencing Commission, *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines* 98-9 (October 7, 2003).

⁵⁶ See Berry, *Revised Principles of Federal Prosecutions of Business Organizations: An Overview*, 51 UNITED STATES ATTORNEYS’ BULLETIN 8 (November 2003)(“One significant ‘non-revision’ of the Holder memo is noteworthy. Amidst controversy, no change in the use of waivers of the attorney-client and work product protections has been included in the Thompson memo”).

representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation. Thompson Memorandum, VI. B.

Yet this is one of the few amendments to the Holder Memorandum. To some, the whole scale adoption of language from the earlier Memorandum suggested a Justice Department perception that the problem with the Holder Memorandum was not its content but its application. The Thompson Memorandum's description of the changes might be read to confirm this impression:

The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution.

Moreover, where the Holder Memorandum seemed to bespeak guidance, the Thompson appeared to sound a command. The Holder Memorandum's introductory remarks provided that, "These factors are, however, not outcome-determinative and are only guidelines. Federal prosecutors are not required to reference these factors in a particular case" The remarks might have suggested that prosecutors enjoyed some significant degree of flexibility as to whether and how to apply the standards it announced. The Thompson Memorandum seemed to speak with a much more commanding tone; its introductory remarks stated that, "prosecutors and investigators in every matter involving business crimes *must* assess the merits of seeking the conviction of the business entity itself." Thompson Memorandum (emphasis added).⁵⁷

Comparable Policies Elsewhere. Nevertheless, the policies articulated in the Holder and Thompson Memoranda are similar to the enforcement policies announced by a substantial number of federal regulatory agencies that call for voluntary corporate disclosure of statutory or regulatory violations.⁵⁸ Some specifically mention the waiver of the attorney-client or work product protection,⁵⁹

⁵⁷ Cf., *United States v. Stein*, 435 F.Supp.2d 330, 338 (S.D.N.Y. 2006) ("Unlike its predecessor, however, the Thompson Memorandum is binding on all federal prosecutors").

⁵⁸ For a description of several of these see, Wray & Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AMERICAN CRIMINAL LAW REVIEW 1095, 1118-135 (2006).

⁵⁹ E.g., U.S. Commodity Futures Trading Commission, Division of Enforcement, *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations* ("The three areas of a company's conduct that bear on the Division's decision-making about sanctions recommendations include the following ... II. Quality of the Company's Efforts in Cooperating with the Division and Managing the Aftermath of the Misconduct... 3. Did the company willing: a. waive corporate attorney-client and work

while others seem to speak with sufficient generality to justify consideration on enforcement and sanction questions.⁶⁰

Sentencing Guidelines. In May of 2004, the United States Sentencing Commission amended Commentary in the Sentencing Guidelines that some read as an endorsement of this new more aggressive approach. The change explicitly described the circumstances under which a corporation's failure to waive could have sentencing consequences: "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."⁶¹

product protection and other corporate documents? b. waive corporate attorney-client privilege for employee testimony? ..."); Securities Exchange Commission, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Release No. 44969 (October 23, 2001) (Seaboard Report) ("In brief form, we set forth below some of the criteria we will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation – from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions... .In some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege, the work product protection and other privileges, protections, and exemptions with respect to the Commission... Did the company promptly make available to our staff the results of its review... did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions ... In this regard, the Commission does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission").

⁶⁰ E.g., Federal Energy Regulatory Commission, *Policy Statement on Enforcement*, 113 FERC ¶ 61,068 (October 20, 2005) ("the Commission will consider these factors even for entities that did not self-report violations, provided that cooperation was provided once the violation was uncovered. > Did the company volunteer to provide internal investigation or audit reports relating to the misconduct ... > Did the company ... actively encourage [its] employees to provide the Commission with complete ... information?"); Federal Financial Institutions Examination Council, *Assessment of Civil Money Penalties*, 63 Fed.Reg. 30226, 30227 (June 3, 1998) ("In determining the amount and the appropriateness of initiating a civil money penalty assessment proceeding ... the agencies have identified the following factors as relevant... (4) The failure to cooperate with the agency in effecting early resolution of the problem; (5) Evidence of concealment of the violation, practice, or breach of fiduciary duty or, alternatively, voluntary disclosure of the violation, practice or breach of fiduciary duty").

⁶¹ 69 Fed.Reg. 29021 (May 19, 2004); *United States Sentencing Commission Guidelines Manual*, U.S.S.C. §8C2.5, Commentary Note 12 (2004 ed.).

Although apparently crafted at least in part to ease corporate anxiety,⁶² it seemed to have the opposite effect.⁶³ The following August, the American Bar Association voted to recommend that the Commentary be changed to state that waiver should not be considered a sentencing factor.⁶⁴ The Commission instead removed from the Commentary the language quoted above that it had added in 2004.⁶⁵

McCallum Memorandum.

Then on October 21, 2005 came the McCallum Memorandum. It made no revision in the Thompson Memorandum, but briefly addressed the manner in which the Thompson Memorandum's policy on waiver was to be implemented. The various United States Attorneys were instructed to prepare written guidelines for supervisory approval of requests for corporate waivers.⁶⁶ The effort did little to

⁶² United States Sentencing Commission, *Reason for the Amendment*, 69 *Fed.Reg.* 29024 (May 19, 2004).

⁶³ Brown, *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 *HOFSTRA LAW REVIEW* 897, 937 (2006) (“Whatever faint distinctions existed between the two Memos, the ultimate result appears to be the same, at least from the perspective of the corporate bar, namely, routine demands by DOJ for waiver, which corporations feel compelled to provide... The amendment to the U.S. Sentencing Guidelines, suggesting that waiver could be a prerequisite to the reduction of a corporation's culpability score under certain circumstances, added further credence to this perception”); McLucas, Shapiro & Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 *JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY* 621, 634 (2006) (“The U.S. Sentencing Commission has validated the DOJ view of waiver of the attorney-client privilege by recent amendments to the Organizational Sentencing Guidelines. In particular, recently amended Commentary to §8C2.5 ... [in which] the exception is likely to swallow the rule; prosecutors will make routine requests for waivers and organizations will be forced to routinely grant them”).

⁶⁴ American Bar Association Task Force on Attorney-Client Privilege, *Report to the House of Delegates* 4 n.4 (2006)

⁶⁵ 71 *Fed.Reg.* 28073 (May 15, 2006) (“The Commission added this sentence to address some concerns regarding the relationship between waivers and §8C2.5(g), and at the time stated that ‘[t]he Commission expects that such waivers will be required on a limited basis.’ Subsequently, the Commission received public comment and heard testimony at public hearings ... that the sentence at issue could be misinterpreted to encourage waivers”).

⁶⁶ “To ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the Thompson Memorandum, some United States Attorneys have established review processes for waiver requests that require federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking a waiver of the attorney-client privilege or work product protection. Consistent with this best practice, you are directed to establish a written waiver review process of your district or component. The United States Attorneys' Manual will be amended to reflect this policy. Such waiver review processes may vary from district to district (or component to component), so that each United States Attorney or component head retains the prosecutorial discretion necessary, consistent with their circumstances, to seek timely, complete, and accurate information from business organizations,” McCallum Memorandum.

assuage critics.⁶⁷

Proposed Rules of Evidence.

In January, 2006, then Chairman of the House Judiciary Committee asked the Judicial Conference to consider a rule which would protect against inadvertent waiver of the attorney-client privilege, would permit protective court orders to limit the consequences of disclosure of privileged material during discovery, and selective waivers in the case of governmental investigations.⁶⁸ On May 15, 2006, the Federal Advisory Committee on Evidence opened for comment a proposed evidentiary rule amendment crafted, among other things, to resolve the split in the circuits and to afford corporations some relief in the form of selective waivers.⁶⁹ The proposed new Federal Rule of Evidence, proposed Rule 502, would have provided that disclosure of protected attorney-client or work product information to governmental investigators or regulators would not constitute a waiver of those protections with respect to third parties.⁷⁰

The selective waiver feature of the rule, however, proved to be highly controversial and was dropped from the proposed rule the Judicial Conference recommended to the Congress.⁷¹ Congress ultimately accepted the recommendation

⁶⁷ McLucas, Shapiro & Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 621, 633 (2006) (“The McCallum Memo ensures that each U.S. Attorney across the country will be ready to strike with a demand for a privilege waiver. Significantly, it does not require consistency or predictability across offices in making these demands – an issue that is particularly troublesome for corporations doing business in a global marketplace”).

⁶⁸ Letter from Chairman F. James Sensenbrenner, Jr. to Director Leonidas Ralph Mecham, Administrative Office of the United States Courts, dated January 23, 2006, available on October 11, 2008 at [<http://www.uscourts.gov/rules/2006-01-23-Sensenbrenner.pdf>].

⁶⁹ Memorandum from the Honorable Jerry E. Smith, Chair of the Advisory Committee on Evidence Rules to the Honorable David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure, relating to a Report of the Advisory Committee on Evidence Rules and dated May 15, 2006, available on October 11, 2008 at [http://www.uscourts.gov/rules/Report/ev05_2006.pdf].

⁷⁰ “In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection – when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority – does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law,” proposed F.R.Evid. 502(c).

⁷¹ Letters from Judge Lee H. Rosenthal, Chair of the Comm. On Rules and Procedure of the Judicial Conference of the United States to Senators Patrick J. Leahy and Arlen Specter as well as Representatives John Conyers, Jr., and Lamar Smith, each dated January 26, 2007, at 6, available on October 11, 2008 at [http://www.uscourts.gov/rules/Hill_Letter_re_Ev_502.pdf].

and enacted a rule with only inadvertent waiver and protective order components.⁷²

Constitutional Concerns. In summer of 2006, a court in the Southern District of New York held that implementation of the Thompson Memorandum’s policy with regard to a corporation’s reimbursement of the attorneys’ fees of its employees and pressure on them to make incriminating statements violated the Fifth Amendment substantive due process rights of the employees, their Fifth Amendment privilege against self-incrimination, as well as their Sixth Amendment right to the assistance of counsel.⁷³

The case began with the criminal tax investigation of an accounting firm and its employees. After issuing subject letters to more than twenty of the firm’s officers and employees, prosecutors met with the firm’s attorneys.⁷⁴ At the meeting the firm indicated that it intended to “clean house,” that it had already taken some personnel actions, that it meant to cooperate fully with the government’s investigation, and that its objective was to avoid indictment of the firm and the fate of Arthur Andersen by acting so as to protect the firm and not the employees and officers targeted.⁷⁵ The firm indicated that it had been its practice to cover the litigation costs of its employees but that it would not pay the fees of employees who refused to cooperate with the government’s investigation or who invoked their Fifth Amendment privilege.⁷⁶ Prosecutors referred to the Thompson Memorandum and the Sentencing Guidelines and indicated they would take into account any instances where the firm was legally obligated to pay attorneys’ fees.⁷⁷ They also indicated, however, that misconduct should not be rewarded and that prosecutors would examine “under a microscope” the payment of any fees that were not legally required.⁷⁸

In consultation with prosecutors, the firm sent the subjects of the investigation form letters informing them that attorneys’ fees would be capped at \$400,000 and that fees would be cut off for any employee charged with criminal wrongdoing.⁷⁹ Thereafter prosecutors advised the firm’s attorney when one of the firm’s employees

⁷² F.R.Evid. 502, P.L. 110-322, 122 Stat. 3537 (2008). See also, S.Rept. 110-264 (2008).

⁷³ *United States v. Stein*, 435 F.Supp.2d 330, 356-72 (S.D.N.Y. 2006); *United States v. Stein*, 440 F.Supp.2d 315, 337-38 (S.D.N.Y. 2006).

⁷⁴ *United States v. Stein*, 435 F.Supp.2d at 341.

⁷⁵ *Id.* See also, *United States v. Stein*, 440 F.Supp.2d 315, 337 (S.D.N.Y. 2006) (“Many companies faced with allegations of wrongdoing are under intense pressure to avoid indictment, as an indictment – especially of a financial services firm – threatens to destroy the business regardless of whether the firm ultimately is convicted or acquitted. That is precisely what happened to Arthur Andersen & Co., one of the world’s largest accounting firms, which collapsed almost immediately after it was indicted – and the Supreme Court’s eventual reversal of its conviction did not undo the damage. So any entity facing such catastrophic consequences must do whatever it can to avoid indictment”).

⁷⁶ *Id.* at 342.

⁷⁷ *Id.* at 342-43.

⁷⁸ *Id.* at 344.

⁷⁹ *Id.* at 345-46.

proved uncooperative; the firm then advised the employees that they would be fired and their attorneys' fees cut off if they did not cooperate; and did so in cases of those employees who remained recalcitrant.⁸⁰ The firm then entered into a deferred prosecution agreement with prosecutors for the eventual dismissal of charges under which it agreed to waive indictment; pay a \$456 million fine; accept restrictions on its practice; waive all privileges including but not limited to attorney-client and attorney work product; and provide the government with extensive cooperation in its investigation and prosecution of the firm's former officers and employees.⁸¹

The by-then indicted former officers and employees moved to have their indictments dismissed on constitutional grounds.⁸² The court agreed that constitutional violations had occurred but declined at least temporarily to dismiss the indictments under the understanding that the government had agreed that it would accept, without prejudice to the firm in its deferred prosecution agreement or otherwise, any fee arrangement that the firm should come to with its former officers and employees.⁸³ It subsequently dismissed the indictment against 13 of the defendants, but declined to do so with respect to three others who had left the firm sometime previously and therefore had been the victims of the misconduct the court perceived.⁸⁴

Substantive Due Process. With regard to the constitutional provisions implicated in the *Stein* decision, the Fifth Amendment guarantees that "No person shall ... be deprived of life, liberty, or property, without due process of law," nor "be compelled in any criminal case to be a witness against himself," U.S.Const. Amend. V. The Sixth Amendment promises that "in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence," U.S.Const. Amend. VI.

The Fifth Amendment due process clause and its twin in the Fourteenth Amendment house both procedural and substantive components.⁸⁵ The courts have said that the substantive due process component of the due process clauses provides protection against the denial of any fundamental right to life, liberty, or property by

⁸⁰ *Id.* at 347.

⁸¹ *Id.* at 349.

⁸² *Id.* at 350.

⁸³ *Id.* at 382.

⁸⁴ *United States v. Stein*, 495 F.Supp. 390, 425-28 (S.D.N.Y. 2007).

⁸⁵ *Reno v. Flores*, 507 U.S. 292, 301 (1993) ("Respondents' 'substantive due process' claim relies upon our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); see also, *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Collins v. Harker Heights*, 503 U.S. 115, 1992 (1992).

“oppressive,” “egregious or arbitrary” governmental action.⁸⁶ Given its sweeping potential breadth, the courts have been reluctant to recognize new claims to its safeguards.⁸⁷ They have noted that the component affords no protection against private deprivations,⁸⁸ imposes no affirmative duties upon government entities,⁸⁹ and protects only legally recognized entitlements not expectations or anticipated benefits.⁹⁰ Moreover, when “a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.”⁹¹

When substantive due process is found to include a particular fundamental right, infringement by government action may only survive if it is narrowly tailored to serve a compelling governmental interest.⁹² Faced with the question of whether a particular type of government action is oppressive, egregious or arbitrary for substantive due process purposes, courts have often referred to the *Rochin* standard: government action cannot be said to violate substantive due process unless it first shocks the conscience of the court.⁹³

⁸⁶ *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198 (2003); *Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989).

⁸⁷ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“we have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a greatest extent, place the matter outside the area of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court”); see also, *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

⁸⁸ *Castle Rock v. Gonzales*, 545 U.S. 748, 755 (2005); *DeShaney v. Winnebago Country Dept. of Social Services*, 489 U.S. 189, 195 (1989).

⁸⁹ *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992).

⁹⁰ *Castle Rock v. Gonzales*, 545 U.S. at 756; *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

⁹¹ *Sacramento v. Lewis*, 523 U.S. 833, 842 (1998); see also, *Albright v. Oliver*, 510 U.S. 266, 273 (1994).

⁹² *Reno v. Flores*, 507 U.S. at 302; *Collins v. Harker Heights*, 503 U.S. at 125.

⁹³ *Chavez v. Martinez*, 538 F.3d 760, 774 (2003) (“Convictions based on evidence obtained by methods that are so brutal and so offensive to human dignity that they shock the conscience violate the Due Process Clause. *Rochin v. California*, 342 U.S. 165, 172, 174 (1952)”); *Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998); *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992); *Estate of Phillips v. District of Columbia*, 455 F.3d 397, 403 (D.C. Cir. 2006); *United States v. Guidry*, 456 F.2d 493, 506-507 (5th Cir. 2006); *Ramos-Piñero v. Puerto Rico*, 453 F.3d 48, 53 (1st Cir. 2006); *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006); *Graves v. Thomas*, 450 F.3d 1215, 1220 (10th Cir. 2006); *Pabon v. Wright*, 459 F.3d 241, 250-51 (2d Cir. 2006); *County Concrete Corp. v. Roxbury*, 442 F.3d 159, 169

The *Stein* court concluded that a criminal defendant has a substantive due process right “to obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference.”⁹⁴ It also found that the Thompson Memorandum and the pressure the prosecutors exerted upon the accounting firm to cut off the payment of attorneys’ fees for the firm’s former employees impinged upon the right.⁹⁵ While the court conceded that the government had a compelling interest in investigating and prosecuting crime and in preventing obstruction of those efforts, it felt the means chosen to serve its interests were insufficiently tailored to satisfy strict scrutiny:

The first difficulty is that the Thompson Memorandum does not say that payment of legal fees may cut in favor of indictment *only if* it is used as a means to obstruct an investigation. Indeed, the text strongly suggests that advancement of defense[] costs weighs against an organization independent of whether there is any circling of the wagons... If the government means to take the payment of legal fees into account in making charging decisions only where the payments are part of an obstruction scheme – and thereby narrowly tailor its means to its ends – it would be easy enough to say so. But that is not what the Thompson Memorandum says.

The concerns do not end here. The argument that payment of legal fees to employees and former employees is relevant to gauging the extent of a company’s cooperation also is problematic... [I]t simply cannot be said that payment of legal fees for the benefit of employees and former employees necessarily or even usually is indicative of an unwillingness to cooperate fully. This is especially unlikely after employees have been indicted and fired, as is the situation here. *Id.* at 363-64 (emphasis in the original).

The government fared no better with its Sixth Amendment argument.

Assistance of Counsel. The Sixth Amendment assures the criminally accused the right to assistance of counsel “in all criminal prosecutions.” It is said the right generally attaches once “prosecution has been commenced, that is, at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”⁹⁶ Once attached, the right includes the right to counsel of the defendant’s choosing, subject to several limitations.⁹⁷ Among those limitations is the fact that an accused has no

(3d Cir. 2006); *Skokos v. Rhoades*, 440 F.3d 957, 962 (8th Cir. 2006); *Montgomery v. Stefaniak*, 410 F.3d 933, 939 (7th Cir. 2005).

⁹⁴ *United States v. Stein*, 435 F.Supp.2d at 361-62.

⁹⁵ *Id.* at 362 (The court calculated that “even a minimal defense of this case could well cost \$500,000 to \$1 million, if not significantly more”).

⁹⁶ *Texas v. Cobb*, 532 U.S. 162, 166 (2001); see also, *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *United States v. Mills*, 412 F.3d 325, 328 (2d Cir. 2005).

⁹⁷ *Wheat v. United States*, 486 U.S. 153, 159 (1988) (“The Sixth Amendment right to choose one’s own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing

right to secure counsel of his choice using funds subject to confiscation, or as the Supreme Court stated, “[a] defendant has no Sixth Amendment right to spend another person’s money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice.”⁹⁸

The government contended that its conduct could not constitute a violation of the Sixth Amendment because (1) it had occurred before indictment and thus before the right to counsel had attached and (2) the employees had no Sixth Amendment right to pay for their counsel of choice with someone else’s money. Attachment was no obstacle, replied the court, when the motive or at least the clearly foreseeable result was to impede the employee’s criminal defense after they were indicted.⁹⁹ As for the Supreme Court’s someone-else’s-money comment, it referred to defendants using the government’s money, money to which they had neither right nor expectation. Here, the court said the defendants had every reason to expect that the firm would have assumed their legal expenses, but for the government’s intervention.¹⁰⁰

The government’s conduct so struck at the heart of the adversarial nature of the criminal justice system that it commanded redress without reference to proof of actual prejudice to its victims.¹⁰¹

relationship with an opposing party, even when the opposing party is the government”); see also, *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557, 2561 (2006).

⁹⁸ *Caplin & Drysdale v. United States*, 491 U.S. 617, 626 (1989); see also, *United States v. Monsanto*, 491 U.S. 600, 614-615 (1989).

⁹⁹ *United States v. Stein*, 435 F.Supp.2d at 366.

¹⁰⁰ *Id.* at 367 (“Thus, both the expectation and any benefits that would have flowed from that expectation – the legal fees at issue now – were, in every material sense, their property not that of a third party”).

¹⁰¹ *Id.* at 368-73 (noting the similarity to *Gonzalez-Lopez*, and observing that the “Thompson Memorandum discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves. This is so even where companies obstruct nothing and, to the contrary, do everything within their power to make a clean breast of the facts to the government and to take responsibility for any offenses they may have committed. It undermines the proper functioning of the adversary process that the constitution adopted as a mode of determining guilt or innocence in criminal cases. The actions of prosecutors who implement it can make matters even worse, as occurred here”). See also, *United States v. Stein*, 495 F.Supp.2d 390, 426-27 (S.D.N.Y. 2007) (“The Department of Justice, in promulgating the aspects of the Thompson Memorandum here at issue, and the USAO in the respects discussed above and in *Stein I*, deliberately or callously prevented many of these defendants from obtaining funds for their defense that they lawfully would have had absent the government’s interference. They thereby foreclosed these defendants from presenting the defense they wished to present, and in some cases, even deprived them of counsel of their choice. This is intolerable in a society that holds itself out to the world as a paragon of justice”).

Self-Incrimination. The court resolved the self-incrimination issue in a separate decision following defendants' suppression motions.¹⁰² Here the government was a bit more successful, for although the court found a violation in some instances it declined to do so in others.

As a general rule statements secured under governmental threat of job termination are inadmissible in subsequent criminal proceedings.¹⁰³ During the course of the *Stein* case investigation, several employees had initially refused to talk to authorities. Prosecutors then brought the matter to the attention of the firm's attorneys and employees were told to cooperate or payment of their attorneys' fees would be discontinued and if still employed they would be fired.¹⁰⁴ In some cases, the coercion resulted in involuntary statements; in others the employees made voluntary statements for reasons of their own notwithstanding the pressure.¹⁰⁵

To the government's argument that no Fifth Amendment consequences flowed from the conduct of the firm, a private non-governmental actor, the court found the firm's conduct attributable to the government.¹⁰⁶ Yet in the end only two of the nine challenged statements were suppressed.¹⁰⁷

Legislative Activity in the 109th Congress.

Both the House and Senate Judiciary Committees held hearings on the policy reflected in the Thompson Memorandum during the 109th Congress.¹⁰⁸ They heard contentions from some witnesses that

- The policy represented a departure from past practices, since historically Justice Department requests for waivers of corporate attorney-client and work product protection were unheard of.¹⁰⁹

¹⁰² *United States v. Stein*, 440 F.Supp.2d 315 (S.D.N.Y. 2006).

¹⁰³ *Garrity v. New Jersey*, 385 U.S. 493, 496-500 (1967); *United States v. Waldon*, 363 F.3d 1103, 1112 (11th Cir. 2004); *Modrowski v. Dept. of Veterans Affairs*, 252 F.3d 1344, 1350 (Fed.Cir. 2001).

¹⁰⁴ *United States v. Stein*, 440 F.Supp.2d at 330-33.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 337 ("the government, both through the Thompson Memorandum and the actions of the [United States Attorney's Office], quite deliberately coerced, and in any case significantly encouraged, [the firm] to pressure its employees to surrender their Fifth Amendment rights. There is a clear nexus between the government and specific conduct of which the Moving Defendants complain").

¹⁰⁷ *Id.* at 338.

¹⁰⁸ *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. (2006)(*House Hearings*); *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Senate Committee on the Judiciary*, 109th Cong., 2d Sess. (2006)(*Senate Hearings*).

¹⁰⁹ *House Hearings* 13-4 (testimony of former U.S. Attorney General Thornburgh).

- “A culture of waiver has evolved in which government agencies believe it is reasonable and appropriate to them to expect a company under investigation to broadly waive.”¹¹⁰
- Although characterized as “voluntary disclosures” or “waivers,” in reality a company faced with a Justice Department request often has no alternative but to comply.¹¹¹
- Company officials responsible for regulatory compliance are less likely to seek the advice of counsel if they believe those communications unprotected.¹¹²
- “[D]uring an investigation, if employees suspect that anything they say to their attorneys can be used against them, they won’t say anything.”¹¹³
- Even if a company should prove innocent of any criminal or regulatory wrongdoing, it may have lost the privilege against third party civil plaintiffs by virtue of its disclosure to the government.¹¹⁴

The Justice Department’s perspective was a bit different. Its officials responded that:

- The Holder and Thompson Memoranda emerged in an environment of corporate scandal. Congress suggested, and the Department agreed, that enormous companies and their executives simply because of their wealth, position and influence should not be considered above the law but should instead be held accountable if they engage in criminal conduct.¹¹⁵

¹¹⁰ *House Hearings* 13 (testimony of former U.S. Attorney General Thornburgh).

¹¹¹ *House Hearings* 17 (testimony of U.S. Chamber of Commerce, President and CEO Thomas J. Donohue) (“A company that refuses to waive its privilege risks being labeled as uncooperative, which all but guarantees that it will not get a chance to come to a settlement or receive, if it needs to, leniency in sentencing or fines. But it goes far beyond that, Mr. Chairman. The uncooperative label can severely damage a company’s brand, its shareholder value, [its] relationship with suppliers and customers, and [its] very ability to survive”); see also, *Senate Hearings* (statement of Karen J. Mathis, President of the American Bar Association).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Senate Hearing* (statement of Deputy Attorney General Paul J. McNulty).

- The Memoranda reflected an articulation of the principles that good prosecutors had long used in the context of a potential corporate prosecution.¹¹⁶
- The Department believed that waivers need not be, and had not been, routinely sought.¹¹⁷
- The Memoranda balance “the legitimate interests furthered by the privilege, and the societal benefits of rigorous enforcement of the laws supporting ethical standards of conduct.”¹¹⁸
- Waiver was one, but only one, factor considered in the exercise of prosecutorial discretion.¹¹⁹
- The Department would support establishment of a selective waiver provision that would allow companies to continue to claim the attorney-client and work product protection against third parties notwithstanding disclosure to the government.¹²⁰

In the final days of the 109th Congress, Senator Specter introduced S. 30 which, among other things, would have prohibited federal authorities from requesting a waiver of organizational attorney-client or work product protection or predicating the adverse exercise of prosecutorial discretion on the absence of such a waiver or the payment of attorneys’ fees for their employees or officers.¹²¹

McNulty Memorandum.

The McNulty Memorandum, announced December 12, 2006, supersedes the Thompson and McCallum Memoranda.¹²² While it incorporates a great deal of the substance of its predecessors, the McNulty Memorandum rewrites the principles and commentary that address corporate attorney-client and work product protection waivers as well as those covering the payment of employee litigation costs.

It drops the specific reference to the waivers from the general statement of factors to be weighed when considering whether to charge a corporation.¹²³

¹¹⁶ *Id.*

¹¹⁷ *Id.* 7.

¹¹⁸ *House Hearing* 6 (testimony of Assoc. Attorney General Robert D. McCallum, Jr.)

¹¹⁹ *Id.*

¹²⁰ *Senate Hearing* (statement of Deputy Attorney General Paul J. McNulty).

¹²¹ 152 *Cong. Rec.* S11439, S11740 (daily eds. December 7 and 8, 2006).

¹²² Department of Justice, *U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud*, Press Release December 12, 2006, available on January 26, 2007 at [http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html].

¹²³ “. . . In conducting an investigation, determining whether to bring charges and negotiating plea agreements, prosecutors should consider the following factors in reaching

Earlier Memoranda stated that waiver was not an “absolute” requirement for the favorable exercise of prosecutorial discretion,¹²⁴ suggesting to some that it was a requirement under most circumstances. The McNulty Memorandum suggests that prosecutors’ waiver requests are to be considered the exception rather than the rule:

Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely desirable or convenient to obtain privileged information. The test requires a careful balancing of important policy considerations underlying the attorney-client privilege and work product doctrine and the law enforcement needs of the government’s investigation.

Whether there is a legitimate need 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. McNulty Memorandum, VII. B. 2.

Moreover, the McNulty Memorandum divides attorney-client and work product material into two categories. Category I consists of factual information. Category II material is described in much the same manner as opinion work product material (It “might include the protection of attorney notes, memoranda or reports containing counsel’s mental impressions, conclusions legal determinations reached as a result of an internal investigation, or legal advice given to corporation”), McNulty Memorandum, VII. B.2. The Memorandum cautions prosecutors that only in rare circumstances should they seek the waiver of Category II material, *id.* A request for Category I must be approved by the United States Attorney in consultation with the head of the Department’s Criminal Division; a request for Category II information requires prior approval of the Deputy Attorney General, *id.* A corporation’s refusal to waive cannot be considered in the exercise of prosecutorial discretion, *id.*

It also adds an explicit provision concerning attorneys’ fees, declaring that, “Prosecutors generally should not take into account whether a corporation is advancing attorneys’ fees to employees or agents under investigation and indictment,” *id.* at VII.B.3. On the other hand, it notes that, “In extremely rare cases, the advancement of attorneys’ fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation ... approval must be obtained from the Deputy Attorney General before prosecutors may consider this factor in their charging decisions,” *id.* at VII.B.3. n.3.

a decision as to the proper treatment of a corporate target. . . 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 corporate attorney-client and work product protection* (see section VI, *infra*,” Thompson Memorandum, II.A.4 (language omitted in McNulty Memorandum in italics; see McNulty Memorandum, III.A.4).

¹²⁴ Holder and Thompson Memoranda, VI.B.

Legislative Activity in the 110th Congress.

The House and Senate Judiciary Committees held hearings during the 110th Congress which focused on the McNulty Memorandum and upon related legislative proposals.¹²⁵

Senator Specter introduced the Attorney-Client Privilege Protection Act of 2007 (S. 186) early in the 110th Congress,¹²⁶ which reappeared in revised form later in the Congress (S. 3217). S. 186 as introduced was identical to S. 30 (109th Cong.) that the Senator introduced at the end of the earlier Congress.¹²⁷ It was also identical to H.R. 3013 offered in the House by Representative Scott¹²⁸ and virtually identical to the version of that bill passed by the House.¹²⁹ The bills would have barred the Justice Department and other federal investigative, regulatory or prosecutorial agencies from requesting that an organization:

- waive its attorney-client privilege or attorney work product protection;¹³⁰
- decline to pay the legal expenses of an employee;
- avoid joint defense, information sharing or common interest agreements with its employees;
- refrain from disclosing information concerning an investigation or enforcement action to employees; or

¹²⁵ *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 House Comm. on the Judiciary, 110th Cong., 1st Sess. (2007)(House Hearings II); Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the Senate Comm. on the Judiciary, 110th Cong., 1st Sess. (2007)(Senate Hearings II).*

¹²⁶ 153 *Cong. Rec.* S181-183 (daily ed. January 4, 2007)(text at S183).

¹²⁷ 154 *Cong. Rec.* S6294-295 (daily ed. June 26, 2008).

¹²⁸ The House Judiciary Committee reported H.R. 3013 without amendment, H.Rept. 110-445 (2007)(the text of the substance of the bill, *i.e.*, proposed 18 U.S.C. 3014, begins on page 8 of the report).

¹²⁹ 153 *Cong. Rec.* H13562-564 (daily ed. November 13, 2007)(text at H13563).

¹³⁰ The bill defines the "attorney-client privilege" as currently understood under the federal law, that is as "the attorney-client privilege as 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, and the principles of article V of the Federal Rules of Evidence," proposed 18 U.S.C. 3014(a)(1). It similarly defines "attorney work product" as "materials prepared by, or at the direction of an attorney in anticipation of litigation, particularly any such materials that contain a mental impression, conclusion, opinion, or legal theory of that attorney," proposed 18 U.S.C. 3014(a)(2).

- terminate or discipline an employee for the employee's exercise of a legal right or prerogative with respect to a governmental inquiry, proposed 18 U.S.C. 3014(b).

They would have also precluded using such organizational activity as the basis in whole or in part for a civil or criminal charge against the organization, id.

The bills would have allowed the government to request information it believes is beyond the scope of the attorney-client privilege or the attorney work product protection, proposed 18 U.S.C. 3014(c). And they would not prevent an organization, on its own initiative, from sharing the results of an internal investigation with authorities, proposed 18 U.S.C. 3014(d).

H.R. 3013, as passed by the House, included two subsections in proposed 18 U.S.C. 3014 that the S. 186 did not. One dealt with statutory authority elsewhere for federal officials to demand access to material covered by the attorney-client and attorney work product privileges, proposed 18 U.S.C. 3014(e).¹³¹ The second would have permitted federal prosecutors, in determining whether to bring criminal charges against a corporation, to consider the fact the corporation had provided counsel for an employee, entered into a joint defense agreement with an employee, or shared information relating to investigation with an employee – but only when those activities are themselves federal crimes, proposed 18 U.S.C. 3014(f).¹³² The language of the two appeared first when the bill was brought to the House floor under suspension of the rules. The brief statements preceding its passage did not explain or even mention the new subsections.¹³³

It was not entirely clear what subsection 3014(e) intended to preserve when it referred to “any other federal statute that may authorize, in the course of an examination or inspection, an agent or attorney of the United States to require or compel the production of attorney-client privilege material.” Many federal statutes

¹³¹ “This Act does not affect any other federal statute that may authorize, in the course of an examination or inspection, an agent or attorney of the United States to require or compel the production of attorney-client privilege material or attorney work product,” proposed 18 U.S.C. 3014(e).

¹³² “It is not conditioning a charging decision under subsection (b)(2) of this section [which generally prohibits conditioning such decisions on the fact a corporation has provided counsel for its employees, or entered into a joint defense agreement with them, or shared information concerning an investigation with them] to charge an organization or person affiliated with that organization for conduct described in subparagraphs (B), (C), or (D) of that subsection [relating to providing counsel, joint defense agreements and sharing information, respectively] under a federal law which makes that conduct in itself an offense,” proposed 18 U.S.C. 3014(f).

¹³³ The new subsections made explicit assurances that appear in the House Judiciary Committee report which recommended passage of H.R. 3013 as introduced: “Finally, the measure is not intended to limit any statutory authority of an agent or attorney of the United States to access material protected by attorney client privilege or attorney work product. Nor is it designed to prohibit an agent or attorney from charging an entity or individual under a Federal statute that makes the conduct in itself an independent offense,” H.Rept. 110-445 at 4 (2007).

authorize the examination or inspection of corporate records and other materials. Few, if any, federal statutes state in so many words that federal inspectors may examine otherwise privileged attorney-client or work product material. In fact, if privilege is mentioned at all, the statute is likely to preserve the privileged material against inspection.¹³⁴

Use of the phrase “any other federal statute that *may* authorize” indicated that the authors of the subsection were referring to statutes which grant general authority that on a given occasion “may” extend to compelled access to privileged material. Use of the term “in the course of an examination or inspection” suggested that the exception likely would not have extended to situations where the material was sought through an administrative or grand jury subpoena or through a civil investigative demand. Finally, reference to “privileged” material narrowed the category further and belied any intent to include material which on its face seems “privileged” but which because of the “crime or fraud” or some other exception cannot be classified as such. It was difficult to see what remains.

The second subsection seemed designed to permit prosecutors, when pondering whether to charge a corporation, to consider whether the company had provided counsel, or entered into joint defense agreements, or shared information, as part of a scheme to suborn perjury, destroyed evidence, or otherwise engaged in conduct that was separately prosecutable as an obstruction of justice.

The testimony of hearing witnesses and views of commentators largely addressed other features of the legislative proposals and of the McNulty Memorandum. Some applauded the changes in the Memorandum and questioned the justification for the legislative proposals on several grounds, e.g.:

- the McNulty Memorandum changes the tone of the policy, abandoning the aggressive implications of the Thompson Memorandum in favor of statements that confirm the Department’s recognition and respect for the importance of the attorney-client privilege;¹³⁵
- the Memorandum establishes a strict procedure for waiver requests and generally bars prosecutors from holding against a company its payment the legal expenses of an employee;¹³⁶

¹³⁴ *E.g.*, 42 U.S.C. 2996h(d)(“Notwithstanding the provisions of this section or section 2996g of this title, neither the Corporation nor the Comptroller General shall have access to any reports or records subject to the attorney-client privilege”); 7 U.S.C. 2143(a)(6)(B) (“No rule, regulation, order, or part of this chapter shall be construed to require a research facility to disclose . . . to the Institutional Animal Committee during its inspection, trade secrets or commercial or financial information which is privileged or confidential”).

¹³⁵ Testimony of Deputy Assistant Attorney General Barry M. Sabin, House Hearings II at 14.

¹³⁶ Prepared Statement of Deputy Assistant Attorney General Barry M. Sabin, House Hearings II at 19-22.

- the Memorandum strikes the proper balance between the public's interest in vigorous investigation and prosecute white collar crime and fairness to corporations and their officers and employees;¹³⁷
- experience since the issuance of the McNulty Memorandum refute the suggestion of widespread prosecutorial abuse; "legislative action is simply not needed;"¹³⁸
- although the bills have no explicit enforcement mechanism and the courts are generally reluctant to impose sanctions in the absence of statutory authority, the bills' proposals are likely to bring forth a "cottage industry of prosecutorial abuse claims" that may deter the prosecution of worthy cases;¹³⁹
- even if the Memorandum fosters an environment in which employees must waive their Fifth Amendment privilege or be fired, it results in no more than a situation in which the guilty suffer;¹⁴⁰
- the legislative proposals will make prosecution of white collar crime more difficult because they reduce the incentive for corporate cooperation and thereby encourage "stonewalling."¹⁴¹

Others found the McNulty Memorandum troubling and applauded the legislative proposals for several reasons of their own, e.g.:

- the McNulty Memorandum will continue to result in routine compelled waiver of the attorney-client privilege and the work product protection;¹⁴²

¹³⁷ Testimony of Professor Michael Seigel, Senate Hearings II at 1. Since the relevant Senate hearings from the 110th Congress are not yet publicly available, the citations to Senate hearing testimony here and elsewhere refer to the pages in the witness's prepared statements available on November 16, 2007 at [<http://judiciary.senate.gov>].

¹³⁸ Testimony of United States Attorney Karin Immergut, Senate Hearings II at 6.

¹³⁹ Testimony of Professor Daniel Richman, Senate Hearings II at 2; *see also*, Testimony of United States Attorney Karin Immergut, Senate Hearings II at 7.

¹⁴⁰ Testimony of Professor Michael Seigel, Senate Hearings II at 5-6 ("The bulk of that leverage, of course, would come from the threat of the ultimate sanction: termination. Only an employee truly mired in criminality would suffer this consequence rather than cooperate").

¹⁴¹ Testimony of United States Attorney Karin Immergut, Senate Hearings II at 8.

¹⁴² Testimony of American Bar Association President Karen J. Mathis, House Hearings II at 45; testimony of former Attorney General Dick Thornburgh, Senate Hearings II at 1-2; 153 *Cong. Rec.* H.13564 (daily ed. November 13, 2007)(American Bar Association letter in support of H.R. 3013).

- the policy improvements contained in the McNulty Memorandum are not binding and lack an enforcement mechanism;¹⁴³
- the Memorandum continues to allow prosecutors to encourage companies to fire employees who fail to waive their Fifth Amendment rights;¹⁴⁴
- the Memorandum affords inadequate, partial attorney-client and attorney work product protection by assigning less stringent approval levels for waivers involving “factual” information which reveal client statements and attorney strategy;¹⁴⁵
- the Memorandum addresses only Justice Department investigation and prosecution practices, whereas the legislative proposals reach the practices of other agencies as well;¹⁴⁶
- the legislative proposals would not unduly impinge upon the prerogatives of federal prosecutors; to a limited extent, they bar interference with the attorney-client privilege, a mainstay of the Anglo-American system of justice since Elizabethan times and one whose presence has not heretofore been considered an unwarranted impediment to prosecution;¹⁴⁷
- the proposals would “uphold the finest traditions of the DoJ by allowing it to strike harsh blows but fair ones in combating corporate crime.”¹⁴⁸

Senator Specter addressed some of these observations in S. 3217. S. 3217 expressly excluded from its protections certain terrorists organizations, illicit drug cartels, and crime-for-profit entities.¹⁴⁹ Where the earlier bar applied to federal

¹⁴³ Testimony of William M. Sullivan, Jr., Esq., House Hearings II at 33-4; *see also*, *Restricting Prosecutors’ Powers: Increasing Oversight to Reinstate Corporate Interests*, 92 IOWA LAW REVIEW 1523, 1548 (2007).

¹⁴⁴ Testimony of Andrew Weissmann, Esq., House Hearings II at 24; *see also*, Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 NEW YORK UNIVERSITY LAW REVIEW 311, 378 (2007)(“Even setting aside whether the end of fighting corporate crime can be achieved via the Thompson and McNulty Memoranda, the means here violate important Fifth Amendment protections”).

¹⁴⁵ Testimony of Andrew Weissmann, Esq., House Hearings II at 24-5.

¹⁴⁶ Statement of Richard T. White, Chairman of the Board of Directors of the Association of Corporate Counsel, House Hearings II at 89.

¹⁴⁷ Testimony of former Attorney General Dick Thornburgh, Senate Hearings II at 2.

¹⁴⁸ Testimony of Andrew Weissmann, Esq., Senate Hearings II at 4.

¹⁴⁹ Proposed 18 U.S.C. 3014(a)(3)(“The term ‘organization’ does not include – (A) a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act (21 U.S.C. 848); (B) any group of individuals whose primary purpose is to obtain money through illegal acts; or (C) any terrorist organization, as defined in section 2339B”).

criminal and civil matters and investigations alone, S. 3217 covered administrative adjudications and proceedings as well.¹⁵⁰ Where the earlier bills condemned governmental demands that an organization abandon its privileges, S. 3217 also removed any claim of those privileges from the permissible array of prosecutorial considerations.¹⁵¹ Where the earlier bills permitted authorities to request information that they might reasonably consider beyond the scope of the privileges, S. 3217 also permitted them to seek information otherwise within the reach of a federal grand jury subpoena, privilege considerations notwithstanding, or to seek information whose privilege status was unknown to them.¹⁵²

S. 3217 would have carried forward, with some modification, the subsections added to the House bill just before its passage there. The exception it afforded to instances, in which a statute “that *may* authorize” authorities to compel disclosure of privileged material, was revised to cover statutes “that authorize” compulsory access.¹⁵³

¹⁵⁰ Proposed 18 U.S.C. 3014(b).

¹⁵¹ Proposed 18 U.S.C. 3014(b)(2)(“In any Federal investigation or criminal or civil enforcement matter, including any form of administrative proceeding or adjudication, an agent or attorney of the United States shall not consider any conduct described in subparagraph (B)[claiming attorney-client or work product privileges, paying attorneys’ fees for employees, entering into joint defense agreements with employees, and refusing to fire employees who claim their constitutional or other rights] in – (i) making a civil or criminal charging or enforcement decision relating to an organization, or a current or former employee or agent of such organization; (ii) determining whether an organization, or a current or former employee or agent of such organization, is cooperating with the Government”).

¹⁵² Proposed 18 U.S.C. 3014(c)(“Nothing in this section shall be construed to prohibit an agent or attorney fo the United States from requesting or seeking any communication or material that – (1) an agent or attorney of ordinary sense and understanding would not know is subject to a claim of attorney-client privilege or attorney work product; (2) an agent or attorney of ordinary sense and understanding would reasonably believe is not entitled to protection under the attorney-client privilege or attorney work product doctrine; or (3) would not be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation”).

¹⁵³ Proposed 18 U.S.C. 3014(e).