

## **Issues in Corporate Compliance: The Erosion of the Attorney-Client Privilege**

**By Tammi K. Franke**

A fundamental part of honest and open communications between attorneys and their clients is the attorney-client privilege. This legal principle, which protects confidential communications between lawyers and clients, is one of the foundations of our legal system.

Increasingly, the Department of Justice (DOJ) is requesting waivers of the attorney-client privilege during an investigation into corporate misconduct. The DOJ has routinely viewed a waiver of the privilege as a sign of corporate cooperation in an investigation. In practice, companies under investigation have no choice but to waive these protections. The threat of being labeled 'uncooperative' poses too great of a risk of indictment to do otherwise.

Corporate lawyers play a key role in helping companies and their officials understand and comply with complex laws and regulations. An open and confidential relationship between company lawyers and board members, business executives, and operating personnel is essential so that lawyers can represent the company effectively and ensure that compliance with laws and regulations is maintained. The DOJ policy requiring the waiver of attorney-client privilege discourages company personnel from consulting with their lawyers and undermines internal compliance programs and procedures.

In order to stop the erosion of the attorney-client privilege, the American Bar Association has recommended that the DOJ modify its policies to (1) prohibit federal prosecutors from demanding companies waive their attorney-client protections during investigations, (2) specify the types of factual, non-privileged information that prosecutors may request from companies during investigations as a sign of cooperation, and (3) clarify that any voluntary decision by a company to waive the attorney-client privilege will not be considered when assessing whether the company provided effective cooperation.

The American Bar Association, the Association of Corporate Counsel, and ten former high-ranking Department of Justice officials (including Dick Thornburgh, Kenneth Starr and Seth Waxman) have taken strong positions against the DOJ waiver policy. Several business associations, including the US Chamber of Commerce, the National Association of Manufacturers and the Business Roundtable, are also seeking a change in the U.S. government's policy. There have been several hearings in Congress to date on the issue with strong support for modification of the DOJ policy.

After this vocal opposition from both the business and the legal communities, the DOJ reconsidered its policy and, in December 2006, the Deputy Attorney General, Paul J. McNulty, issued a new directive to department officials regarding the policy (the “McNulty Memo”). In the memo, the DOJ outlines the general principles and factors to be taken into consideration when determining whether a business organization should be charged with a crime.

The McNulty Memo lists nine factors that government prosecutors should take into consideration when deciding whether to bring charges against or negotiate a plea agreement with a corporation under investigation. The factors are:

1. The nature and seriousness of the offense.
2. The pervasiveness of wrongdoing within the corporation.
3. The corporation’s history of similar conduct.
4. The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation.
5. The existence and adequacy of the corporation’s pre-existing compliance program.
6. The corporation’s remedial actions (such as implementing a compliance program, replacing management and employees, and cooperating with government agencies).
7. Collateral consequences (such as harm to shareholders, pension holders and employees).
8. The adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.
9. The adequacy of civil or regulatory enforcement actions.

The forth factor, which considers the corporation’s willingness to cooperate in the investigation, is the factor where the issue of attorney-client privilege and waiver is most prevalent. According to the DOJ, the McNulty Memo revises and clarifies its policy in this area.

The memo acknowledges how the attorney-client privilege is one of the oldest most sacrosanct privileges under U.S. law and that its purpose is to encourage “full and frank” communication between attorneys and their clients. It then attempts to reverse the former DOJ policy by stating: “Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government’s investigation.”

Unfortunately, the rest of the memo chips away at this reversal. The memo

provides U.S. prosecutors with the ability to request a waiver of attorney-client privilege “when there is a legitimate need . . . to fulfill their law enforcement obligations.” The memo sets out a balancing test for determining when a prosecutor’s legitimate need for privileged information outweighs one of the most sacrosanct privileges under U.S. law.

According to the memo, mere convenience or desire does not rise to the level of a legitimate need. A legitimate need depends upon:

1. The likelihood that the privileged information will benefit the government’s investigation.
2. Whether the information can be obtained without the waiver.
3. Whether the voluntary disclosure is complete.
4. The collateral consequences to a corporation from the waiver.

Based on these factors, if it is determined that a legitimate need exists, the memo outlines a step-by-step process for prosecutors to follow so that the request for privileged information is the least intrusive request possible. First, the prosecutor should, if possible, request only factual information such as copies of key documents, witness statements, factual summaries or reports containing investigative facts gathered by corporate counsel. Before requesting any privileged factual information, prosecutors must obtain a written authorization from the U.S. Attorney. If the request is granted the U.S. Attorney will communicate the request in writing to the corporation. A corporation’s response to this type of request may be considered in determining whether a corporation has cooperated with the government’s investigation.

If the request for factual information does not provide a complete basis for a thorough investigation, only then can prosecutors request non-factual privileged information such as legal advice given to the corporation before, during and after the corporate misconduct occurred. The memo cautions prosecutors to seek this information in “rare circumstances”. If the corporation refuses to turn over non-factual privileged information or work product, the DOJ cannot hold this decision against the corporation. However, if the corporation does provide this information, they can be given credit for cooperating.

## **ANALYSIS**

It would be easy to guess at intentions, good or bad, of the DOJ and Deputy Attorney General in the McNulty memo. Whatever the intentions, an attempt was made to address some very legitimate concerns of private attorneys and businesses about the erosion of one of the most sacrosanct privileges under U.S. law. While the memo restricts the actions of individual prosecutors in this area, it does very little to change the policy of rewarding corporations for waiving the privilege. The only real change is that corporations will not be viewed as

uncooperative for withholding memos or other work product with direct legal advice from their counsel regarding the misconduct under investigation.

The attorneys at Fitzgerald & Hewes have conducted internal investigations on behalf of their clients on a variety of legal issues. In considering if the policy set out in the McNulty Memo would affect those investigations, the unanimous conclusion was “yes”. Attorneys and the corporations they represent will be hard pressed to have “full and frank” communications when those communications are still at risk of ending up in a prosecutors case against the corporation. Even if this risk is now less under the McNulty Memo, any risk of disclosure of privileged information creates a chilling effect on attorney-client communications and the work product produced during internal investigation by corporate counsel.

It is unfair for the government to add complex operating regulations to the U.S. business environment and then, through departmental policy, undermine the attorney-client relationship, which is one significant way of ensuring compliance with those same regulations.

#### **Further Information**

*ABA Presidential Task Force on the Attorney – Client Privilege*

[www.abanet.org/buslaw/attorneyclient/home.shtml](http://www.abanet.org/buslaw/attorneyclient/home.shtml)

#### **Contact Information**

Tammi Franke,  
Fitzgerald & Hewes LLP  
550 West Van Buren Street  
Suite 1450  
Chicago, IL 60607  
312-447-2903  
[tfranke@fitzhewlaw.com](mailto:tfranke@fitzhewlaw.com)  
[www.fitzhewlaw.com](http://www.fitzhewlaw.com)

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