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RECENT DEVELOPMENTS ON ATTORNEY-CLIENT PRIVILEGE, WORK PRODUCT PROTECTIONS

On November 3, 2006, many in-house counsel attended HRO's seminar on Ethical Challenges for In-House Counsel. The seminar included a presentation on selective waiver of attorney client privilege and the Tenth Circuit's decision in *In re Qwest Communications Int'l Securities Litigation*, 450 F.3d 1179 (10th Cir. 2006), which rejected the notion of selective waiver. Also discussed at the seminar was the Justice Department's Thompson Memorandum, which set forth the *Principles of Federal Prosecution of Business Organizations* at the time of the Qwest investigations.

This HRO Alert is to update you on recent developments in this important area of law, which impact conduct of internal investigations.

- November 13, 2006. The United States Supreme Court denied certiorari in *Qwest. Qwest Comm. Int'l. v. New England HealthCare Empls. Pension Fund*, 75 U.S.L.W. (U.S. Nov. 13, 2006).
- December 12, 2006. The Justice Department issued the McNulty Memorandum. The McNulty Memorandum supersedes and replaces the Thompson Memorandum. http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.
- The McNulty Memorandum revises the *Principles of Federal Prosecution of Business Organizations*, particularly Section VII. 2. titled *Charging A Corporation: The Value of Cooperation*. Section VII. 2. deals with waiving attorney client and work product protections. Under the McNulty Memorandum, prosecutors may only request waiver of attorney client or work product protections when there is a "legitimate need" for the privileged information to fulfill their law enforcement obligations. Some of the factors that will be looked at in determining whether there is a *legitimate need* include:
 - (i) The likelihood and degree to which the privileged information will benefit the government's investigations;
 - (ii) Whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
 - (iii) The completeness of the voluntary disclosure already provided; and
 - (iv) The collateral consequences to a corporation of a waiver.
- If the prosecutors find that there is a *legitimate need*, they must pursue materials from the corporation on a step by step approach. First, **Category I** materials may be sought. **Category I** materials are purely factual information. These are described as witnesses' statements, factual interview memoranda, and (i) contemporaneous legal advice when the organization is asserting advice of counsel as a defense, and (ii) legal advice falling under the crime fraud exception to privilege assertion/protection. A prosecutor must get the approval of the United States Attorney or Assistant Attorney General before seeking **Category I** materials.

- If the factual materials in the **Category I** materials are not sufficient, the Government can seek **Category II** information, but only after requesting **Category I** and only in rare circumstances if there is a *legitimate need*. **Category II** information is privileged attorney client communications and nonfact attorney work product. **Category II** information might include the production of attorney notes, memoranda or reports (or portions thereof) containing counsel's mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation. Seeking **Category II** information requires written approval of the Deputy Attorney General.
- Although the McNulty Memorandum provides that a corporation's refusal to turn over attorney client privilege and work product protected materials cannot be used against the organization, the McNulty Memorandum continues to permit prosecutors to consider favorably a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation. The McNulty Memorandum also allows prosecutors to take into account advancement of fees or indemnification, common interest agreements, sharing relevant information with employees, and whether the company has terminated or sanctioned employees who exercise their constitutional or other rights.
- **December 12, 2006.** American Bar Association President, Karen Mathis, issued a statement regarding the McNulty Memorandum saying that it fell far short of what is needed to prevent further erosion of fundamental attorney client privilege, work product, and employee protections during government investigations.
- **December 7, 2006.** Senator Arlen Specter introduced a Bill in Congress relating to attorney client privilege, work product protections. Although it was the last day of the 109th Congress, 2d Session, Senator Specter stated that he would reintroduce the Bill in January when Congress reconvenes. The Bill is titled the "Attorney Client Privilege Protection Act of 2006."¹ If enacted, the Act would prohibit the federal government from: 1) demanding, requesting, or conditioning treatment on the disclosure by an organization of any communication protected by the attorney client privilege or attorney work product; 2) conditioning a civil or criminal charging decision relating to an organization, or using as a factor in determining whether an organization is cooperating with the Government: a) valid assertion of the attorney client privilege or attorney work product; b) providing counsel to or contributing to the legal defense fees or expenses of an employee of that organization; c) entering into a joint defense, information sharing, or common interest agreement with an employee of that organization; d) sharing information relevant to the investigation or enforcement matter with an employee of that organization; or e) failing to terminate the employment or otherwise sanction any employee of that organization because of the decision by that employee to exercise the constitutional rights or other legal protections of that employee in response to a Government request.

If you would like more information or have needs in this area of the law, please contact Nancy J. Gegenheimer at Holme Roberts & Owen LLP at nancy.gegenheimer@hro.com or 303.866.0602.

¹ <http://www.acc.com/public/attyclientpriv/thompsonmemoleg.pdf>.

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