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Waiver of Corporate Attorney-Client and Work Product
Protection*

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CRS Report for Congress

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

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Summary

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 The Thompson Memorandum, subsequently superseded by the McNulty Memorandum, sparked considerable debate before Congress and elsewhere.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 reported out the Attorney-Client Privilege Protection Act of 2007 (H.R. 3013), H.Rept. 110-445 (2007), which the House passed on November 13, 2007, 153 *Cong. Rec.* H13564. 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 in the 109th and 110th Congresses, but adjourned without taking further action on the proposals. This is a brief discussion of the legislation as well as the controversy's legal background and chronology.

This is an abridged version of CRS Report RL33842, *The McNulty Memorandum: Attorneys' Fees and Waiver of Corporate Attorney-Client and Work Product Protection*, without the footnotes and citations to authority found in the longer report.

Attorney-Client Privilege and Work Product Protection. The attorney-client privilege and work product protection are federal evidentiary privileges. The attorney-client privilege is one of oldest common law privileges. 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. It protects confidential communications with an attorney made in order to obtain legal advice or assistance. It is available to corporations as well as to individuals. Although disclosure ordinarily waives the privilege, the circuits are divided over whether the privilege may survive disclosure for limited selective purposes (selective waiver) to government investigators or regulators.

At least since the Supreme Court announced its decision in *Hickman v. Taylor*, the federal courts have recognized that an attorney's work product gathered or created in anticipation of litigation enjoys qualified disclosure protection. The protection can be waived, 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.

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.

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” In the section devoted to cooperation and voluntary disclosure, the Memorandum stated that “In gauging the extent of the corporation’s cooperation, the prosecutor may consider the corporation’s willingness ... to waive the attorney-client and work product privileges.” 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. Although several academics and defense counsel expressed concern over the possible impact of the waiver feature of the Holder Memorandum, a survey of United States Attorneys conducted in late 2002 indicated that waivers were rarely requested.

On January 30, 2003, the Holder Memorandum was superseded by the Thompson Memorandum. 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. 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. 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 policies articulated in the Holder and Thompson Memoranda were at least roughly similar to enforcement policies announced by a substantial number of federal regulatory agencies that call for voluntary corporate disclosure of statutory or regulatory violations. Some specifically mention the waiver of the attorney-client or work product protection, while others seem to speak with sufficient generality to justify consideration on enforcement and sanction questions.

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. Although apparently crafted at least in part to ease corporate anxiety, it seemed to have the opposite effect. 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. The Commission instead removed from the Commentary the language that it had added in 2004.

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. The effort did little to assuage critics.

On May 15, 2006, the Federal Advisory Committee on Evidence reported a proposed evidentiary rule amendment crafted to resolve the splits in the circuits over the selective waiver of corporate attorney-client and work product protection. The selective waiver feature of the rule, however, proved to be highly controversial and was dropped from the proposed rule that the Judicial Conference recommended to the Congress. Congress ultimately accepted the recommendation and enacted a rule with only inadvertent waiver and protective order components.

Constitutional Concerns. In summer of 2006, a court in the Southern District of New York held in *United States v. Stein* 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. The case began with the criminal tax investigation of an accounting firm and its employees. After prosecutors issued subject letters to more than twenty of the firm's officers and employees, they met with the firm's attorneys. 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. 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. 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. 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.

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. Thereafter prosecutors advised the firm’s attorney when one of the firm’s employees 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. 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.

The by-then indicted former officers and employees moved to have their indictments dismissed on constitutional grounds. 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. The court then announced that it would accept ancillary jurisdiction over a civil action by the defendants against the firm and in a subsequent decision generally denied the firm’s motion for summary judgment.

The 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. It also found that the Thompson Memorandum and the pressure the prosecutor’s exerted upon the accounting firm to cut off the payment of attorneys’ fees for the firm’s former employees impinged upon the right. 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. On the right to counsel issue, the government contended that their 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. 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. By contrast in the case before it, 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. The court resolved the self-incrimination issue in a separate decision following defendants’ suppression motions. 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. 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. In some cases, the coercion resulted in involuntary statements; in others the employees made voluntary statements for reasons of their own notwithstanding the pressure. 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. Yet in the end only two of the nine challenged statements were suppressed.

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, and in its final days, 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 of the absence of such a waiver or the payment of attorneys' fees for their employees or officers.

McNulty Memorandum. The McNulty Memorandum, announced December 12, 2006, supersedes the Thompson and McCallum Memoranda. 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. Where earlier Memoranda stated that waiver was not an "absolute" requirement for the favorable exercise of prosecutorial discretion, 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.

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. The Memorandum cautions prosecutors that only in rare circumstances should they seek the waiver of Category II material. 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. A corporation's refusal to waive cannot be considered in the exercise of prosecutorial discretion. The Memorandum 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," except in "extremely rare cases" where it can be taken into account with the approval of the Deputy Attorney General. Initial reaction appears to have been favorable, but some critics continue to prefer an absolute ban on Justice Department corporate waiver requests.

Legislative Activity in the 110th Congress. Senator Specter introduced the Attorney-Client Privilege Protection Act of 2007 (S. 186) early in the 110th Congress. The bill as introduced is identical to S. 30 (109th Cong.) that the Senator introduced at the end of the last Congress. It is also identical to H.R. 3013 introduced in the House by Representative Scott and virtually identical to the version of that bill passed by the House.

The bill would have barred the Justice Department and other federal investigative, regulatory or prosecutorial agencies from requesting that an organization: (1) waive its attorney-client privilege or attorney work product protection; (2) decline to pay the legal expenses of an employee; (3) avoid joint defense, information sharing or common interest agreements with its employees; (4) refrain from disclosing information concerning an investigation or enforcement action to employees; or (5) terminate or discipline an employee for the employee's exercise of a legal right or prerogative with respect to a governmental inquiry. It 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. The bill would have allowed the government to requesting information it believed was beyond the scope of the attorney-client privilege or the attorney work product protection. And it would not have prevented an organization, on its own initiative, from sharing the results of an internal investigation with authorities.

H.R. 3013 as passed by the House included two subsections in proposed 18 U.S.C. 3014 that the Senate bill 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. The second would have permitted federal prosecutors in determining whether to bring criminal charges against a corporation to consider the fact the corporation has 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. 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.

Senator Specter later introduced S. 3217 which would have carried forward, with some modification, the features of the House bill. S. 3217 expressly excluded from its protections certain terrorists organizations, illicit drug cartels, and crime-for-profit entities. Where the earlier bar applied to federal criminal and civil matters and investigations alone, S. 3217 covered administrative adjudications and proceedings as well. 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. 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. Congress adjourned before further action could be taken.