AMERICAN HEALTH LAWYERS ASSOCIATION

April 2007

MEMBER BRIEFING

CORPORATE GOVERNANCE TASK FORCE*

MCNULTY MEMO: CURE FOR THE THOMPSON BLUES?

Craig D. Margolis, Esquire*
Vinson & Elkins LLP, Washington, DC

Amy L. Riella, Esquire*
Vinson & Elkins LLP, Washington, DC

I. Introduction

Since January 2003, the so-called "Thompson Memorandum" had dominated the federal investigation and prosecution of corporations. According to the defense bar, prosecutors used the Memo to bludgeon companies and other entities under investigation into waiving privilege and/or cutting off legal fees for corporate officers and employees. Outside of the Department of Justice (DOJ), the Memo had few, if any, defenders.

The Thompson Memo, however, was unable ultimately to withstand an onslaught of criticism from the bar, the courts, and the Congress. A rallying point for the opposition was the June 2006 landmark decision of Judge Lewis A. Kaplan of the Southern District of New York in *United States v. Stein* holding unconstitutional the prosecution's use of the Thompson Memo to induce KPMG to stop paying legal fees to its former partners and employees.[1] Finding that "KPMG refused to pay because the government held the proverbial gun to its head,"[2] Judge Kaplan held that the prosecution had "violat[ed] the Constitution it is sworn to defend."[3] The court further concluded that both the Memo itself, and

---

[*] A former federal prosecutor, Craig D. Margolis is a partner in the Washington D.C. office of Vinson & Elkins LLP and represents Jeffrey Stein in the KPMG case together with David Spears of Spears & Imes LLP. Amy Riella is a litigation associate in Vinson & Elkins' Washington office.

[1] *United States of America v. Stein,* 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006) ("*Stein*").

[2] *Stein* at 336.

[3] *Id.*

its application by the prosecutors in *Stein*, violated the Fifth Amendment right to due process and the Sixth Amendment right to counsel of choice.[4] Using an unusual, but not unprecedented, procedure, the court exercised ancillary jurisdiction in the criminal case over the former KPMG partners' and employees' claims for fee advancement against KPMG, reserving temporarily the question of whether prosecutorial misconduct warrants dismissal of the indictment.[5]

The court's decision is now on appeal with the Second Circuit[6] but whatever its fate, the opinion has changed the legal landscape. In its wake came proposed legislation from Senator Arlen Specter that, if enacted, would preclude the government from requesting privilege waivers or considering in its charging decisions a corporation's willingness to advance fees to employees under investigation.[7] In a September 2006 Senate Judiciary Committee hearing preceding the introduction of the proposed legislation, Deputy Attorney General Paul J. McNulty testified "[t]he time may come when revisions are needed to [the Thompson Memo], and I will gladly make them when I am convinced they are necessary and in the public interest."[8]

That time came quickly. A few months later, and after Senator Specter introduced his legislation, the DOJ announced in December 2006 that the Thompson Memo would be replaced by what has now became known as the McNulty Memo.[9] The new Memo appears designed to restrict, but not eliminate,

---

[4] *Id.* at 380; 356-62; 367-68.

[5] *Id.*

[6] KPMG has appealed the court's exercise of ancillary jurisdiction as well as its refusal to compel the defendants to arbitrate their advancement claims. *See Stein,* Docket Entry No. 754, Notice of Appeal (Interlocutory) by KPMG LLP (entered Sep. 19, 2006). The government has separately appealed the suppression of certain defendants' proffer statements, which Judge Kaplan had excluded based on coercion resulting from the DOJ's abuse of the Thompson Memorandum. *See Stein*, Docket Entry No. 699, Notice of Appeal by USA (entered Oct. 25, 2006). Decisions in both appeals are expected within months.

[7] ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT OF 2006, S. __, 109th Cong. (2nd Sess. 2006) ("Specter Bill"); *see also* Ashby Jones, *Specter Takes on Thompson Memo,* WALL STREET JOURNAL, BLOGS, Dec. 7, 2006, *available at* http://blogs.wj.com/law/2006/12/07/specter-takes-on-thompson-memo/trackback. The legislation was reintroduced by Senator Specter early in the 110th Congress. *See* S. 186, 110TH CONG. (1ST SESS. 2007); *see also* Sarah Johnson, *Specter Re-Ups Thompson Memo Battle*, CFO.COM (Jan. 10, 2007).

[8] Testimony of Deputy Attorney General Paul J. McNulty, *The Thompson Memo's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (Sept. 12, 2006) ("Thompson Memo Hearing").

[9] *See* Memorandum from Paul J. McNulty, Deputy Attorney General, Department of Justice, to Head of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (December 12, 2006), ("McNulty Memo"), *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf; *U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud,* DEPARTMENT OF JUSTICE

a prosecutor's ability to seek privilege waivers or to consider a company's advancement of fees. Line prosecutors must now seek approval from senior levels within the Department before doing either of the above.

Significant questions and concerns remain. As described in detail below, the new policy has several exceptions that threaten to swallow the new rules. Is the McNulty Memo a significant departure from prior policy or is it merely a "fig leaf" offered to appease the critics?[10] The debate is certain to continue, and while we cannot here answer these questions, we hope to provide a brief primer on the issues in play so that our readers can form their own judgment as to the likely effectiveness, or not, of the McNulty Memo. We conclude that, as much or more so than the government, defense lawyers and in-house counsel will have a significant say in whether the McNulty Memo will be a cure or merely a band-aid for the ills caused by the Thompson Memo.

II. Framing the Issues

The Thompson Memo, formally titled *Principles of Federal Prosecution of Business Organizations*, is the star of this debate and therefore needs little introduction.[11] Nevertheless, a brief discussion of its origin and its terms helps to frame the issues.

Prior to the late 1990s, federal prosecutors operated without clear guidelines concerning the investigation and prosecution of corporations.[12] The defense bar and corporate America similarly lacked visibility into the process by which the government made investigation and charging decisions regarding corporate crime. The precursor to the Thompson Memo, the so-called "Holder Memo," was adopted in summer 1999 as DOJ's first set of guidelines relating to the prosecution of corporations.[13] In many respects, the Holder Memo is similar

---

RELEASE NO. 06-838 (Dec. 12, 2006) ("McNulty Announcement"), *available a*t http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html.

[10] Marcia Coyle, *The 'McNulty Memo': Real Change, or Retreat?"* THE NATIONAL LAW JOURNAL, Dec. 20, 2006, *available at* http://www.law.com/jsp/article/jsp; *see generally,* Martha McNeil, *Thompson Memo Changes Not Enough, ABA Says,"* ABA JOURNAL REPORT, *available at* http://www.abanet.org (last visited Jan. 3, 2007); *The McNulty Memo Replaces Thompson,"* SEC ACTIONS, *available a*t http://www.secations.com (last visited Jan. 3, 2007).

[11] *See* Memorandum of Larry D. Thompson, Deputy Attorney General, Department of Justice, to Heads of Department Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (January 20, 2003), at p. 7, available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf (the "Thompson Memo").

[12] Christopher A. Wray and Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice,* 43 Am. Crim. L. Rev. 1095, 1000-01 (2006) ("Wray and Hur").

[13] The memo is named for then Deputy Attorney General Eric Holder. Formally titled "Memorandum from Eric Holder, Deputy Attorney General, Department of Justice, to Component

to the Thompson Memo. Both include a set of factors—described below—that prosecutors are to consider in deciding whether to charge a company.

Indeed, the Holder Memo can claim credit for first identifying privilege waiver and payment of attorney's fees as leverage points against companies under investigation. In evaluating corporate cooperation, the Holder Memo instructed prosecutors "to consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive attorney-client and work product privileges."[14] Further, the Memo counseled prosecutors to consider "attempts to shield corporate officers and employees from liability" including funding the legal defense of allegedly culpable individuals.[15]

There is a critical difference, however, between the Holder and Thompson Memoranda. The former was precatory only, intending to serve as non-binding guidance to prosecutors in the field to be considered among other circumstances.[16] As explained below, the subsequent Thompson Memo changed the playing field by elevating these principles from mere guidance to mandatory rules of the road.

B. The Thompson Memorandum

The Thompson Memo was born of corporate scandal. A series of high-profile corporate investigations followed shortly after the Holder Memo, such as Enron, Arthur Andersen, Adelphia, WorldCom, and HealthSouth.[17] According to the DOJ, these scandals shattered "the public's trust in corporate America" and led to a renewed and vigorous interest in the investigation and prosecution of so-

---

Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999) ("Holder Memo")," the memo is *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html.

[14] Holder Memo, at VI.A.

[15] *Id.* at VI.B.

[16] Holder Memo, at Intro (noting that "[t]hese factors are, however, not outcome-determinative and are only guidelines. Federal prosecutors are not required to reference these factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision."); *see also* Jason McLure, *The Life and Death of the Thompson Memo,"* LEGAL TIMES, Dec. 18, 2006, ("McLure, *Life and Death"*) *available at* http://www.nacdl.org/public/rsf (quoting former DOJ fraud prosecutor Philip Urofsky, who was involved in the Holder drafting, as confirming that the Memo was "put out almost as a discussion draft.").

[17] Wray and Hur, 1000-01; *see also* McClure, *Life and Death,* (noting that the Justice Department moved from the Enron bankruptcy in 2001 to what it termed "the summer of fraud" in 2002, wherein the Department indicted Arthur Andersen, Adelphia, and WorldCom).

called corporate crime.[18] The government responded in various ways, including the formation of a Corporate Fraud Task Force and passage of the Sarbanes-Oxley Act.[19] DOJ mounted a significant offensive, resulting in the prosecution and conviction of twenty-five former Enron executives, John Rigas and his sons in the Adelphia case, and Bernie Ebbers of WorldCom, among others.[20]

Issued on January 20, 2003, the Thompson Memo was part of the DOJ's crack down on corporate crime. Like its predecessor, it outlines the factors prosecutors are to consider when deciding whether to criminally charge a business organization.[21] As already noted, the standards are mandatory not discretionary.[22] The Memo was designed to place "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation" with government investigations.[23] Part of such scrutiny is assessing "whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the

---

[18] *See* Paul J. McNulty, Deputy Attorney General, United States Department of Justice, Testimony before the Committee on the Judiciary of the United States Senate (Sept. 12, 2006), *available at* http://www.usdoj.gov/dag/testimony/2006/091206dagmcnulty_testimony_thompson_mememorandum (discussing Thompson Memorandum's effect on the right to counsel in corporate investigations); *see also* Wray and Hur, at 1000-01 (noting the "episodes of fraud and corruption at the highest levels of Corporate America sparked a crisis of confidence in the markets and in the economy").

[19] *See* EXEC. ORDER NO. 13,271, 67 Fed. Reg. 46091 (July 9, 2002) (establishing the Corporate Fraud Task Force), *available* at www.doj.gov/dag/cftf/execorder.htm. The Task Force's goal is to maximize coordination and joint regulatory, investigative, and enforcement activities across the federal law enforcement branches. *See also* The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (Jul. 30, 2002).

[20] Wray and Hur, 1000-01; (noting also that the Department secured $25 million in penalties from AIG, who also was required to disgorge profits of $800 million). There were some notable failures as well, including the acquittal of Richard Scrushy of HealthSouth and the reversals of the convictions of Frank Quattrone of Credit Suisse First Boston and of former Merrill Lynch bankers in the Enron Nigerian barge case. *See* Carrie Johnson, *Jury Acquits HealthSouth Founder of All Charges,* WASHINGTON POST, Jun. 29, 2003 (noting that the acquittal marked the "first major setback for federal prosecutors after a string of recent business fraud convictions . . ."); *Quattrone Trial Ends in Hung Jury,* CNNMONEY.COM, Oct. 24, 2003, *available at* http://www.money.cnn.com/2003/10/24/news/companies/quattrone; *United States v. Brown, et al.,* 459 F.3d 509 (5th Cir. 2006) (reversing convictions of several Merrill Lynch and Enron executives following six-week trial relating to alleged fraud scheme involving power-generating barges moored off Nigeria).

[21] *See* Thompson Memo ("The Thompson Memo sets forth nine factors that federal prosecutors must consider in determining whether to charge a corporation or other business organization.")

[22] U.S. Dep't. of Justice, CRIMINAL RESOURCE MANUAL § 163 (2005) (emphasis added), available at http://www.usdoj.gov/ausao/eousa/foia_reading_room/usam/title9/crm00163.htm.

[23] Thompson Memo, at VI (instructing prosecutors to intently scrutinize the corporation's "willingness to cooperate in the investigation of its agents.")

investigation."[24] Even conduct falling short of actual obstruction would "weigh in favor of corporate prosecution."[25]

The two most controversial aspects of this emphasis on the quality of corporate cooperation are at issue here: (1) corporate privilege waivers, including internal investigations and communications among officers, directors, employees, and counsel; and (2) corporate refusals to protect "culpable" employees and agents by advancing attorney fees or sharing information pursuant to a joint defense agreement.[26] The first is an "all but explicit requirement that corporations must waive the protections of the corporate attorney-client privilege and attorney work product doctrine in order to avoid a prosecution of the corporation itself."[27] The second is an arguable command for companies under investigation to cut off support to officers and employees under investigation, or risk the consequences.[28] This second factor, as used (or misused) by prosecutors in the Southern District of New York, led to the *Stein* decision.

III. The Debate

The Thompson Memo has sparked heated debate, and, some have alleged, created a culture of privilege waiver and caused some corporate officers and employees to be deprived of the means to defend themselves.

A. Privilege Waiver

---

[24] *See* Wray and Hur, at 1096; *see also,* Thompson Memo, at VI.

[25] Wray and Hur, at 1146 (noting that yet another development contributing to "increased cooperation is the Justice Department's more aggressive pursuit of obstructive conduct since the Thompson Memo's issuance."); Thompson Memo at VI (Examples of such obstructive conduct, in the eyes of DOJ, include broad assertions of corporate 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; 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.)

[26] Thompson Memo, at VI.

[27] Couden, at 415 (citing Richard Ben-Veniste & Lee H. Rubin, *DOJ Reaffirms and Expands Aggressive Corporate Cooperation Guidelines,* 18 No. 25 Andres Corp. Off. & Dir. Liab. Litig. Rep. 18 (2003)).

[28] *See Stein* at 364 (finding that the Thompson Memo caused KPMG to consider departing from its long-standing policy of paying legal fees and expense of its personnel in all cases and investigations even before it first met with the USAO). At the conclusion of the *Stein* hearings, Judge Kaplan told the government lawyers that if, as they had argued, the Thompson Memo "in and of itself" could not dictate a company's position on advancement of attorneys fees, then the DOJ is replete with "lousy drafters" and the Department should start all over.

Most of the criticism targeted at the Thompson Memo has focused on privilege waiver. Prosecutors were directed to consider an entity's willingness to waive attorney-client privilege and work product protection as a key factor in evaluating the corporation's level of cooperation:

> [o]ne factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosures including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to the communications between specific officers, directors, and employees and counsel.[29]

Although the DOJ maintained that privilege waiver is not an "absolute requirement" to receiving leniency, the Memo's commentary appeared to encourage prosecutors to seek waivers as a short-cut to conducting their own investigation:

> [W]aivers 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.[30]

Practical experience appears to have supported this reading of the Thompson Memo. For example, in March 2005, the Association of Corporate Counsel (ACC) surveyed its members with the following surprising results.[31] At least one-third of the respondents had personal knowledge of some effort by the government to breach privilege.[32] The results also indicated that: (1) corporations may be increasingly unwilling to rely on the long-established protection of legal confidentiality; (2) companies that refuse to waive privilege suffer adverse consequences; and (3) privilege waiver demands are not uncommon.[33]

---

[29] Thompson Memo, at VI.

[30] *Id.*

[31] *See* Executive Summary, "*Is the Attorney-Client Privilege Under Attack?"* (Apr. 6, 2005), *available at* http://www.acca.com/Surveys/attyclient.pdf.

[32] *Id.*

[33] *Id.*

A November 2005 follow-on ACC survey, conducted at the request of the United States Sentencing Commission, confirmed the earlier findings.[34] The ACC received responses from more than 1,200 attorneys, 30% of whom were in-house counsel and 50% of whom were outside counsel.[35] Almost 75% of the respondents indicated that a "culture of waiver" had developed such that government officials believed it was appropriate and reasonable to expect that a company under investigation would broadly waive privilege protections.[36] Respondents also indicated that prosecutors most often cited the Holder and Thompson Memos as the basis for making waiver requests.[37]

Criticism from the bar mounted. The American Bar Association (ABA) and several prominent former senior DOJ officials wrote separately to the Attorney General seeking revision of the Thompson Memo.[38] These critics noted that: "[i]n practice, companies who are all aware of the policies outlined in the Thompson Memorandum have no choice but to waive these protections. The threat of being labeled 'uncooperative' simply poses too great a risk of indictment to do otherwise."[39] Another critique of the Thompson Memo's waiver provisions was that the policy actually undermined internal compliance by discouraging frank communication among company employees and lawyers.[40]

---

[34] *See* Association of Corporate Counsel et al., *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results Presented to the United States Congress and the United States Sentencing Commission,* at p. 2, *available at* http://www.acca.com/Surveys/attyclient2.pdf (hereinafter "ACC Survey"). Previously, in November 2004, the Sentencing Commission adopted guideline commentary that could be read to encourage privilege waivers. Specifically, the commentary to U.S.S.G. § 8C2.5 provided that "[w]aiver of attorney-client privilege and work product protections is not a prerequisite to a reduction in a culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

[35] *Id.* at p. 3.

[36] *Id.*

[37] *Id.* at p. 4 (noting also that the Sentencing Guidelines were the second most prevalent rationale cited).

[38] *See, e.g.*, Letter from Michael S. Greco, President, American Bar Association, to Hon. Alberto Gonzales, Attorney General, Department of Justice (May 2, 2006) ("ABA Letter"); Letter of Former Justice Officials, to Hon. Alberto Gonzales, Attorney General, Department of Justice (Sept. 5, 2006) ("Former Justice Officials' Letter"). Signatories to the above letter include former Attorneys General Griffin Bell and Richard L. Thornburgh, former Deputy Attorney General Jamie S. Gorelick, and former Solicitors General Theodore B. Olson, Kenneth W. Starr, and Seth P. Waxman.

[39] *Id.*

[40] *Id.*

DOJ's waiver policies provided further disincentives to conducting frank internal inquiries by encouraging private litigation.[41] The long moribund "selective waiver" doctrine, unless resuscitated by the Federal Rules of Evidence as described below, does not protect companies that share privileged information with the DOJ. Under that largely repudiated doctrine, the privilege was not waived against a third party by providing confidential information to the government.[42] The majority of circuits have rejected it, however, leaving companies exposed to third party discovery requests in the event privileged information is provided to the government.[43] In November 2006, the Supreme Court declined to review a Tenth Circuit decision, refusing to apply the "selective waiver" doctrine to bar plaintiffs' access to over 220,000 pages of privileged documents provided by a company to the Securities Exchange Commission (SEC).[44] Accordingly, the selective waiver doctrine, unless codified in the Rules of Evidence,[45] provides cold comfort to corporations assessing whether to disclose privileged information to the DOJ or another governmental agency.

B. Fee Advancement

Long-standing principles of good corporate governance, enshrined in the Delaware Corporate Code and elsewhere, recognize that companies benefit by providing for the advancement and indemnification of legal fees to officers and employees under investigation or prosecution.[46] Most corporations have concluded that paying legal fees better enables them to attract and retain highly

---

[41] ACC Survey Results, at p. 4. The threat of third-party litigants building a case upon what would otherwise be privileged material is very real. In the ACC's 2006 survey, fifteen percent of the companies surveyed which endured governmental investigation in the past five years indicated that the investigation generated related third-party civil suits.

[42] *See e.g., Diversified Indus. v. Meredith,* 572 F.2d 596 (8th Cir. 1977) (finding that company's disclosure to SEC of internal investigation did not require company later to produce same information to subsequent plaintiff).

[43] *See Qwest Communs. Int'l., Inc. v. New Eng. Healthcare Employees Pension Fund,* 2006 U.S. LEXIS 8627 (10th Cir. 2006))(*"Qwest*") (joining eight other circuits to reject the selective waiver doctrine and holding that documents produced by Qwest to the DOJ and to the SEC do not enjoy the protection of the attorney-client privilege or the attorney work product doctrine with respect to third parties).

[44] *Id.*

[45] *See infra* discussion at IV.B.

[46] David Kistenbroker, Pamela Q. Smith, David S. Slovick, and Alyxs S. Pattison, *Criminal and Civil Investigations: United States v. Stein and Related Issues,"* 1557 PLI/CORP 483, 492, (Sept. 2006) ("Kistenbroker, et al.") (noting that indemnifying officers and directors for expenses they incur responding to government investigations "is an integral component of good corporate governance, uniformly sanctioned in one form or another by state corporation law."); *Homestore, Inc. v. Tafeen,* 888 A.2d 204, 211 (Del. 2005) ("Tafeen") (finding an agreement to advance expenses "is an inducement for attracting capable individuals into corporate service.")

qualified officers and employees, particularly in the current climate marked by numerous, far-reaching, and aggressive corporate investigations.[47] The practical result is that most individuals employed by corporations reasonably expect their employer to support them in the event their conduct comes under scrutiny.[48] Consistent with this expectation, Delaware's Corporate Code broadly authorizes indemnification for legal expenses with the sole limitation that the employee must have "acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interest of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful."[49] Further, the Code permits a corporation to advance legal fees to an employee pending the outcome of the dispute provided the employee provides an "undertaking," that is, an agreement to repay fees advanced if it is ultimately determined he was not entitled to indemnification.[50]

The Thompson Memo's directives on fees flew in the face of these well-established principles. The memo instructed "a corporation's promise of support to culpable employees and agents . . . through the advancing of legal fees . . . may be considered by the prosecutor in weighing the extent and the value of the corporation's cooperation."[51] Prosecutors viewed a corporation's decision to fund the defense of its employees as such "support of culpable employees" evidencing a lack of true corporate cooperation.[52] Deputy Attorney General Thompson made his thinking clear: "they [corporate employees] don't need fancy legal representation," if they are innocent.[53]

---

[47] *Ridder v. Cityfed Fin. Corp.,* 47 F.3d 85, 87 (3d Cir. 1995) (noting that the Delaware code "reflect[s] a legislative determination to avoid deterring qualified persons from accepting responsible positions with financial institutions for fear of incurring liabilities greatly in excess of their means . . ."); *see also Kaung v. Cole Nat'l. Corp.,* 884 A.2d 500, 509-10 (Del. Sup. 2005); 8 WEST'S DEL. C. ANN. § 145(E).

[48] *Tafeen*, at 888 A.2d at 211 ("Given the frequency with which public companies are sued for securities fraud upon any announcement of bad news, it does not take any imagination to conclude that rational and qualified persons would not join a board or accept a position as an officer with a company that did not offer indemnification and adequate D&O insurance coverage.")

[49] 8 DEL. C. § 145 (A) (2006).

[50] 8 DEL. C. § 145 (E) (2006); *see also Morgan v. Grace,* 2003 Del. Ch. Lexis 113, at *9, n.18 (Del. Ch. Oct. 29, 2003) (advancement of legal fees regularly allowed and not dependent on ultimate success or failure of underlying claim against party seeking advancement).

[51] Thompson Memo, at VI.

[52] *Id.*

[53] *See Stein,* at 338 n.13 (quoting Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees,* WALL ST. J., June 4, 2004, A1).

IV. Thompson Memo Under Attack

Over the past year, and culminating with the McNulty Memo, the Thompson Memo gradually was eroded and eventually gave way. We briefly describe some of the major events that led to the McNulty Memo before posing the penultimate question of how much of the more pernicious aspects of the Thompson Memo linger on.

A. Striking the Sentencing Guidelines' Commentary

After considering concerns raised by the legal community,[54] and hearing testimony in March 2006, the Sentencing Commission voted unanimously in April 2006 to remove language from Guidelines commentary that could be read to provide cooperation "credit" to an organization for waiving privilege.[55] Effective November 1, 2006, this Sentencing Guideline commentary on privilege waiver was stricken. This important revision, however, left unchanged the Thompson Memo policy, dictating whether a corporation would be charged in the first instance.

B. Federal Rules of Evidence

A recent proposed amendment to the Rules of Evidence on privilege waiver also is a step forward.[56] Under the proposed rule, a disclosure of a communication or information that would otherwise be covered by 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, [will] not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities."[57] This rule would effectively resuscitate the "selective waiver" doctrine, providing some additional protection for companies that waive privilege. Ironically, the rule change arguably would *encourage* privilege waivers by removing one ground for refusing a government request and therefore could be considered consistent with the Thompson Memo's rationale. The amendment awaits action by Congress.

---

[54] *See, e.g.,* Letter from Robert D. Evans, American Bar Association, Governmental Affairs, to the United States Sentencing Commission (Mar. 28, 2006), *available at* http://www.abanet.org/poladv/abaussc32806.pdf. (last visited Oct. 9, 2006).

[55] U.S. Sentencing Guideline § 8C2.5, App. N. 12 (providing that "[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.")

[56] *See* David H. Kistenbroker, et al., *Criminal and Civil Investigations: United States v. Stein and Related Issues,* 1557 PLI/CORP. 483, 499 (Sept. 2006).

[57] PROPOSED FED. R. EVID. 502(C) (2006).

C. The *Stein* Decision

Perhaps the most notable development in the Thompson Memo controversy was the recent decision by Judge Kaplan in *Stein* holding its fee advancement provisions unconstitutional. We summarize the most salient points of that landmark ruling.

Prior to the criminal tax shelter investigation, KPMG had a long-standing, inviolate practice of advancing legal fees to its partners and employees in the defense of any civil or criminal case.[58] For example, in a 2002 SEC enforcement action, KPMG paid over $20 million to defend just four of its partners.[59]

After an evidentiary hearing, Judge Kaplan found that this long-standing corporate policy was attacked by federal prosecutors during their very first meeting with KPMG lawyers early in the investigation. As would any prudent defense counsel, KPMG's lawyers attempted to take the government's temperature as to its attitude towards their client. Among the very first topics raised by the government was whether KPMG would advance legal fees. The lead prosecutor informed KPMG's counsel that "the government would take into account KPMG's legal obligations, if any, to advance legal expenses, but referred specifically to the Thompson Memorandum as a point that had to be considered."[60] Notwithstanding KPMG counsel's protestations that it had conducted no internal investigation to determine who, if anyone, had committed wrongdoing, prosecutors informed KPMG that "misconduct" should not "be rewarded," and referred specifically to the federal guidelines.[61] Notes taken during the meeting by one KPMG lawyer show another of the prosecutors stating that "<u>if u have discretion re: fees – we'll look at that under a microscope</u>."[62] The statement was underlined for emphasis in the lawyer's notes.

---

[58] *Stein*, at 340 (noting that while KPMG's partnership agreement and by-laws are silent as to advancement of legal fees, parties stipulated that prior to February 2004, "it had been the longstanding voluntary practice of KPMG to advance and pay legal fees, without a preset cap or condition of cooperation from the government, for counsel for partners, principals, and employees of the firm in those situations where separate counsel was appropriate to represent the individual in any civil, criminal or regulatory proceeding involving activities arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee.")

[59] *Id.* (in an investigation and related civil litigation involving KPMG's relationship with Xerox Corporation).

[60] *Id.* at 341.

[61] *Id.* at 342.

[62] *Id.* at 344. Although the statement was disputed by the government at the hearing, Judge Kaplan found no other credible explanation for the recording of the statement in the lawyer's notes and therefore found the statement had been made.

After the meeting, KPMG's apparent fear of indictment—in the words of its chief legal officer, its need "to be able to say at the right time with the right audience" that the firm fully complied with the Thompson Memo—caused it to break from its established practice of advancing fees to employees.[63] Within two weeks, KPMG capped fees for employees being investigated, conditioned the payment on "cooperating fully with . . . the government," and stated no fees would be paid to any employee who invoked his privilege against self-incrimination or was charged criminally.[64] None of these conditions, or any fee cap, had previously been imposed by KPMG in any criminal investigation or prosecution.[65]

The government then enlisted KPMG's help in policing employees' cooperation, using fees as a cudgel. The government reported to KPMG if employees were not cooperating as the government saw fit, including unconditional acceptance of government-dictated terms of proffer agreements. KPMG would then notify the employees' counsel that, unless they cooperated to the government's satisfaction, fees would be cut off. Then-current employees also faced discipline, up to and including termination.[66]

On August 29, 2005, KPMG signed a deferred prosecution agreement (DPA) requiring it to admit to a statement of facts that it provided fraudulent tax advice (without having done any internal investigation to determine the truth of falsity of the allegations), pay a $456 million fine, and agree to comply with the government's "cooperation" terms.[67] Almost immediately thereafter, the government filed its initial indictment in *Stein*, resulting in KPMG immediately cutting off fees to the defendants who had not yet exceeded the cap.[68]

Based upon the foregoing, Judge Kaplan made the following four key findings:

> *First,* the Thompson Memorandum caused KPMG to consider departing from its long-standing policy of paying legal fees and expenses of its personnel in all cases and investigations even before it first met with the USAO.
>
> ---

---

[63] *Stein,* at 348.

[64] *Id,* at 348-49.

[65] *Id.*

[66] *Id.*

[67] *United States v. KPMG LLP,* 05 Crim. 0903 (LAP) (Aug. 29, 2005).

[68] *Stein,* at 349.

> *Second,* the USAO did not give KPMG the comfort it sought. To the contrary, it deliberately, and consistent with DOJ policy, reinforced the threat inherent in the Thompson Memorandum.
> ---
> *Third,* the government conducted itself in a manner that evidenced a desire to minimize the involvement of the defense attorneys.
> ---
> *Fourth,* KPMG's decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO. Absent the Thompson Memorandum and the actions of the USAO, KPMG would have paid the legal fees and expenses of all of its partners and employees both prior to and after indictment, without regard to cost.[69]

The court further held that the government's interference in KPMG's fee advancement decision violated defendants' rights under the Fifth and Sixth Amendments. Judge Kaplan recognized the defendants' "fundamental" right under the Fifth Amendment "to obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference."[70] Applying strict scrutiny, the court found the government's justification for the Thompson Memo lacking. Specifically, the court found that DOJ had no legitimate interest in depriving defendants of fees as punishment, given that there had been no conviction, and that the government had not limited the policy to defendants who had unjustifiably refused to cooperate. Neither the Thompson Memo itself nor its application by the prosecution team in *Stein* had been narrowly tailored to achieve a compelling government interest.[71]

Based on similar reasoning, the court found a Sixth Amendment violation. Judge Kaplan held that the Thompson Memorandum unconstitutionally interfered with the defendants' right to counsel of choice because it "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."[72] The court held that the government's pre-indictment

---

[69] *Stein,* at 352-53.

[70] *Id.* at 362.

[71] *Id.* at 363-64. The court further chastised the government for its lack of candor in the proceedings, finding its submissions as to the underlying facts to have been "economical with the truth." *Id.* at 381.

[72] *Id,* at 357 (noting also that "government may not both prosecute a defendant then seek to influence the manner in which or she defends the case.")

conduct, clearly intended to have a post-indictment impact, implicated the Sixth Amendment.[73] Drawing support from the recent Supreme Court decision in *United States v. Gonzalez-Lopez,*[74] the court found that the government's interference with defendants' choice of counsel was a Sixth Amendment violation complete in itself without a showing of deficient performance of counsel at trial.[75]

The court reserved the question of remedy, including dismissal of the indictment, pending a determination of whether KPMG would advance fees.[76] The court instituted an ancillary proceeding in the criminal case permitting the defendants to seek advancement of fees directly from KPMG.[77] In a subsequent opinion, the court found both that it had such ancillary jurisdiction and that KPMG could not compel the defendants to arbitrate their advancement claims.[78] The advancement proceeding, however, has been stayed pending interlocutory appeal to the Second Circuit.[79] Meanwhile, Judge Kaplan has continued to signal that, if defendants' fees cannot be paid, he would consider seriously dismissing the criminal case.[80]

D. Congressional Oversight and Legislation

Judge Kaplan's decision received immediate national attention followed by Congressional scrutiny.[81]

---

[73] *Id.* at 366.

[74] *United States v. Gonzalez-Lopez,* 126 S.Ct. 2557 (2006) (finding that a trial court's erroneous deprivation of a criminal defendant's choice of counsel violates his Sixth Amendment right to choice of counsel and entitles him to reversal of his conviction).

[75] *Stein,* at 369.

[76] *Id.* at 382.

[77] *See infra* note 79.

[78] *United States v. Stein, et al.,* 452 F. Supp. 2d 230 (S.D.N.Y. Sep. 6, 2006).

[79] The court also has suppressed government proffers made by three of the defendants as coerced by the government's threat to deprive them the means to defend themselves through the Thompson Memo. *United States v. Stein,* 440 F. Supp. 2d 315 (S.D.N.Y. July 25, 2006). This ruling is also under appeal.

[80] *See Stein,* Docket Entry No. 823, Memorandum and Order, denying Motion for Extension of Time as to Jeffrey Stein, et. al. (entered July 14, 2006) (finding it "evident" that the fee advancement issue cannot be resolved in time for a January 2007 trial and continuing the trial *sine die*).

[81] Mark Hamblett, *Kaplan Blasts U.S. Pressure on KPMG Case Fees,* N.Y. L. J., LAW.COM, (June 28, 2006); Peter Lattman, *Survivor: The KPMG Tax-Shelter Edition,* WSJ BLOGS (June 30, 2006), *available at* http://blogs.wsj.com/law/2006/06.

On September 12, 2006, the Senate Judiciary Committee held a hearing concerning "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations."[82] Prominent practitioners, such as former Attorney General Edwin Meese, testified about the burdens imposed by the Memo on attorney-client privilege and suggested revisions "to state affirmatively that waiver of the attorney-client privilege and work product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation."[83] Similarly, ABA President Karen J. Mathis cautioned the Committee that the federal governmental policies and practices under the Thompson Memo have eroded employees' constitutional and other legal rights, including the right to effective legal counsel and the right against self-incrimination.[84]

Though Deputy Attorney General Paul J. McNulty testified in support of its policies, he showed some inclination towards flexibility: "I promise to keep the dialogue open about the Thompson [M]emo, and I welcome constructive criticism of this and any other policy . . . [t]he time may come when revisions are needed to this policy, and I will gladly make them when I am convinced they are necessary and in the public interest."[85]

Senator Arlen Specter chastised McNulty for upholding a coercive policy that "may even rise to the level of being a bludgeon" and signaled his willingness to consider introducing legislation if the DOJ did not act.[86] Senator Specter made good on his promise and introduced in the waning days of the 109th Congress a bill addressing these issues.[87] Introduced on December 7, 2006 and titled the *Attorney-Client Privilege Protection Act of 2006,* the bill had the wide support of a variety of groups, including the ABA, Association of Corporate Counsel, the

---

[82] *The Thompson Memo's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (Sept. 12, 2006) ("Thompson Memo Hearing"); *See also* Andrew Weissman Calls for Revision of Thompson Memo, Rethinking of Corporate Criminal Liability, 20 Corp. Crim. Rep. 36 (1) (Sept. 11, 2006), *available at* http://www.corporatecrimereporter.com/weissmann091106.htm; *see also* John Gibeaut, *Hearings Target Thompson Memo,* 5 NO. 37 A.B.A. J. E-REPORT 2 (September 15, 2006) (hereinafter "Gibeaut").

[83] *Id.*

[84] Thompson Memo Hearing, Statement of Karen J. Mathis, President of the American Bar Association.

[85] Thompson Memo Hearing, Statement of Paul J. McNulty, Deputy Attorney General.

[86] Kevin Drawbaugh, *Attorney-Client Right Waivers Concern Senators,* NAT'L. ASSOC. CRIM. DEFENSE LAWYERS, Sept. 12, 2006, *available at* http://www.nacdl.org/public.nsf.

[87] *See* Specter Bill, *supra* note 7.

National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and the U.S. Chamber of Commerce, among others.[88]

The legislation directly addresses the Thompson Memo, reciting in its findings that: "the Department of Justice and other agencies have increasingly employed tactics that undermine the adversarial system of justice, such as encouraging organizations to waive attorney-client privilege and work product protections to avoid indictment or other sanctions." If enacted, it would prevent federal prosecutors and investigators from seeking waiver of the attorney-client privilege and from considering a company's advancement of attorney fees in making charging decisions.[89] Prosecutors would be prevented from, among other things: (1) demanding, requesting, or conditioning treatment of an organization on the disclosure of any communication protected by the attorney-client privilege or any attorney work product; and (2) conditioning a civil or criminal charging decision on, or use as a factor in determining cooperation, a valid assertion of the attorney-client or work production privilege or the provision of counsel or contribution of legal defense fees or expenses to an employee.[90]

The 109th Congress came to a close without action on this legislation, which Senator Specter re-introduced promptly in the 110th Congress. Whether the legislation moves forward will depend, in large part, on the DOJ's implementation of the McNulty Memo described below.

VI. McNulty Replaces Thompson

A. The McNulty Memo

Five days after Senator Specter's bill was introduced, on December 12, 2006, the DOJ announced the revisions of the Thompson Memo now known as the McNulty Memo.[91] Also titled, *Principles of Federal Prosecution of Business Organizations*, the McNulty Memo supersedes the Thompson Memo.[92]

---

[88] Martha Neil, *Thompson Memo Changes Not Enough, ABA Says: Changes to the Justice Department's Policy On Wai*ver of Attorney-Client Privilege 'Fall Short,' Mathis Says, ABA JOURNAL EREPORT, available at http://www.abanet.org/journal/ereport/d15specter.html (last visited Jan. 3, 2007).

[89] Specter Bill, *supra* note 7, at Findings ("It is the purpose of this Act 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.").

[90] *Id.*

[91] *U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud,* DEPARTMENT OF JUSTICE RELEASE NO. 06-838 (Dec. 12, 2006) ("McNulty Announcement"), *available at* http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html. This was not DOJ's first attempt to react to criticism of the Thompson Memo. In October 2005, then-acting Deputy Attorney General Robert McCallum issued a memorandum instructing U.S.

The new guidelines preserve the nine factors prosecutors are obligated to consider when determining whether to charge a corporation,[93] but comprehensively rewrite the provisions addressing privilege waiver and advancement of attorney's fees. First, prosecutors will have to endure a more rigorous review and approval process (at least in theory) to request privileged material from a company. Second, prosecutors will be prevented in all but the rarest cases from taking into account a company's advancement of legal fees to employees.[94]

As to privilege waiver, the McNulty Memo clarifies that the "waiver of the attorney-client and work product protections is not a prerequisite to a finding that the company has cooperated in the government's investigation."[95] Prosecutors may only request such a waiver "when there is a legitimate need for the privileged information to fulfill their law enforcement obligations."[96] In order to establish "legitimate need," prosecutors must show: (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 the corporation in requiring a waiver.[97]

Importantly, however, the Memo further instructs that prosecutors seek "the least intrusive waiver necessary," and creates two tiers of privileged information and two standards of approval for requesting waiver of each category

---

Attorneys and main DOJ department heads to adopt "a written waiver review process for your district or component" to "ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the Thompson Memorandum." This Memo also required some standardization of the process by which line prosecutors would make requests of companies to waive privilege. Memorandum of Robert McCallum, Deputy Attorney General, Department of Justice, to the U.S. Attorneys and Department Heads (October 21, 2005) ("McCallum Memo"), *available at* http://www.abanet.org/polady/mccalummmemo212005.pdf. This interim memo nevertheless was insufficient to address fully the concerns of the prior policy.

[92] *See* Memorandum from Paul J. McNulty, Deputy Attorney General, Department of Justice, to Head of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) ("McNulty Memo"), *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

[93] McNulty Memo*,* at III.

[94] *Id.*

[95] McNulty Memo, at VII.

[96] *Id.*

[97] McNulty Memo, at VII.B.2.

of information.[98] In "Category I" are so-called factual information and documents such as witness statements, "purely factual" interview memoranda, factual chronologies, factual summaries and similar materials. Prior to seeking a waiver of privilege over Category I information or documents, a prosecutor must seek approval of his or her U.S. Attorney, who, in turn, must consult with the Assistant Attorney General for the Criminal Division.[99] Note that the latter step requires consultation but not approval. The prosecutor may consider in the charging decision a company's response to a request to waive privilege over Category I material.[100]

In Category II are non-factual attorney-client communications, legal advice or non-fact attorney work product, such as an attorney's notes containing mental impressions, legal determinations resulting from an internal investigation, and legal advice given to the company. A prosecutor is only to consider requesting a waiver of Category II material if the Category I factual material "provides an incomplete basis to conduct a thorough investigation" and is to be reserved for "rare circumstances."[101] A waiver request for Category II material requires the written approval of the Deputy Attorney General.[102]

A prosecutor is not to consider a company's refusal to provide Category II material in the charging decision. However, "[p]rosecutors 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."[103]

As to legal fees, the McNulty Memo instructs that "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment."[104] It also states that: "a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate."[105] Again, there is a catch, discussed in an accompanying footnote:

---

[98] *Id.*

[99] *Id.* In addition, the United States Attorney is to keep a file with such privilege waiver requests, and the request, when made and authorized, is to be sent in writing from the U.S. Attorney to the company.

[100] McNulty Memo, at VII.B.2.

[101] *Id.*
[102] *Id.*

[103] *Id.*

[104] McNulty Memo, at VII.B.3.

[105] *Id.*

> 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. In these cases, fee advancement is considered with many other telling facts to make a determination that the corporation is acting improperly to shield itself and its culpable employees from government scrutiny.[106]

As with a request for waiver of Category II privileged materials, prosecutors are instructed that approval must be obtained from the Deputy Attorney General prior to considering fee advancement as a factor in charging decisions.[107]

B. The Impact of the McNulty Memo

The impact of McNulty Memo is difficult to gauge. The Memo provides that it was never the intention of the Department to discourage "full and candid communications between corporate employees and legal counsel."[108] On the other hand, the DOJ appears to relegate some of the criticisms of the Thompson Memo to ones of perception only. The Memo itself cautions prosecutors that they "should be mindful that confidence in the Department is affected both by the results we achieve and by the real and *perceived* ways in which we achieve them."[109] Further, in prepared remarks delivered to a meeting of the Lawyers for Civil Justice Membership Conference on December 12, 2007, Deputy Attorney General McNulty had the following to say about the Department's revisions:

> As an initial matter, let me point out that the Thompson Memorandum was not intended to encourage practices that chill attorney-client communications, as is currently *perceived* by some. The revised guidance addresses that concern.
>
> . . . .
>
> This guidance . . . should satisfy anyone who may be concerned about the perception of a "culture of waiver" in corporate investigations. I disagree that there is such a culture but to the

---

[106] *Id.* at n.3.

[107] *Id.* at VII.B.3.

[108] McNulty Memo, at Intro.

[109] *Id.*

> extent that the *perception* exists, this new memorandum and the new practices it requires thoroughly address the issue.[110]

The Deputy Attorney General also categorized the issue of advancement of attorney's fees as a "rare consideration in our corporate prosecutions,"[111] but indicated that if it were, the McNulty revision certainly cured that issue as well.[112]

The Department takes the position that the McNulty Memo addresses concerns relating to the Thompson memo. Many in the defense bar maintain that their concerns have not been addressed completely.[113] The continuing debate includes the following issues.

First, the McNulty Memo continues to permit the government to seek privilege waivers. The process by which such waivers are sought is now set out to be more regularized and formalized. It remains to be seen how rigorous that process will be in practice. Traditionally, some DOJ approvals have proven to be more difficult to obtain (e.g., authorization to seek a wiretap) than others (e.g., authorization to seek tax return information). If the approval requirement, particularly with respect to Category I information, is less than rigorous at either the level of the U.S. Attorney, or main DOJ, then the McNulty Memo no doubt will be subject to the same criticisms as the Thompson Memo.

Second, a potentially troublesome issue is the lack of clarity in the definition of Category I versus Category II information. Sorting what is "purely

---

[110] Deputy Attorney General Paul J. McNulty, Prepared Remarks of Deputy Attorney General Paul J. McNulty at the Meeting of the Lawyers for Civil Justice Membership Conference Regarding the Department's Charging Guidelines in Corporate Fraud Prosecutions (Dec. 12, 2006) (remarks *available at* http://www.lettermark.net/postschell/lhead/businesslaw.Litigation.map) (emphasis added) ("McNulty Prepared Remarks").

[111] *Id.*

[112] *Id.*

[113] *See e.g.,* Marcia Coyle, *Lawyers Find Several Flaws in New Guidelines for Corporate Probes,* NAT'L LAW JOURNAL, Dec. 20, 2006; Jason McLure, *DOJ Revises Corporate Fraud Procedures,* LEGAL TIMES (Dec. 13, 2006) (quoting Fred Krebs, President of the Association of Corporate Counsel as stating: "We're pleased they're making an effort," "[b]ut overall, it's a day late and a dollar short."); Purva Patel, *Prosecutors Easing Back on Methods,* HOUSTON CHRONICLE, Dec. 12, 2006 (quoting from an ABA prepared statement: "the McNulty Memorandum threatens to further erode the ability of corporate leaders to seek and obtain the legal guidance they need to effectively comply with the law . . . [i]n addition, the new policy does not fully protect employees' legal rights in that it continues to allow prosecutors to force companies to take punitive actions against their employees in some cases in return for cooperation credit, long before guilt is established."); Martha Neil, *Thompson Memo Changes Not Enough, ABA Says: Changes to the Justice Department's Policy on Waiver of Attorney-Client Privilege "Fall Short," Mathis Says,* ABA JOURNAL REPORT, *available at* http://www.abanet.org/journal/ereport/di15specter.html (quoting ABA President Karen Mathis as stating that "the changes don't go far enough.").

factual" information from what would reveal the mental impressions of an attorney is no easy task. Indeed, when first recognizing attorney work product protection, the Supreme Court noted that an attorney's interview notes show what facts the attorney deemed important enough to record and in what order and thereby reveal much into that attorney's thinking about the case.[114] The very concept of a "purely factual memorandum" may be a misnomer as such a document will virtually always reveal the mental impressions of its author.

Third, while the concept of heightened scrutiny over requests for Category II information is sensible, there is an exception that could threaten to swallow the rule. Companies that "voluntarily" waive privilege are not subject to these rules. Accordingly, informal signals from a prosecutor could induce a "voluntary" waiver without the initiation of the formal approval procedure, since defense attorneys know that Department policy continues to favor so-called voluntary waivers.

Fourth, the line between a "voluntary" waiver that may be positively considered by a prosecutor in the charging decision and a refusal to waive that may not be considered negatively may prove to be a thin one. The President of the ACC argued that, "[a]sking prosecutors to get permission before formally requesting that companies waive their attorney-client privilege will not put an end to the culture of waiver," as ACC research reveals that "more often than not, requests for waiver are not asked for outright, but are coercively inferred."[115]

Fifth, on the fee indemnification issue, the McNulty Memo condemns consideration of whether a company is paying legal fees, but does permit such consideration in the "rare" case when a company appears to be using fees to "circle the wagons." Of course, the latter is a subjective determination,[116] i.e., the DOJ will judge when, and whether, a company has paid attorneys' fees to obstruct an investigation.

Sixth, the McNulty guidelines are not enforceable at law, and there is no hard and fast remedy should prosecutors choose to ignore them.[117] The U.S. Attorney's Manual states that the Department guidance "[i]s not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."[118] Though the

---

[114] *See Hickman v. Taylor*, 329 U.S. 495 (1947).

[115] Patti Waldmeir and Brooke Masters, *US Eases Rules on Corporate Confidentiality,* THE FINANCIAL TIMES, Dec. 13, 2006, *available at* http://www.ft.com/cms.

[116] It bears notice that these were the words used by a lead prosecutor in the KPMG case to justify the conduct which the court found unconstitutional. *Stein,* at 363 (citing prosecutor Neiman).

[117] Purva Patel, *Prosecutors Easing Back on Methods,* HOUSTON CHRONICLE, Dec. 12, 2006 (noting that "[t]he guidelines are still just that – guidelines.")

[118] USAM § 1-1.100.

DOJ Office of Professional Responsibility could investigate a complaint lodged against a prosecutor, the McNulty Memo itself provides no mechanism for punishing those who fail to comport with its guidelines. Of course, at least one federal court, in *Stein,* has found unconstitutional the government's consideration of payment of attorney's fees in a manner that caused a company to decline to pay them.

How these issues surrounding the McNulty revisions play out in practice will depend in part on how prosecutors in the field react to this policy. Some argue that only legislation, such as Senator Specter's bill,[119] will effect real change.[120] It is difficult to predict the future of such legislation now that the DOJ responded to Thompson Memo critics with the McNulty Memo.[121]

Of course, it remains incumbent upon criminal defense, healthcare and in-house counsel to scrutinize carefully government requests for waiver or for information about who is paying employees' fees and to ask whether the McNulty Memo procedures have been followed. In appropriate circumstances, counsel may seek an opportunity to speak with the U.S. Attorney, the Assistant Attorney General, or even the Deputy Attorney General about waiver or fee requests. Ultimately the impact of the McNulty Memo can only be assessed if a record is built on the Department's implementation of the new rules.

---

[119] Like the McNulty Memorandum, the Specter Bill as introduced provides that nothing prevents a corporation from making, and the government from accepting, a voluntary production of internal investigation material, but omits a provision included in earlier draft versions of the bill that would have treated such a voluntary disclosure to the government as not constituting a general waiver of privilege, similar to proposed Federal Rule of Evidence 502(c). Without such a statement, the legislation affords corporate counsel significantly less comfort.

[120] Martha McNeil, *Thompson Memo Changes Not Enough, ABA Says,* SEC ACTIONS, *available at* http://www.secactions.com (last visited Jan. 10, 2007) (noting that former ABA President and present Chair of the ABA Task Force on Attorney-Client Privilege, R. William Ide III, indicates there is a "fundamental philosophical difference between the task force's concern that requiring a privilege waiver to avoid prosecution is not appropriate and the Justice Department's position that it sometimes is," and concludes that "[w]e are still going to need legislation.")

[121] Incoming Judiciary Committee Chairman Patrick Leahy, (D-Vt.), who had shared many of Senator Specter's concerns, applauded the changes in a statement: "I am pleased the Department has heeded bipartisan criticism of its policy." *See* Statement of Sen. Patrick Leahy, (Dec. 12, 2006) *available at* http://leahysenate.gov/press/200612/121206.html.

This Member Briefing was edited by Ronald H. Levine, Esquire, Post & Schell PC, Philadelphia, Pennsylvania.

***Corporate Governance Task Force leadership for FY2007:**

Chair:
Stuart I. Silverman, Esquire, Office of the Inspector General for the District of Columbia
Deputy for Programs:
William W. Horton, Esquire, Haskell Slaughter Young & Rediker LLC
John R. Washlick, Esquire, Cozen O'Connor PC
Advisor for Special Projects:
Marci Rose Levine, Esquire, Sonnenschein Nath & Rosenthal LLP
John B. Beard, Esquire, Baker Donelson Bearman Caldwell & Berkowitz PC
Ronald H. Levine, Esquire, Post & Schell PC

McNulty Memo: Cure for the Thompson Blues? © 2007 is published by the American Health Lawyers Association. All rights reserved. No part of this publication may be reproduced in any form except by prior written permission from the publisher. Printed in the United States of America.

Any views or advice offered in this publication are those of its authors and should not be construed as the position of the American Health Lawyers Association.

"This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that the publisher is not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought" *—from a declaration of the American Bar Association*