

THE U.S. DEPARTMENT OF JUSTICE'S "REVISED" PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS: REAL CHANGE OR JUST MORE OF THE SAME?

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On December 12, 2006, Deputy Attorney General Paul McNulty issued a memorandum updating the U.S. Department of Justice's "Principles of Federal Prosecution of Business Organizations." The "McNulty Memorandum" was a response to growing criticism of what many view as the heavy-handed tactics employed recently by federal prosecutors in corporate investigations and plea negotiations. However, as discussed below, the revised policy may do little to protect either the sanctity of the corporate attorney-client privilege or the ability of corporations to advance legal fees to their executives and employees who find themselves enmeshed in federal criminal investigations.

I. BACKGROUND

On January 20, 2003, Mr. McNulty's predecessor, Larry Thompson, issued a memorandum entitled "Principles of Federal Prosecution of Business Organizations," the "main focus" of which was to "increase[e] [the] emphasis on and scrutiny of the authenticity of a corporation's cooperation" with federal criminal investigations. The Thompson Memorandum "encouraged" corporations to waive the attorney-client privilege relating to their internal investigations of potential wrongdoing, and expressly permitted prosecutors, "[i]n determining whether to charge a corporation," to consider the corporation's willingness "to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection." The memorandum also provided that "a corporation's promise of support to culpable employees and agents, . . . through the advancing of attorneys fees . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation."

Those provisions set off a firestorm among business groups, civil libertarians, and the white collar defense bar, resulting in several years of heated debate. In a survey published in March 2006 by the National Association of Criminal Defense Lawyers, almost 75 percent of in-house and outside counsel agreed that a "culture of waiver" now exists, pursuant to which the government expects broad waivers of corporate privilege.

That culture threatens a foundational element of our justice system. For hundreds of years, it has been understood that the privilege encourages frank discussions between lawyers and clients, thereby increasing the likelihood that corporations will comply *voluntarily* with the law. Furthermore, it has long been accepted that when criminal proceedings are commenced, justice is best served when all of the targets/defendants—including individual employees—are represented by competent and experienced counsel. The Thompson Memorandum threatens to eviscerate those basic tenets of common law tradition.

The debate took on a new dimension when, in March 2006, U.S. District Judge Lewis Kaplan ruled that prosecutors violated the constitutional rights of defendants in a tax shelter case by pressuring the accounting firm where they worked, KPMG, not to pay for their legal defense. Judge Kaplan's ruling received widespread attention in the popular press, resulting in increased scrutiny of the policies articulated in the Thompson Memorandum.

In August 2006, the American Bar Association's Task Force on Attorney-Client Privilege sharply criticized the Thompson Memorandum in Resolution 302B, which was adopted unanimously. And on December 7, 2006, Senate Judiciary Committee Chairman Arlen Specter introduced The Attorney-Client Privilege Protection Act of 2006 (the "Act"). The Act included nine "findings," including that "[w]aiver demands and other tactics of Government agencies are encroaching on the constitutional rights and other legal protections of employees." The stated purpose of the Act was "to place on each agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization." Accordingly, the Act would explicitly prohibit the government from "demand[ing], request[ing] or condition[ing] treatment on the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product." The Act would also prohibit government lawyers from forcing organizations into refusing to contribute to the legal defense of an employee, refusing to enter into a joint defense strategy with an employee, refusing to share relevant information with an employee, and terminating or disciplining an employee.

The Act was supported by an unusually broad coalition of organizations, including the American Bar Association, the U.S. Chamber of Commerce, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and other influential business and legal groups. In a press release, former Attorney General, Edwin Meese III, called for Congress to pass the Specter bill, stating that "[t]he principles embodied in the [Act] strike the right balance between the needs of law enforcement and the fundamental civil rights embodied in the attorney-client privilege and related protections for individual employees."

On December 12, 2006, just five days after Senator Specter introduced the Act, the DOJ released the McNulty Memorandum, which purports to revise several of the Thompson Memorandum's more controversial policies. However, as discussed below, it remains to be seen whether those revisions will result in any practical changes in the Department's behavior.

II. PRIVILEGE WAIVERS

The McNulty Memorandum makes clear that "[w]aiver of attorney-client and work product protections is not a *prerequisite* to a finding that a company has cooperated in the government's investigation." However, it goes on to recognize that "a company's disclosure of privileged information may permit the government to expedite its investigation" and that "the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure." In short, there appears to be little if any change in the Department's view of the potential importance of a privilege waiver.

The McNulty Memorandum purports to provide additional safeguards by limiting the circumstances under which prosecutors may request privilege waivers, and imposing a regime whereby line prosecutors, depending on the type of information being sought, must first obtain approval from senior Department officials. Although these “safeguards” may prove to be a step in the right direction, the devil, as they say, is in the details.

A. Establishing a “Legitimate Need” for Privileged Information

For example, the memorandum provides that “[p]rosecutors 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” and a “legitimate need for the information is not established by concluding it is merely desirable or convenient to obtain privileged information.” So far, so good. However, examination of the “important policy considerations” that guide prosecutors in determining whether a “legitimate need” exists suggests that prosecutors might be able to articulate a “legitimate need” in virtually any and every case:

- The first factor is “the likelihood and degree to which the privileged information will benefit the government’s investigation.” It is hard to imagine any case involving the investigation of an organization and its employees in which the privileged information would not satisfy that low threshold. Certainly, the results of a company’s internal investigation and records of its interviews of employees are “likely” to be of “benefit” to the government’s investigation in virtually every case.
- The second factor is “whether the information sought can be obtained in a *timely and complete* fashion by using alternative means that do not require waiver.” Prosecutors faced with the possibility of individuals asserting their Fifth Amendment rights, or even the possibility of having to retrace steps that corporate counsel may already have taken, may well conclude that this factor weighs in favor of a waiver, even in the ordinary case.
- The third factor is “the completeness of the voluntary disclosure already provided.” However, a few paragraphs earlier, the McNulty Memorandum provides, in circular fashion, that “disclosure of privileged information may be critical in enabling the government to *evaluate* the accuracy and *completeness* of the company’s voluntary disclosure.” Taken together, those two provisions literally establish that a waiver may be necessary to determine whether a waiver is necessary.
- Fourth, a prosecutor must consider “the collateral consequences to a corporation of waiver.” But such consequences have not proven to be a deterrent to the Department in the past, and there is no reason to believe that they suddenly will act as one in the future.

B. Obtaining Necessary Approvals to Request Privilege Waivers

After setting prosecutors’ “legitimate need” bar quite low, the McNulty Memo then divides requests into two categories for purposes of establishing the extent to which senior level Departmental approval must be sought prior to requesting privilege waivers.

1. “Category I” Information

“Category I” information is described as “purely factual information, which may or may not be privileged, relating to the underlying misconduct.” “Examples of Category I information could include, without limitation, copies of key documents, *witness statements, or purely factual interview memoranda regarding the underlying misconduct*, organization charts created by company counsel, *factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel.*” Of course, materials falling into each of the italicized categories fall squarely within what has traditionally been considered to be protected by the attorney-client privilege and the work product doctrine.

Before requesting Category I information, an AUSA must obtain written approval from his or her United States Attorney, who must “provide a copy” of the request and “consult” with the Assistant Attorney General or, in the case of prosecutors at Main Justice, get approval in the first instance from the Assistant Attorney General. As a practical matter, it is difficult to imagine either that U.S. Attorneys—who frequently press their Assistants to seek such materials in the first instance—will deny many such requests or that the “review” process at the Assistant Attorney General level will be anything but perfunctory. It will almost certainly be no more rigorous than the review and approval by the Assistant Attorney General of requests by line prosecutors to provide statutory immunity to witnesses, which requests are routinely rubber-stamped.

Perhaps most troubling, the McNulty Memorandum continues to instruct prosecutors that “[a] corporation’s response to the government’s request for waiver of privilege for Category I information *may* be considered in determining whether a corporation has cooperated in the government’s investigation.” Coupled with the separate dictate that “[f]ederal prosecutors are not required to obtain authorization if the company voluntarily offers privileged documents without a request by the government,” it is difficult to discern any real policy revision at all. Recent experience has shown that, under those circumstances, prosecutors will not have to demand or even “request” waivers; companies will feel constrained to offer waivers for fear of being deemed “uncooperative” absent such an offer.

2. “Category II” Information

The McNulty Memorandum goes on to outline circumstances in which prosecutors may request “Category II” information, defined to include “attorney-client communications or non-factual attorney work product,” including “legal advice given to the corporation before, during, and *after* the underlying misconduct occurred.” As a threshold matter, this appears to be an *expansion* on the Thompson Memorandum, which stated that waivers “should ordinarily be limited to the factual internal investigation and any *contemporaneous* advice given to the corporation concerning the conduct at issue” and “[e]xcept 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 memorandum provides that Category II requests “should only be sought in rare circumstances” and require written authorization from the Deputy Attorney General. But the memorandum does not define what circumstances are “rare,” apparently leaving that

determination to the discretion of the individual prosecutor. Nor does the memorandum set out the factors that will be considered by the Deputy Attorney General in determining whether to authorize the request.

Moreover, although the McNulty Memorandum provides that “[i]f a corporation declines to provide a waiver for Category II information . . . , prosecutors must not consider this declination against the corporation in making a charging decision,” that seeming limitation is rendered effectively meaningless by the memorandum’s very next sentence, which expressly permits prosecutors to “*favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.*” The italicized language will undoubtedly perpetuate the existing “culture of waiver,” notwithstanding the “limitation” that immediately precedes it.

III. ADVANCEMENT OF ATTORNEYS’ FEES TO EMPLOYEES

With regard to an organization’s ability to pay the legal fees of its employees and agents, the McNulty Memorandum first provides that

Prosecutors *generally* should not take into account whether a corporation is advancing attorneys’ fees to employees or agents under investigation and indictment. Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt. As a consequence, many corporations enter into *contractual obligations* to advance attorneys’ fees through provisions contained in their corporate charters, bylaws or employment agreements. Therefore, a corporation’s *compliance with governing state law and its contractual obligations* cannot be considered a failure to cooperate. This prohibition *is not meant to prevent a prosecutor from asking questions about an attorney’s representation of a corporation or its employees.*

Taken together, that language seems to establish that an organization’s payment of legal fees for individuals should “generally” not be taken into account, so long as the organization is *obligated* to do so by state law or a specific contractual agreement. But in most cases, an organization is permitted—but *not* obligated—to pay the legal fees and expenses of its employees and agents. Many organizations do so because their bylaws permit it, not because they have specific written contractual agreements with their employees. Perhaps even more troubling is a footnote in the McNulty Memorandum which states that “[r]outine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys’ fees are paid, frequently arise in the course of an investigation” and “[s]uch questions are appropriate and this guidance is not intended to prohibit such inquiry.” The potential chilling effect of such inquiries is obvious. Indeed, just as with many of the McNulty Memorandum’s provisions relating to privilege waivers, this exception threatens to swallow the purported rule.

IV. OTHER ISSUES

The McNulty Memorandum does not even address, much less rectify, many of the serious problems identified by the ABA in Resolution 302B regarding the Department's policies discouraging corporations from entering into or continuing to operate under joint defense and information sharing agreements, sharing information with employees and agents relating to the matters under investigation by the government, or choosing to retain or declining to sanction an employee who exercises his or her Fifth Amendment rights in response to a government inquiry. To the contrary, the McNulty Memorandum expressly states that:

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, e.g., 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.

The bottom line is that, although the McNulty Memorandum purports to "revise" Department policy, the revisions may prove to be largely superficial and may result in little, if any real change. Moreover, by announcing with great fanfare a "revision" of its policy, the Department's real aim may have been to try to drive a wedge between members of the coalition that has opposed the Department's policies, and to convince Congress that curative legislation is not necessary. It may only be through that type of legislation that the Department's policies and practices will change in any meaningful respect.