



When 'Confidential' Isn't –  
Attorney Client Privilege and Federal Investigations

By Christina Costa

Protecting the confidentiality of communications between a client and his counsel is a cornerstone principle of our legal system. In an attempt to safeguard these communications, there is a Congressional bill that has been gaining great momentum. The Attorney-Client Privilege Protection Act (ACPPA) of 2008 was reintroduced on June 16, 2008<sup>1</sup> before the 110<sup>th</sup> Congress adjourned. The ACPPA is intended to protect attorney-client privilege during corporate federal investigations. In recent years, a popular tactic employed by federal prosecutors to gain access to documents has been to order companies to turn over privileged documents as a condition of a cooperation agreement. This bill would make that practice illegal. The bill, which passed the House of Representatives voice vote, has been gaining support from senators, federal prosecutors and a wide array of organizations such as the American Civil Liberties Union and the Chamber of Commerce. Even proponents of the bill are surprised at the amount of support it has received given today's environment of intense scrutiny of corporate America.

The ACPPA of 2008 is a modified version of legislation introduced in 2007. Grounded in the same principles as the original legislation, the modified bill contains some language changes in an effort to address the concerns of several senators who wanted assurance that the

bill would set clear parameters for the DOJ, SEC and other agencies whose policies would be affected. One of the bill's supporters stated, "While it was almost impossible to argue with the logic of the first bill, the language of the re-introduced bill is clearer and tighter."

The function of the attorney-client privilege is to ensure legal communications between lawyers and their clients are protected. However, during a time of heightened attention towards corporate fraud scandals, this foundation legal principle has come under attack. Sen. Arlen Specter (R-Pa.), the bills' original sponsor, spoke from the floor stating, "This bill will protect the sanctity of the attorney-client relationship by prohibiting federal prosecutors and investigators from requesting waiver of attorney-client privilege and attorney work product protections in corporate investigations."

There has been some debate regarding the amount of success the Justice Department has had in their efforts to combat major corporate fraud by issuing prosecutorial guidelines. In late 2006, the Justice Department issued prosecutorial guidelines known as the *McNulty Memo* in an effort to ease the harsh tactics previously set out in the *Thompson Memo*<sup>2</sup>. The *McNulty Memo*

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<sup>1</sup> Originally introduced in the Senate on January 4, 2007.

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<sup>2</sup> The *Thompson Memo*, issued on January 20, 2003, and the *McNulty Memo*, issued on December 12, 2006, both were intended to serve as a corporate charging guideline for federal prosecutors.

set up guidelines to limit a prosecutor's right to demand privileged information from companies seeking a plea deal or a deferred prosecution agreement. However, a major weakness of the softened *McNulty Memo* guidelines has been that they are not legally binding resulting in many prosecutors continuing to ignore the recommendations. Complicating the matter further, in recent years the SEC, the Federal Communications Commission, the Department of Housing and Urban Development and other agencies have not followed these guidelines and have continued to pressure companies under investigation to disclose legal confidences. The proposed bill would toughen the *McNulty Memo*, making it illegal for prosecutors and other federal enforcement officials, including those at the SEC, to require a company under investigation to disclose confidential legal communications or risk being indicted. As the bill's chief sponsor, Specter urges, "There is no need to wait to see how the McNulty memorandum will operate in practice. There is similarly no need to wait for another internal Department of Justice reform..." The proposed bill would replace the *McNulty Memo* by simply making the practice illegal. The ACPA could force the government to find new ways to combat corporate fraud. Advocates of the bill urge that the bill "takes off the table the irresistible incentive for businesses to waive the privilege in order to gain favor with the prosecution."

An attempt to put the brakes on the bill's momentum came on July 9, 2008, when Attorney General Michael Mukasey announced plans to revise the *McNulty Memo* with a new set of guidelines for

the attorney-client privilege regarding the investigation of corporate criminal misconduct. The DOJ has asked for another opportunity to address concerns before the legislation is passed. Mukasey revealed that Deputy Attorney General Mark Filip sent a letter to Senators Leahy and Specter stating proposed changes to guidelines that could replace the *McNulty Memo*. Specifically, the proposed guidelines would still allow federal prosecutors to request findings of fact resulting from an internal investigation (known as "Category I information"), but would prohibit the request of "non-factual attorney work product and core attorney-client privileged communications" (also known as "Category II information"). Nothing in the guidelines would prevent corporations from volunteering this information.

Such guidelines would "be binding on every prosecutor in the Department of Justice, on the pain of discipline," according to Daniel R. Alonso, a former Assistant U.S. Attorney who is now a partner at Kaye Scholer. Nevertheless, as Alonso points out, neither the ACPA nor the revised guidelines would create a private right of action for aggrieved citizens, nor would they carry any civil sanctions (apart from employment-related penalties) for those prosecutors accused of violating the rules of engagement.

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