



Department of Justice Revises Policies  
Regarding Waiver of Privilege

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The Department of Justice recently modified its Principles for Federal Prosecution of Business Organizations, published in January, 2003, (i.e. "Thompson Memo") related to requests for waiver of the attorney/client and work product privileges and payment of attorney fees for organization employees. These modifications to the Department of Justice prosecution policies may have the effect of strengthening compliance effectiveness for business organizations.

The revised Principles for Federal Prosecution of Business Organizations (i.e. now referred to as the "McNulty Memo") emphasize that requests for waiver of privilege should be rare and prosecutors should not negatively consider a refusal by an organization to consent to a request for waiver or the advancement of legal fees to organization employees when making charging decisions in criminal and civil enforcement matters. There were a number of reasons for these revisions, but one important reason cited by Deputy Attorney General McNulty in announcing this change in the "Thompson Memo" prosecution policy was to strengthen organizational efforts to detect and prevent wrongdoing and misconduct and to encourage self policing and cooperation with law enforcement by business organizations.

This article will primarily focus on the issue of cooperation and waiver of the attorney-client privilege and work product protections and how this issue has evolved over the past several years resulting in the McNulty Memorandum.

### The Thompson Memo

The original Principles of Federal Prosecution of Business Organizations (previously referred to as the "Thompson Memo"), reinforced general prosecutorial objectives involving the charging of a corporation, but pointedly focused its emphasis on the thoroughness of and authenticity of a business organization's cooperation in investigating its own wrongdoing during a government investigation. The Thompson Memo, and the aggressive prosecution policies it reflected, was a natural by product of the abuses identified in earlier corporate scandals, such as Enron, World Com, Arthur Andersen and Health South. The Thompson Memo noted that the Department of Justice must evaluate the weight of the evidence, the likelihood of success at trial, the deterrent effect, the consequences of filing charges and the adequacy of alternative approaches when considering whether or not to bring charges against an individual or an organization. The Thompson Memo, however, acknowledge that a Federal prosecutor must examine additional factors before reaching a decision on the treatment of a business organization target of an investigation. The additional factors cited in the Thompson Memo included: the nature and seriousness of the offense; the risk of harm to the public; the pervasiveness of wrongdoing within the organization; the history of the organization's similar conduct; the disclosure of

wrongdoing; the organization's willingness to cooperate; the existence of a compliance program or remedial action; and, the adequacy of charges against any individuals responsible for the misconduct.

The Thompson Memo is perhaps most known for emphasizing its consideration of an organization's cooperation during an investigation and its remedial actions when contemplating a decision on whether or not to charge the organization. The Thompson Memo also cited factors which would play in to this determination and the measure of an organization's willingness to cooperate including: the organization's ability to make witnesses available; the disclosure of the complete results of the organization's own internal investigation; and, if necessary, a waiver of the attorney-client privilege and work product protection. The comment section to the Thompson Memo further stated that waiver of a corporation's attorney-client privilege is not an absolute requirement, but sometimes it might be necessary. The Thompson Memo quite clearly advised Federal prosecutors that in measuring "cooperation" they may consider whether a business organization turned over the results of its internal investigation and whether it waived applicable attorney-client privileges and work product protections.

An address by the then Deputy Attorney General of the United States, James Comey, to attendees of the American Bar Association Health Fraud Institute 2004 in New Orleans, further elaborated on the Federal government's view of "cooperation". The Deputy Attorney General noted that the DOJ understands the term "cooperation", as reflected in the Thompson Memo, Sentencing Guideline Amendments of 2004 and in court decisions, to mean assistance that discloses all pertinent information sufficient for the government to identify the individuals

responsible for criminal conduct and to understand the full scope of that conduct. According to the Deputy Attorney General, at that time, cooperating organizations should enable government investigators to gather facts before they become stale and assist in recovering losses incurred by the victims of wrongdoing. However, the Deputy Attorney General did note that what constitutes cooperation can vary from case-to-case and that, at a minimum, it must be recognized that if a corporation has learned precisely what happened and who is responsible, then it must turn the information over to the appropriate authority to receive credit for cooperation or a reduced culpability score under the United States Sentencing Guidelines for Organizations. The Deputy Attorney General emphasized during his remarks that if a business organization expected to receive credit for cooperation, then “it must help the government catch the crooks.”

The critics of the Thompson Memo and its application regarding “cooperation” and waiver of the attorney-client privilege and work product protections believe that the Justice Department was mandating waiver as a factor in assessing cooperation. These critics argued, as a practical matter, that the government was routinely demanding waivers, making it the norm, rather than the exception, which was a proposition that Deputy Attorney General Comey expressly rejected during his remarks at the ABA Health Fraud Institute in 2004.

The DOJ position of “give us the necessary information one way or another or face prosecution” is exactly the situation that the critics of the Thompson Memo feared would develop regarding the issue of cooperation and waiver of the attorney-client privilege and work product protections. These critics argued that a waiver of privileged information

would cause: 1) less thorough organizational internal investigations in their efforts to detect and prevent wrongdoing (because of the fear that the organization would ultimately have to turn over this factual information as a consequence of “cooperating” with Federal law enforcement authorities); 2) a chilling effect on the ability of counsel to give advice to clients in compliance matters (also for fear of it being disclosed to Federal law enforcement authorities) 3) An erosion of the fundamental relationship between business organizations and its employees (because of the likelihood of organization “cooperation” with Federal law enforcement authorities resulting in the disclosure of information forming the basis for individual employee culpability); 4) a relaxation of government investigation methods by piggybacking the efforts of the organization’s review; and 5) an increased exposure to civil litigation by third parties because of waiver of the attorney-client privileges and work product protections.

The combined effect of the Thompson Memo, the Sentencing Guideline Amendments of 2004, and aggressive incentives for a business organization to cooperate created a climate of dynamics which left business organizations little choice, but to cooperate fully and promptly with Federal law enforcement investigators. These circumstances literally coerced business organizations into cooperation and according to critics created a “culture of waiver” of the attorney-client privilege and work product protections for business organizations. The chief executives and the counselors to business organizations have speculated whether “cooperation” under these circumstances really meant anything more than “unconditional surrender.”

The Criticism Mounts and The McNulty Memorandum is Published

The application of the principles and guidelines enunciated in the original Thompson Memo by various Department of Justice attorneys across the country, since its publication in 2003, precipitated a mounting crescendo of criticism and actions by the Courts, the United States Sentencing Commission and ultimately the United States Congress. The "Coalition to Preserve the Attorney-Client Privilege" ("Coalition") lobbied the United States Sentencing Commission and the United States Congress about its concerns with the application of the Thompson Memo and erosion of the attorney-client privilege. The Coalition consisted of a broad base of business organizations, including the Association of Corporate Counsel, the Business Roundtable, the United States Chamber of Commerce, the Retail Industry Leaders Association, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers and, ultimately, several former Attorney General's of the United States. The United States Sentencing Commission also weighed in on this issue and modified its commentary language, which was associated with the amendments to Chapter 8 of the Sentencing Guidelines for Organizations in 2004. The original commentary language stated the following with respect to cooperation and waiver of the attorney-client privilege:

Waiver of attorney-client privilege and of work product protections is not a perquisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

The United States Sentencing Commission reconsidered this commentary and in May 2006 deleted the phrase “unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization,” thereby staking out “neutral” ground on the issue. The Federal courts also addressed the application of the principles in the Thompson Memo related to waiver of the attorney-client privilege in the case of *U.S. v. Stein*, in the Southern District of New York (otherwise known as the KPMG case). This case involved the prosecution of individual partners and employees of the accounting and consulting firm, KPMG. The organization had not only waived attorney-client privilege and disclosed information to the Federal government in this case, but had withdrawn financial support for the defense of its employees during its cooperation with the Federal government and prior to reaching a settlement of potential charges against the organization. The United States District Court in reviewing the prosecutorial tactics against KPMG and the business organization’s response to those tactics, found that the overwhelming coercion against the organization to waive attorney-client privilege and to withdraw support to its employees, violated the individuals Fifth Amendment right to due process and the Sixth Amendment right to counsel. These findings by the Court had a profound effect on the momentum and criticism of prosecutorial tactics involving waiver and support of the defense of employees by organizations. Finally, the United States Senate introduced Legislation in November of 2006 entitled the “Attorney-Client Privilege Protection Act of 2006. This proposed legislation prohibits waiver of the attorney-client privilege by an organization and allows for limited and selective waiver of privilege upon disclosure of information to the government. These actions clearly set the stage for a revision of the

Principles of Federal Prosecution of Business Organizations reflected in the Thompson Memo, ultimately resulting in publication of the McNulty Memo.

The McNulty Memo is an attempt by the Department of Justice to amend the content of the Thompson Memo regarding requests for waiver of privileges by organizations and indemnification of the costs for employee legal defense. The McNulty Memo affirmed the nine basic factors reflected in the Thompson Memo, but adds some unprecedented restrictions on prosecutors seeking privileged “factual” and “legal” information from organizations. It creates new procedural approval requirements, within the Department of Justice, before requests for a waiver of attorney-client privilege and work product protections can be made by line prosecutors in law enforcement investigations. The McNulty Memo states that Federal prosecutors must establish a legitimate need for privileged information and must seek approval before requesting such information from the Deputy Attorney General of the United States. The procedures require that when a Federal prosecutor seeks privileged “factual” information from an organization, then approval must be obtained from the local United States Attorney, who must consult with the Deputy Attorney General. (i.e. facts developed as a result of an organization’s internal investigation)

The McNulty Memo cautions that requests for waiver should be sought only in rare circumstances. The McNulty Memo further advises that prosecutors must establish a legitimate need before requesting privileged factual and/or legal information and waiver of the attorney-client privilege and work product protections.



The tone of the McNulty Memo was also reflected in the Deputy Attorney General's remarks to "Lawyers for Civil Justice" in New York on December 12, 2006. The Deputy Attorney General's speech coincided with the announcement and dissemination of the revised Principles of Federal Prosecution of Business Organizations. Deputy Attorney General McNulty emphasized that the "memorandum amplifies the limited circumstances under which prosecutors may ask for waivers of privilege". The Deputy Attorney General further emphasized that prosecutors must show a "legitimate need" for such privileged information and advised that in order to meet this test, prosecutors must show;

1. The likelihood and degree to which the information will benefit the government's investigation.
2. Whether information can be obtained in a timely and complete manner by using alternative means that do not require a waiver.
3. The completeness of the voluntary disclosure already provided..
4. The collateral consequences to requesting a waiver.

The Deputy Attorney General went on to say that "the privilege is protected to such an extent, that even if prosecutors have established a legitimate need and I approve a request for a waiver, the DOJ will not hold it against the corporation if it declines to give the information. That is, prosecutors will not view it negatively in making a charging decision" according to the Deputy Attorney General.

The content of the McNulty Memo and the Deputy Attorney General's remarks before the civil lawyers reflect that the revisions to the Federal Principles of Prosecution of Business Organizations are designed to encourage organizations to prevent wrongdoing through self-policing and cooperation with law enforcement. The Deputy Attorney General, in

fact, stated that “the best corporate prosecution is the one that never occurs. Through successful corporate compliance efforts, investor harm can be avoided. Corporate officials must be encouraged to seek legal advice if they are in doubt about requirements of the law”. The Deputy Attorney General further emphasized that “if that relationship (i.e. attorney-client) is interfered with, if those communications are unfairly breached, it makes it harder for companies to detect and remedy wrongdoing”.

Finally, it should be pointed out that the McNulty Memo does make a distinction between the disclosure of attorney-client privilege “factual” information and attorney-client privileged “legal” information. The factual information is the kind of information gathered by an organization through its own internal investigation and essentially involves the who, what, where, why and when of misconduct. This information can be requested with the permission of the local United States Attorney who must consult with the Deputy Attorney General. If a corporation declines to provide this information to the government, then the government prosecutors may negatively take that into consideration in measuring the degree of the organization’s cooperation. The request for waiver of the attorney-client privilege to obtain the advice of counsel or the mental impressions of counsel must be requested directly from the Deputy Attorney General. If this request is approved and a request for waiver for this type of information is made to a corporation, then a refusal by the corporation to turn this type of information over, would not be negatively held against the organization during consideration of the government’s charging decision.

## CONCLUSION

The McNulty Memo clearly seeks to reverse a practice and/or perception involving “routine requests” for waiver of the attorney-client and work product protections by business organizations. The McNulty Memo attempts to emphasize the importance of the attorney-client privilege and work product protections. The procedures for approval of such requests within the Department of Justice are unprecedented and clearly designed to ensure that such requests are rarely made, and when they are made, it will be uniformly reviewed at the highest levels of the Department of Justice. It will remain to be seen how the McNulty Memo and its principles and procedures are applied in practice and its impact on future organization compliance efforts and effectiveness.

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