



THE “MCNULTY MEMO”: A MISSED OPPORTUNITY TO REVERSE EROSION OF ATTORNEY-CLIENT PRIVILEGE

by

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On December 12, 2006, Deputy Attorney General Paul McNulty announced the release of a revised set of Department of Justice charging guidelines concerning the federal prosecution of business organizations (the “McNulty Memo”).¹ The McNulty Memo, which addresses the now commonplace practice of line prosecutors seeking waivers of the attorney-client and work product privileges as an element of a company’s cooperation with a government investigation,² supersedes the guidance provided in prior memoranda issued by McNulty’s predecessors, Robert McCallum and Larry Thompson.³ Although this new guidance presents a relatively abrupt, if long overdue, amendment to the Justice Department’s policy concerning waiver requests,⁴ it offers only mild

¹See U.S. Department of Justice press release, “U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud, *New Guidance Further Encourages Corporate Compliance*,” Dec. 12, 2006, at http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html. The full text of the McNulty Memo is available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

²The McNulty Memo in fact revisits how several factors are to be considered when making charging decisions based upon evaluation of a company’s cooperation, including the payment of attorneys’ fees for individual employees. Responding to the furor surrounding the KPMG debacle, see *U.S. v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), it provides that “[p]rosecutors generally should not take into account whether a corporation is advancing attorneys’ fees to employees or agent under investigation or indictment” except in “extremely rare circumstances” when “the totality of the circumstances show that [payment] was intended to impede a criminal investigation.” McNulty Memo at 11 and n.3 (emphasis added).

³See Memorandum from Acting Deputy Attorney General Robert McCallum, *Waiver of Corporate Attorney-Client and Work Product Protection* (Oct. 21, 2005) [the “McCallum Memo”], and Memorandum from Deputy Attorney General Larry D. Thompson, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) [the “Thompson Memo”]. The Department’s guidance on this question originated in a memorandum that was issued during the prior administration. See Memorandum from Deputy Attorney General Eric H. Holder, Jr., *Bringing Criminal Charges Against Corporations* (June 16, 1999) [the “Holder Memo”].

⁴As recently as September 12, 2006, McNulty testified before Congress in support of the Thompson Memo, and specifically to its discussion of waiving of privilege as an element of cooperation, while conceding only that “[t]he time may come when revisions are

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assurance that the attorney-client privilege will, in practice, be treated as what the Department itself acknowledges is “one of the oldest and most sacrosanct privileges under U.S. law.” McNulty Memo at 8 (citing *Upjohn v. United States*, 449 U.S. 383, 389 (1976)).

The McNulty Memo clearly responds to a sustained tide of criticism from an unusually diverse cadre of former government officials and interest groups, ranging from the American Bar Association to the American Civil Liberties Union to the United States Chamber of Commerce. Moreover, mounting empirical data that a culture of disclosure is undermining the privileges’ very purpose provided a catalyst for DOJ action.⁵ The most acute pressure for a change in policy, however, came from increasing legislative attention, such as the introduction of the Attorney-Client Privilege Protection Act of 2006.⁶ The question now becomes whether the McNulty Memo will succeed in preempting follow-on legislative action. By merely adding procedural hurdles for line prosecutors demanding privilege waivers, the McNulty Memo leaves room for continued abuse, and thus misses an opportunity to reverse further erosion of the attorney-client privilege in the context of the existing culture of compelled disclosure.

The McNulty Memo acknowledges that the “attorney-client and work product privileges serve an extremely important function in the U.S. legal system.” Memo at 8. It provides that a prosecutor may only request a privilege waiver when there is a “legitimate need” for privileged information. *Id.* The Memo describes the four factors that are to be considered when evaluating whether a legitimate need exists:

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

Id. at 9. If “careful balancing” of these factors suggests that a legitimate need for the privileged information is present, the McNulty Memo outlines a “step-by-step approach” for prosecutors to seek “the least intrusive waiver necessary to conduct a complete and thorough investigation.” *Id.*

Prosecutors are instructed to initially seek only so-called Category I material, or “purely factual information, which may or may not be privileged, relating to the underlying misconduct.” Such material includes witness statements, factual interview memoranda, or other factual charts, chronologies, summaries, or reports created by counsel. In order to demand Category I material, prosecutors must obtain written authorization from the U.S. Attorney, who in turn must consult with the Assistant Attorney General. *Id.*

Only if this material “provides an incomplete basis to conduct a thorough investigation” are prosecutors permitted to seek so-called Category II information, which “includes legal advice given to the corporation before, during, and after the underlying misconduct occurred.” Specifically, the production of such material might include attorney notes, memoranda or reports of an attorney’s mental impressions and conclusions, or the legal determinations reached and advice provided as a result of an internal corporate investigation.⁷ Category II

needed to this policy and I will gladly make them when I am convinced they are necessary and in the public interest.” Statement of Paul J. McNulty before the United States Senate Committee on the Judiciary, “The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations,” Sept. 12, 2006, at http://www.usdoj.gov/dag/testimony/2006/091206dagmcnulty_testimony_thompson_memo.htm.

⁵See, e.g., Richard Ben-Veniste and Raj De, *Federal Privilege Waiver Demands Impact Corporate Compliance*, Washington Legal Foundation LEGAL BACKGROUNDER, Vol. 21 No. 6 (Feb. 24, 2006).

⁶This proposed legislation, which was introduced by Senator Arlen Specter on December 7, 2006, would prohibit the federal government from demanding, or conditioning treatment based upon, waiver of attorney-client or work product privileges. It would also prohibit the government from using the assertion of privilege or the provision of legal defense fees for individual employees as a factor in making a charging decision. The full text is available at <http://www.acc.com/public/attyclientpriv/thompsonmemoleg.pdf>.

⁷Two types of legal advice are to be treated as Category I rather than Category II material: (1) contemporaneous legal advice

information “should only be sought in rare circumstances” and requires written authorization from the Deputy Attorney General. *Id.* at 10.

The McNulty Memo further provides that prosecutors “may always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.” *Id.* However, while prosecutors may fully take into account a corporation’s response to a demand for Category I material as an element of cooperation, they are expressly instructed not to consider a company’s declination to provide Category II information “against the corporation in making the charging decision.” *Id.*

Finally, the McNulty Memo states that federal prosecutors are not required to obtain any authorization “if the corporation voluntarily offers privileged documents without a request by the government.” *Id.* at 11.

Although this latest guidance from the Department of Justice takes a step in the direction of protecting attorney-client privilege by providing a uniform, centralized process for prosecutors to obtain necessary approval to demand a waiver of privilege, the McNulty Memo leaves several notable gaps that in practice may very well undermine any appreciable benefit. Thus, notwithstanding how the new policy guidelines are implemented, congressional action may still be needed.

First, under the McNulty Memo, even the most fundamental privileged communications between attorney and client may still be demanded by prosecutors to facilitate government investigations. The relatively vague balancing test to show a “legitimate need” is easily satisfied, and it is almost guaranteed that no prosecutor would ever concede that Category I information is sufficient to conduct a “thorough investigation” (especially as there is no neutral arbiter making either determination). Furthermore, as nearly any practicing attorney can attest, the line between so-called Category I and Category II material is subjective at best – what type of material is, after all, purely factual (e.g., even nearly verbatim interview summaries reflect attorney work product in the selection of questions, the relative time and detail allotted to various topics, etc.)? Unlike a recent amendment adopted by the U.S. Sentencing Commission completely removing language discussing the waiver of privilege as an element of cooperation, the McNulty Memo leaves open the door for prosecutors to continue demanding waivers of the most traditionally sacrosanct area of protection – a client’s request for, and an attorney’s provision of, legal advice.⁸

Second, the McNulty Memo leans heavily on another illusory distinction, that between benefit and penalty. Although the new guidance provides that prosecutors may not consider a company’s declination to waive privilege with respect to core Category II material *against* the company in making charging decisions, it simultaneously allows that prosecutors may always *favorably* consider a company’s acquiescence to a request for a waiver. In practice, this hair-splitting is a distinction without much difference. A carrot that can be denied is effectively not much different than a stick – particularly when the stakes are as high as whether or not to charge a company with criminal conduct. In order to avoid such a potentially crippling fate, corporate clients will continue to feel compelled to acquiesce in privilege waiver requests as a matter of course.

Third, the procedural hurdles set up by the McNulty Memo are inapplicable when a corporation “voluntarily” provides privileged material. In other words, without a formal request from a prosecutor, the revised rules do not apply. It is thus inevitable that a new kabuki dance will be born – between prosecutors seeking privileged material but wanting to avoid the hassle of the McNulty Memo’s authorization hurdles on the one hand, and corporations seeking to curry favor with the prosecutors making charging decisions by “voluntarily” producing such material in an effort to seem accommodating. As a practical matter, what board of

when an advice-of-counsel defense is at issue; and (2) communications that fall within the crime-fraud exception to attorney-client privilege. McNulty Memo at 10.

⁸On April 5, 2006, the U.S. Sentencing Commission voted to delete entirely the following text from Application Note 12 to § 8C2.5 of the organizational sentencing guidelines based on comments and testimony that it could be misinterpreted as encouraging waivers of privilege: “[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.” See 71 FR 28063-28073.

directors will opt to take a principled stand opposing waiver when a “voluntary” waiver may be the determinative factor in the prosecutor’s charging decision? In the end, the true victim of this voluntary offer loophole bypassing the need to satisfy even the minimal uniform standards articulated in the McNulty Memo will be candid communications between attorneys and their corporate clients.

Finally, the new policy guidance from the Justice Department does nothing to address the troubling position in which individual employees find themselves when instructed to cooperate with a company’s own internal investigation – the fruits of which are likely to be produced to the prosecution as a result of a privilege waiver – or risk losing their jobs. Employees will thus continue to feel compelled to cooperate with government investigators indirectly, stripped of the legal protections that would apply were they dealing with the government directly. This dilemma is even more acute when one considers that individuals risk not only losing their jobs by failing to potentially incriminate themselves in a company’s internal investigation, but also possible obstruction charges for statements made to the non-government attorneys conducting such an investigation.⁹

Not surprisingly, the President of the American Bar Association has concluded that the “Justice Department’s new corporate charging guidelines for federal prosecutors fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations.”¹⁰ Speculation now centers on whether the McNulty Memo will forestall, or at least delay, legislative action on the expected DOJ argument that until the impact of this new policy guidance can be gauged, it would be premature for Congress to act.¹¹

In conclusion, two things seem likely – first that consideration of legislation will be deferred in the short term; second, the Department of Justice will not expedite processing of formal requests for waiver by line prosecutors until the threat of legislative action passes. But, until the reward for waiving privilege is removed from the equation, the culture of compelled disclosure will continue to erode the attorney-client privilege.

⁹See, e.g., *U.S. v. Kumar*, No. 04-cr-846 (E.D.N.Y.) and *U.S. v. Singleton*, No. 06-cr-080 (S.D. Tex). Prosecutors in each case relied upon 18 U.S.C. § 1512(c)(2), enacted as part of the Sarbanes-Oxley Act, Pub. L. No. 107-204 (2002), on the theory that the defendants made false statements during the course of an internal investigation knowing that their statements would eventually be provided to federal officials. Although this theory was not ultimately tried to a jury in either instance (in one case the defendants reached a plea deal and in the other the charge was dismissed prior to trial), the court in each case affirmed the general viability of such a theory. See *U.S. v. Kumar*, Memorandum and Order dated Feb. 21, 2006, and *U.S. v. Singleton*, Memorandum and Order dated July 14, 2006.

¹⁰Statement by ABA President Karen J. Mathis regarding revisions to the Justice Department’s Thompson Memorandum (Dec. 12, 2006), at <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59>.

¹¹Senator Specter, for one, has apparently already made up his mind regarding this argument. When reintroducing his legislation, see *supra* note 6, in the 110th Congress, Specter said that “[t]here is no need to wait to see how the McNulty memorandum will operate in practice.” Cong. Rec. S181-183 (Jan. 4, 2007) (statement of Sen. Specter).