2007

2007-05-18 H. Thomas Wells, Jr. ABA Presidential Speech

H. Thomas Wells Jr.

University of Alabama School of Law

Alabama Young Lawyers Section Sandestin Seminar
May 18, 2007
Attorney-Client Privilege and Corporate Cooperation With Prosecutors:
Government Policies and the Bar's Response

Today we'll discuss how recent policies of federal government investigators are constraining the attorney-client privilege in the corporate context. These policies are also eroding the work product doctrine and the legal rights of employees who work for organizations under investigation.

We'll also look at the response to these policies from the American Bar Association and many other groups, including proposed legislative reform.

First, let's review the concept of attorney-client privilege.

[SLIDE 2]

Black's Law Dictionary defines "privilege" as:

"A special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty."

Later, it describes "privilege" as:

"An evidentiary rule that gives a witness the option to not disclose the fact asked for, even thought it might be relevant; the right to prevent disclosure of certain information in court, esp. when the information was originally communicated in a professional or confidential relationship."

That definition is followed by a list of more than two dozen actual or proposed privileges **[SLIDE 3]**—including the accountant-client privilege, spousal privilege, clergyman-penitent privilege, and doctor-patient privilege.

Then there are some privileges you've probably heard about in the news. These include **reporter's privilege** (or "shield laws"), which came up last fall in the travails of the *New York*

Times reporter and the Lewis Libby prosecution, and **executive privilege,** which presidents often cite when they or their aides are subpoenaed by courts and congressional committees.

But most lawyers don't have regular use for executive privilege and the other privileges mentioned. We do, however, rely often on the **attorney-client privilege.**

[SLIDE 4]

Black's defines attorney-client privilege as: "The client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney."

It's important to remember that the attorney-client privilege does not belong to the lawyer. It belongs to the client. For centuries, even before the Constitution was adopted, the privilege has enabled both individual and corporate clients to

communicate with their lawyer in confidence. It is the foundation of our clients' right to effective counsel.

One important point that's sometimes lost on critics is that the attorney-client privilege does not impede law enforcement—it complements it. The privilege helps corporate executives act legally and properly by permitting them to seek and obtain frank, confidential guidance in how to conform to the law. It also provides a safe haven for companies to conduct their own investigations into past conduct to identify shortcomings and remedy problems as soon as possible.

A related doctrine **[SLIDE 5]**—the **work product doctrine**—allows lawyers to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

Black's definition of attorney-client privilege includes a prophetic quotation from John W. Strong, writing in the 4th edition of *McCormick on Evidence:* **[SLIDE 6]**

"Our system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and *this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business."* [emphasis added]

Strong continues: "To the extent that the evidentiary privilege, then, is integrally related to an entire code of professional conduct, *it is futile to envision drastic curtailment of the privilege* without substantial modification of the underlying ethical system to which the privilege is merely ancillary."

Indeed, the ABA Model Rules of Professional Conduct includes a statement about attorney-client privilege in Rule 1.6, Comment 2. **[SLIDE 7]**

It states:

"A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer, including even embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.

"Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct."

The Supreme Court has long endorsed the primacy of the attorney-client privilege to encourage full and frank communication with counsel. **[SLIDE 8]** In the 1981 case of *Upjohn v. United States,* the court wrote—quote:

"The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."

Thus, the court continued, the purpose of the privilege—quote—"is to encourage full and frank communication between attorneys and their clients."

Especially in light of the professional conduct rule and court precedent, it's not surprising that the ABA strongly

supports preserving the attorney-client privilege. But why do we need to express our support these days?

[SLIDE 9]

The ABA and many other organizations are concerned about a U.S. Department of Justice memorandum to prosecutors in 2006. It's known as the McNulty Memorandum, named for the deputy attorney general who wrote it, Paul McNulty. McNulty sought—but many of us believe failed—to assuage critics of a 2003 Justice Department policy articulated in the so-called Thompson Memorandum, named after McNulty's predecessor, Larry Thompson.

Larry and I worked on some cases together before he joined Justice, and now he's general counsel at Pepsico. He recently congratulated me on my pending office at the ABA and added a friendly aside about the hard time the ABA had given him over

his directive to prosecutors. I told him, "Well, Larry, if only you hadn't written that damn memo."

Indeed, the Thompson Memorandum, the follow-up McNulty Memorandum, and related government policies and practices have seriously eroded the attorney-client privilege and work product doctrine. We're also concerned about provisions in McNulty and Thompson that threaten employees' rights to effective legal counsel and against self-incrimination.

What do these policies do, exactly? In the government's post-Enron zeal to prosecute corporate crimes, federal prosecutors and other investigators are being encouraged to pressure companies and other organizations to waive attorney-client privilege as a condition for receiving credit for cooperation during investigations.

The Thompson Memorandum expanded upon a similar directive that a previous Deputy Attorney General, Eric Holder, sent to federal prosecutors in 1999. Thompson instructed federal prosecutors to consider certain factors in determining whether corporations should receive cooperation credit—and hence leniency—during government investigations. Because the government has discretion on what to charge and even whether to charge, corporations are very much interested in obtaining as much leniency as they can get.

One of the key factors cited in the Thompson Memorandum is the organization's willingness to waive attorney-client and work product protections and provide this confidential information to government investigators.

Although the Thompson Memorandum, like the earlier Holder Memorandum, stated that waiver is not an absolute

requirement, it nevertheless made it clear that waiver was a key factor for prosecutors to consider in evaluating an organization's cooperation.

In addition to the Justice Department, a number of other federal agencies have adopted similar privilege waiver policies, **[SLIDE 10]** including the Securities and Exchange Commission (in its so-called Seaboard Report), the Commodity Futures Trading Commission, and the Department of Housing and Urban Development. The U.S. Sentencing Commission had adopted guidelines in 2004 that factored privilege waivers into sentence lengths, but the commission responded to critics and unanimously rescinded them in April of last year.

The Justice Department appeared to pay some attention to those critics as well, but it stopped far short of rescinding its privilege waiver policy. This past December, Deputy Attorney

General Paul McNulty **[SLIDE 11]** issued revisions to the Thompson Memorandum that modified, but did not reverse, the policy. Instead of eliminating the improper practice of requiring or encouraging organizations to waive their attorney-client privilege and work product protections in return for cooperation credit, the new McNulty Memorandum merely requires high-level Department approval of formal waiver requests. McNulty also continues to allow prosecutors to grant cooperation credit for so-called "voluntary," unsolicited waivers.

You'll find a copy of the McNulty memorandum in the handouts.

Many of us are concerned that the McNulty Memorandum and similar agency policies will continue to cause a number of negative consequences.

First, **[SLIDE 12]** although the government often portrays an organization's privilege waiver as a voluntary choice, from a practical standpoint companies have no choice but to waive when requested to do so. The government's threat to label them as "uncooperative" will affect not just their susceptibility to charging and sentencing, but also their public image, stock price, and credit worthiness.

Some have coined a term for the growing trend of companies to sacrifice attorney-client privilege to save themselves: **[SLIDE 13]** a "culture of waiver." The prevalence of this phenomenon was confirmed by a recent survey of more than 1,200 corporate counsel conducted by the Association of Corporate Counsel, National Association of Criminal Defense Lawyers, and the ABA.

(By the way, citations to most of the references I'm making are included in the handouts in the ABA's recent statement to the House Judiciary subcommittee.)

The second negative consequence of these policies **[SLIDE 14]** is that they will continue to weaken the confidential relationship between companies and their lawyers. Lawyers play a key role in helping organizations and their officials comply with the law and act in its best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the company's officers, directors, and employees, and they must be provided with all relevant information necessary to properly represent the organization. By allowing prosecutors to continue to force companies to waive these fundamental protections, policies like McNulty will discourage company personnel from consulting

with the company lawyers. This, in turn, will impede the lawyers' ability to effectively counsel compliance with the law.

Ironically, the third consequence actually impedes law enforcement. **[SLIDE 15]** While the McNulty Memorandum and the other policies were intended to aid government prosecution of corporate criminals, they will continue to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Because the effectiveness of these internal mechanisms depends largely on the ability of the individuals with knowledge to speak candidly and confidentially with lawyers, policies such as the McNulty Memorandum that

pressure companies to waive their attorney-client and work product protections seriously undermine systems that are crucial to compliance.

McNulty and related government policies erode another set of rights for our clients when their organizations are being investigated. Let's now discuss how these policies curb employees' rights to effective counsel and against self-incrimination. **[SLIDE 16]**

The McNulty and Thompson Memorandums contain language directing prosecutors, in determining cooperation, to consider a company's willingness to take certain actions against its employees and agents during investigations.

The Thompson Memorandum encouraged prosecutors to deny cooperation credit to organizations that assist their so-

called "culpable employees and agents" who are the subject of investigations by **[SLIDES 17-20]**

(1) providing or paying for their legal counsel, (2) participating in joint defense and information-sharing agreements with them, (3) sharing corporate records and historical information about the conduct under investigation with them, or (4) declining to fire or otherwise sanction them for exercising their Fifth Amendment rights in response to government requests for information.

Although the McNulty Memorandum bars prosecutors from requiring companies to not pay their employees' attorney fees in most cases, it continues to allow this practice in some situations.

In addition, McNulty continues to allow prosecutors to force companies to take the other three types of punitive action

against employees outlined in the Thompson Memorandum in return for cooperation credit.

Even as modified, McNulty is troubling for several reasons:

First, the Department of Justice's policy is inconsistent with the fundamental legal principle that all prospective defendants—including an organization's current and former employees, officers, directors, and agents—are presumed to be innocent. **[SLIDE 21]** When implementing McNulty and Thompson, prosecutors assume that certain employees and other agents suspected of wrongdoing are "culpable" long before their guilt has been proven or the company has had an opportunity to complete its own internal investigation. In those cases, the prosecutors often pressure the company to either fire the employees in question or to refuse to assist with their legal defense as a condition for receiving cooperation credit.

The Justice Department's policy stands the presumption of innocence principle on its head.

In addition, **[SLIDE 22]** the policy overturns well-established corporate governance practices by forcing companies to abandon the traditional practice of indemnifying their employees and agents or otherwise assisting them with their legal defense for employment-related conduct until it has been determined that the employee or agent somehow acted improperly.

Second, it should be a company's prerogative to make an independent decision as to whether or not an employee should be provided with legal assistance. **[SLIDE 23]** The government should not have the power to make this determination, even in the—quote—"extremely rare cases" mentioned in footnote 3 of the McNulty Memorandum. The fiduciary duties of the directors

in making such decisions are clear. They—not government officials—are in the best position to decide what is in the best interest of the shareholders.

Third, McNulty and Thompson improperly weaken an organization's ability to help its employees defend themselves in criminal actions. **[SLIDE 24]** It is essential that employees, officers, directors, and other agents of organizations have access to competent representation in criminal cases and in all other legal matters.

In addition, competent representation in a criminal case requires that counsel investigate and uncover relevant information. Let's take a look at the relevant portion of the ABA's Standards Relating to the Administration of Criminal Justice **[SLIDE 25]**, which states:

"Defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."

McNulty and Thompson undermine the ability of employees and other personnel to defend themselves by seeking to prevent companies from sharing records and other relevant information with them and their lawyers. However, subject to limited exceptions, lawyers should not interfere with an opposing party's access to such information.

Let's look again at the ABA's Criminal Justice Standards **[SLIDE 26]**, which state:

"A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any

person to be advised to decline to give to the defense information which such person has a right to give."

The language in McNulty and Thompson undermine these rights by encouraging prosecutors to penalize companies that provide information or, in some cases, legal counsel to their employees and agents during investigations.

The costs associated with defending a government investigation involving complex corporate and financial transactions can often run into the hundreds of thousands of dollars. Therefore when government prosecutors succeed in pressuring a company not to pay for the employee's legal defense, the employee typically will be unable to afford effective legal representation.

In addition, employee rights are undermined when prosecutors demand and receive a company's agreement to not

assist employees with other aspects of their legal defense—such as participating in joint defense and information-sharing agreements with the employees with whom the company has a common interest in defending against the investigation or by providing them with corporate records or other information that they need to prepare their defense.

Several of these employee-related provisions of the Justice Department's policy have been declared to be constitutionally suspect by the federal judge presiding over the pending case of *U.S. v. Stein,* also known as the "KPMG case." **[SLIDE 27]** In June 2006, U.S. District Court Judge Lewis A. Kaplan's opinion suggested that the provisions in the Thompson Memorandum making a company's advancement of attorneys' fees to employees a factor in assessing cooperation violated the employees' Fifth Amendment right to substantive due process

and their Sixth Amendment right to counsel. McNulty continues to permit these and similar practices in some instances.

[SLIDE 28] How are those of us concerned about these policies responding? The ABA is leading efforts to protect the attorney-client privilege and the work product doctrine, and to curb the government from denying employee due process rights.

In 2004, the ABA created its Task Force on Attorney-Client Privilege to study and address agency policies and practices that have eroded attorney-client privilege and work product protections. The Task Force has held public hearings on the privilege waiver issue and received testimony from legal, business, and public policy groups. It also crafted ABA policy supporting the attorney-client privilege and work product

doctrine and opposing government policies that erode these protections.

The ABA and its Task Force also are working closely with a broad and diverse coalition of influential legal and business groups—ranging from the U.S. Chamber of Commerce and the Association of Corporate Counsel to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers. The coalition is encouraging the Justice Department and other agencies to modify their waiver policies and clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining cooperation.

The ABA has been using the work of the Task Force and coalition in subsequent efforts.

For instance, ABA president Karen Mathis provided testimony on the issue before the Senate Judiciary Committee and a House Judiciary subcommittee. You'll find a copy of her most recent testimony in the handouts.

For those of you concerned about securities law, President Mathis also wrote a letter to the SEC critiquing policies in the agency's so-called Seaboard Report that are similar to McNulty and Thompson.

Finally, for those of you who are IP lawyers, we've filed an amicus brief outlining our positions as they relate to intellectual property law in the case of *In Re Seagate Technology,* which is currently before the Federal Circuit.

In addition, a prominent group of former senior Justice Department officials—including three former attorneys general from both parties—submitted letters to the Sentencing

Commission and the Justice Department. In their letter to Attorney General Gonzales, the former officials voiced many of the same concerns raised by the coalition and urged the Justice Department to rescind its privilege waiver policies. The fact that these individuals were able to convict wrongdoers without demanding the wholesale production of privileged materials makes their comments particularly credible.

You'll find this remarkable letter in the handouts, in the Appendix to the ABA's House testimony.

Many congressional leaders also have raised concerns over the privilege waiver provisions. During a House Judiciary subcommittee hearing in March 2006, virtually all of the subcommittee members from both parties expressed strong support for preserving the attorney-client privilege and serious concerns regarding the Department's waiver policy. During a

Senate Judiciary Committee hearing last September, both Republican chairman Arlen Specter and Ranking Democrat Patrick Leahy expressed serious concerns regarding the Department's waiver policy.

After considering such concerns, the Sentencing Commission voted unanimously in April 2006 to remove the privilege waiver language from the Sentencing Guidelines. That change became effective on November 1, 2006. Similarly, the Commodity Futures Trading Commission eliminated privilege waiver language from its cooperation standards in March 2007 and issued a new enforcement advisory that specifically recognizes the importance of preserving the privilege.

When it became apparent that the Justice Department would not agree to adopt similar changes to its own policy, Senator Specter introduced legislation last December that would

bar the Department and all other federal agencies from using privilege waivers and denial of legal assistance to employees as a factor in cooperation credit. The ABA and the coalition have endorsed the legislation, a copy of which is in the handouts.

We've also been organizing grassroots lobbying efforts to support Senator Specter's legislation. In the handouts, you'll find a one-page summary from the ABA's Governmental Affairs Office that boils down the arguments nicely. And if you agree with our points, we'd appreciate your contacting your representatives in Washington.

Many of us believe that legislation containing these reforms would strike the proper balance between effective law enforcement and the preservation of essential attorney-client, work product, and employee legal protections.

That concludes my talk. For more information and primary source documents on this issue, here are two helpful ABA web sites **[SLIDE 29]**:

* ABA Presidential Task Force on the Attorney-Client Privilege
www.abanet.org/buslaw/attorneyclient

* ABA Governmental Affairs Office (attorney-client privilege section)
www.abanet.org/poladv/priorities/privilegewaiver

Doc# 1493340

Alabama Young Lawyers Section Sandestin Seminar May 18, 2007 Attorney-Client Privilege and Corporate Cooperation With Prosecutors: Government Policies and the Bar's Response

[redacted]

MAYNARD COOPER
[redacted] & GALE PC
ATTORNEYS AT LAW

"A special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty.“

"An evidentiary rule that gives a witness the option to not disclose the fact asked for, even thought it might be relevant; the right to prevent disclosure of certain information in court, esp. when the information was originally communicated in a professional or confidential relationship."

--Black's Law Dictionary, 7th ed.

Types of Privilege

Accountant-client privilege

Spousal privilege

Clergyman-penitent privilege

Doctor-patient privilege

Reporter's privilege ("shield laws")

Executive privilege

Attorney-client privilege:

"The client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney." --Black's Law Dictionary (7th ed.)

Work product doctrine:

Allows lawyers to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries

"Our system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and *this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business.*"

"To the extent that the evidentiary privilege, then, is integrally related to an entire code of professional conduct, *it is futile to envision drastic curtailment of the privilege* without substantial modification of the underlying ethical system to which the privilege is merely ancillary." [emphasis added]

--*McCormick on Evidence* (4th ed.)

"A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . .

"This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer, including even embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.

"Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct."

-- ABA Model Rules of Professional Conduct, Rule 1.6, Comment 2

"The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."

The purpose of the privilege "is to encourage full and frank communication between attorneys and their clients."

--*Upjohn Co. v. United States* 449 U.S. 383 (1981)

The Thompson and McNulty Memorandums (U.S. Department of Justice)

MAYNARD COOPER
& GALE PC
ATTORNEYS AT LAW

Similar federal agency policies

* **Securities and Exchange Commission**
  (2001 Seaboard Report)
* **Commodity Futures Trading Commission**
  (2004 Enforcement Advisory, "Cooperation Factors in Enforcement Division Sanction Recommendations," rev. 2007)
* **Department of Housing and Urban Development** (2006)
* **U.S. Sentencing Commission**
  (rescinded)

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Paul J. McNulty
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

The Department experienced unprecedented success in prosecuting corporate fraud during the last four years. We have aggressively rooted out corruption in financial markets and corporate board rooms across the country. Federal prosecutors should be justifiably proud that the information used by our nation's financial markets is more reliable, our retirement plans are more secure, and the investing public is better protected as a result of our efforts. The most significant result of this enforcement initiative is that corporations increasingly recognize the need for self-policing, self-reporting, and cooperation with law enforcement. Through their self-regulation efforts, fraud undoubtedly is being prevented, sparing shareholders from the financial harm accompanying corporate corruption. The Department must continue to encourage these efforts.

This memorandum is in your handout material in its entirety.

MAYNARD COOPER & GALE PC
ATTORNEYS AT LAW

* Waiver is not voluntary

* Waiver is not voluntary
* "Culture of waiver"

* Waiver is not voluntary
* "Culture of waiver"
* Weakens confidential relationship between companies and their lawyers

* Waiver is not voluntary
* "Culture of waiver"
* Weakens confidential relationship between companies and their lawyers
* Ironically, impedes law enforcement

Employee legal rights to effective counsel and against self-incrimination

MAYNARD COOPER & GALE PC
ATTORNEYS AT LAW

Thompson, and McNulty to a lesser extent, deny cooperation credit to organizations offering assistance to "culpable employees and agents" by:

* providing or paying for their legal counsel,

Thompson, and McNulty to a lesser extent, deny cooperation credit to organizations offering assistance to "culpable employees and agents" who are the subject of investigations by:

* providing or paying for their legal counsel,
* participating in joint defense and information-sharing agreements,

Thompson, and McNulty to a lesser extent, deny cooperation credit to organizations offering assistance to "culpable employees and agents" who are the subject of investigations by:

* providing or paying for their legal counsel,
* participating in joint defense and information sharing agreements,
* sharing corporate records and historical information about the conduct under investigation, or

Thompson, and McNulty to a lesser extent, deny cooperation credit to organizations offering assistance to "culpable employees and agents" who are the subject of investigations by:

* providing or paying for their legal counsel,
* participating in joint defense and information-sharing agreements,
* sharing corporate records and historical information about the conduct under investigation, or
* declining to fire or otherwise sanction them for exercising their Fifth Amendment rights in response to government requests for information

Problems with McNulty

* Denies presumption of innocence

Problems with McNulty

* Denies presumption of innocence
* Abandons indemnification of employees

Problems with McNulty

* Denies presumption of innocence
* Abandons indemnification of employees
* Takes legitimate power from corporate directors

Problems with McNulty

* Denies presumption of innocence
* Abandons indemnification of employees
* Takes legitimate power from corporate directors
* Weakens a company's ability to provide legal defense to employees

"Defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."

-- ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4

"A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has a right to give."

-- ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3

The "KMPG Case"

United States v. Stein, No. S1 05 Crim. 0888 (LAK) (June 26, 2006)

The Bar's Response

ABA Presidential Task Force on the Attorney-Client Privilege

www.abanet.org/buslaw/attorneyclient

ABA Governmental Affairs Office (attorney-client privilege materials)

www.abanet.org/poladv/priorities/privilegewaiver