Attorney/Client Privilege Waiver Requests: Charging Corporations Under The McNulty Memorandum

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Companies facing federal investigations have difficult decisions to make, including whether to waive the attorney-client privilege and work product protection.

For the last seven years, a federal prosecutor's decision whether to charge a corporation with a crime has been guided by a series of memoranda issued by the Department of Justice.[1] Because these DOJ guidelines have driven how a prosecutor evaluates corporate conduct both before and during an investigation, they have exerted enormous influence over the basic strategic decisions that a corporation must make in its defense. Late last year, the Department of Justice released revised corporate charging guidelines for federal prosecutors nationwide (the "McNulty Memorandum").[2] Although the new procedures outlined in the McNulty Memorandum centralize oversight of privilege waiver requests and adjust DOJ policy with respect to a corporation's advancement of legal fees under certain circumstances, they do not change in any fundamental way DOJ's approach to the charging decision. Waiver and how a corporation handles

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its relationship with its employees during an investigation are still bargaining chips in the assessment of corporate cooperation.

As a result, corporations and their counsel remain in a difficult position. One of the major goals served by subjecting corporations to prosecution is deterrence.[3] As a practical matter, the first line of deterrence is within a corporation — in the effective operation of its internal controls and compliance program.[4] That requires open, candid, confidential lines of communication between employees and counsel for the corporation.[5] Ideally, the guidelines that direct how prosecutors should determine what, if any, charge should be brought against a corporation would be designed to support this goal. Instead, the McNulty Memorandum, like its predecessors, weakens critical components of strong corporate compliance: strong attorney-client privilege and work product protection, and open lines of communication. Although line prosecutors are now required to seek approval and articulate a legitimate need before asking a corporation to waive its attorney-client privilege or work product protection, corporations will still be tempted to waive these protections because voluntary waiver is still evidence of a corporation's cooperation, and a refusal to waive for certain kinds of material can be viewed as a lack of cooperation.[6] Likewise, while prosecutors may no longer generally consider a corporation's advancement of legal fees to its employees to be a lack of cooperation, corporations will remain cautious about entering into joint defense agreements and sharing information with employees because both of these may still be viewed as uncooperative conduct.[7] As a result, despite the changes, the traditional confidential relationship of trust and candor between a corporation and its counsel continues to be at risk. This, in turn, hinders the ability of corporate counsel to prevent misconduct or address it before it has triggered a criminal investigation.

While it appears that DOJ will not voluntarily abandon the troubling incentives it has embedded in its guidelines, the guidelines would nonetheless be substantially improved by removing waiver, joint defense agreements and information sharing from the measure of a corporation's cooperation. Eliminating these factors from the charging decision would encourage both DOJ and corporations to focus on other factors in the guidelines that support, rather than undermine, corporate efforts to com-

ply with the law, including the two factors that focus on pre-existing compliance programs and compliance remediation during the investigation.[8]

Congress may ultimately intervene, but for now, any company facing investigation must proceed with caution.[9] Whether and how to cooperate, including whether to waive and how to handle the defense of employees, necessarily are difficult decisions with uncertain results.

THE ROLE OF COOPERATION IN THE DOJ GUIDELINES

For the four years preceding the release of the McNulty Memorandum, prosecutors relied on the Thompson Memorandum to structure their charging decisions in corporate investigations. The Thompson Memorandum directed federal prosecutors to consider nine factors when evaluating whether to charge a corporation and, if so, what charge to bring.[10] Other than the observation that the nature and seriousness of the offense and risk of harm to the public are primary factors, the weight, if any, to be accorded to each factor was not generally addressed, and thus was left to the line prosecutor to determine on a case by case basis as circumstances warranted.[11] The Thompson Memorandum also placed increased emphasis on factors that focused on cooperation, including waiver of the attorney-client privilege, and limiting employee indemnification.

The McNulty Memorandum does not change the structure of the Thompson Memorandum, or the Thompson Memorandum's particular emphasis on cooperation. Under both McNulty and Thompson, the extent and quality of a corporation's "cooperation" during the course of an investigation is a critical part of two factors,[12] and is evaluated by considering the corporation's willingness to disclose voluntarily any wrongdoing, identify culprits within the organization, and provide relevant evidence to the prosecutor.[13] As a practical matter, under Thompson, this took two principal forms — demands for waiver of the attorney-client privilege and work product protection, and demands to limit or eliminate employee indemnification and advancement of attorney fees, joint defense agreements and information sharing.

While the McNulty Memorandum points out that waiver of the attor-

ney-client privilege or work product protection is not *required* to accomplish these things, that statement is immediately qualified by the observation that waiver may not only expedite the government investigation, but may also be "critical" to the government's evaluation of the accuracy and completeness of the company's other efforts to cooperate. Waiver may not be mandated, but it continues to have a high value.

While waiver is cast by the McNulty Memorandum as a benefit that a corporation can provide to a prosecutor, how a company handles its employees in connection with an investigation is described instead as a series of pitfalls to be avoided at the risk of being branded "uncooperative." Under the Thompson guidelines, the promise of support to "culpable" employees through the advancement of legal fees, retention without sanction for misconduct, or provision of information pursuant to a joint defense agreement could be taken into account in weighing the extent and value of a corporation's cooperation.[14] The McNulty Memorandum preserves this structure, but changes Thompson by acknowledging that the advancement of legal fees should not generally be viewed as uncooperative or obstructive.[15]

Experience has taught that cooperation is valued by prosecutors,[16] and cooperation is one of the few things a corporation can offer to improve its negotiating position in the charging decision once an investigation has commenced.[17] Under these circumstances, any prudent company, in view of its obligations to its shareholders, employees, and the broader community within which it does business, must seriously consider waiving the attorney-client privilege and work product protections when it faces a serious criminal investigation. This is so regardless of whether it receives a formal request to waive from a prosecutor. A corporation must also think carefully before entering into a joint defense agreement, or sharing information with employees. This is the way it has been under the Thompson Memorandum and this is the way it remains under the McNulty guidelines.

When waiver and how the corporation approaches the defense of its employees become bargaining chips in the negotiation over whether the corporation should be charged with a crime; however, the traditional and beneficial role played by counsel to the corporation in ensuring the cor-

poration's compliance with the law is, over time, undermined. The dynamic here is straightforward. If confidentiality promotes trust and candor – both in what employees will share with counsel and in the advice counsel provides to her corporate client – then undermining confidentiality will undermine the candor and value of these communications.[18] That confidentiality plays this role is not in dispute; it is the bedrock principle on which the modern attorney-client privilege is based.[19] As a result, a corporation cannot hope to be effective in identifying, addressing, and disciplining misconduct within the organization if the corporation does not have truthful, reliable lines of communication open with its employees.[20]

The Thompson guidelines, which were intended to guide charging decisions with an eye toward promoting deterrence, instead undermined that goal.

COOPERATION IS STILL CURRENCY UNDER THE McNULTY MEMORANDUM

While the McNulty Memorandum changes how prosecutors should approach corporate cooperation by establishing a more formal process that must be followed before a prosecutor may request a waiver of attorney-client or work product privilege and by recommending against taking a corporation's advancement of legal fees into account where such an advancement is required by statute or contract, it is not clear that the new procedures will eliminate – or even moderate – the strong incentives to waive and to avoid assisting in the defense of employees that were present under the Thompson Memorandum.[21] This is so for several reasons.

First, under the McNulty Memorandum, it is still clearly contemplated that prosecutors will request that corporations waive privilege. While waiver requests for core attorney-client privileged and work product material are intended to be "rare," no such admonition is applied to the discussion of waiver of fact summaries, organizational tools, advice of counsel defense materials, and crime-fraud materials, leaving open the possibility that waiver of this type of material may be routinely contemplated.[22] The McNulty Memorandum's position on potential crime-fraud and advice of counsel defense material raises particularly difficult issues.

The government can already reach these materials without the McNulty Memorandum. A prosecutor can gain access to crime-fraud material if he can demonstrate to a court that he has a reasonable basis to believe that counsel's services were used by the client to foster a crime or fraud.[23] Likewise, if the corporation chooses to assert an advice of counsel defense, the corporation is required, by normal operation of law, to provide the government with the advice on which it relied.[24] As a result, and given the careful policy balance struck by the existing law in this area, the McNulty Memorandum's use of waiver to gain access to these kinds of materials as part of a corporation's cooperation raises questions.[25] Under McNulty, it is the prosecutor who determines whether there is a "legitimate need" for the material, whether the material qualifies as crime-fraud or advice of counsel material, and whether a corporation should be viewed as uncooperative if it disagrees with those assessments or otherwise declines to provide the requested material. The legal lines in this area can be difficult for courts to draw. How much more difficult will it be for a prosecutor, who must play both the role of advocate for the government's position, and that of the neutral judge, in addressing any disagreements between the parties regarding these complex issues.

Second, it is unclear how high a substantive hurdle has been erected by the requirement that prosecutors articulate a "legitimate need" before requesting a waiver.[26] Whether there is a legitimate need depends on four listed factors, but it remains to be seen whether they will operate as much of a brake. A prosecutor will always be able to argue that it will benefit the government's investigation to gain early and regular access to key documents, witness statements, organizational tools like fact chronologies, organizational charts and fact summaries, and, of course the legal advice sought by and provided to the corporation on the subject matters at issue.[27] Likewise, logic dictates that the "completeness" of any voluntary disclosure will likely be improved and the quality of the disclosure more easy to assess with the additional disclosure that would be made available by waiver.[28] Finally, while concern regarding the collateral consequences of a waiver should tilt in favor of preserving the privilege under most circumstances, the McNulty Memorandum provides no guidance on how much weight this factor

should carry.[29] Also, a prosecutor who otherwise believes he has a legitimate need for waiver may be reluctant to abandon that course out of concern that waiver would enable potential victims of the conduct under investigation (future third party plaintiffs) to have better and more complete access to information about the company's conduct.[30]

Third, there is no way to police implicit or indirect requests to waive.

Fourth, it is unclear whether advancement of legal fees when not required by statute or contract may be viewed as a lack of cooperation. The McNulty Memorandum advises prosecutors that they "generally should not take into account" the advancement of legal fees in assessing a corporation's cooperation; however, in explaining this statement, the memorandum concludes "[t]herefore, a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate."[31] This suggests that it is compliance with preexisting legal obligations that can no longer be viewed as a lack of cooperation, not the advancement of legal fees as such.

Finally, joint defense agreements, information sharing, and failure to discipline "culpable" employees may still be considered uncooperative.[32] While this may sound like a limited restriction, it is broader than it may at first appear. Decisions regarding joint defense and information sharing start to be made at the outset of an investigation when the corporation typically has little if any information about the relative culpability of its employees. If the corporation enters into a joint defense agreement or shares information with an employee who *later* turns out to have engaged in serious misconduct, the corporation has placed itself at risk under McNulty. This risk is exacerbated by three additional factors. First, whether an employee is "culpable" is a judgment for the prosecutor to make — the same prosecutor who also determines whether the corporation is cooperating. Second, that prosecutor may have information from other sources about a particular employee's conduct that it does not share with the corporation. Third, it is not unusual for a prosecutor and a corporation under investigation to differ about whether or when the evidence known to both is sufficient to conclude that any particular employee is "culpable." A corporation must still proceed with caution when deciding whether and on what terms it will share information with its employees

regarding an internal or external investigation.

As a result, under the McNulty Memorandum, the *de facto* pressure on a corporation under investigation to cooperate by waiving privilege and distancing itself from its employees should remain high.

CONCLUSION

Corporations must be allowed the tools they need to police themselves. If waiver could no longer be taken into account in the charging decision, and corporations were no longer discouraged from communicating and coordinating with their employees in connection with an investigation, prosecutors would be required to look to other factors to assess what, if any, criminal charge may be appropriate. This would create an opportunity for a corporation's cooperation to be measured in more benign ways, and to shift attention to other factors in the McNulty guidelines, including the two factors that focus on compliance and internal controls.[33] To the extent focus on these factors would prompt corporations to strengthen internal controls and facilitate candid internal communications about what business conduct is and is not permissible, such a focus would support rather than undermine one of the central policy goals supporting the prosecution of corporations. In the end, the McNulty Memorandum is a missed opportunity. Whether it is the last word on the matter remains to be seen.

NOTES

[1] Memorandum by Acting Deputy Attorney General Robert D. McCallum, Jr., "Waiver of Corporate Attorney-Client and Work Product Protection" October 21, 2005 (the "McCallum Memorandum"); Memorandum by Deputy Attorney General Larry D. Thompson, "Principles of Federal Prosecution of Business Organizations," January 20, 2003 (the "Thompson Memorandum") (*available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf); and Memorandum by Deputy Attorney General Eric Holder, "Bringing Criminal Charges Against Corporations," June 16, 1999 (the "Holder Memorandum") (*available at* http://www.usdoj.gov/criminal/fraud/policy/ chargingcorps.html).

[2] Memorandum by Paul J. McNulty, Deputy Attorney General, Department

of Justice, "Principles of Federal Prosecution of Business Organizations," December 12, 2006 (*available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf). In response to a culture favoring waiver that had developed under the DOJ guidelines, the ABA, ACLU, and U.S. Chamber of Commerce engaged in a coordinated effort to convince DOJ to modify the guidelines. When DOJ's response was less than they had hoped it would be, these organizations pursued the matter with Congress. In September 2006 hearings before the Senate Judiciary Committee, they found a sympathetic forum. The result was the submission of a bill to the Committee by Senator Arlen Specter in December 2006. See Attorney Client Privilege Protection Act of 2006 S. 30, 109th Cong. (2006). Days after the bill had been introduced, DOJ released the McNulty Memorandum.

[3] *See e.g.*, McNulty Mem. at 2 ("[A]n indictment often provides a unique opportunity for deterrence on a massive scale."); Holder Mem. At 1 (prosecuting corporations enables the government "to address and be a force for positive change of corporate culture, [to] alter corporate behavior, and [to] prevent, discover, and punish white collar crime."); *N.Y. Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 496 (1909) ("to give [corporations] immunity from all punishment…would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at").

[4] *See e.g.*, Federal Sentencing Guidelines Manual, Ch. 8 — Sentencing Organizations, *Intro. Commentary* ("The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws."); *see also* U.S. Dept. of Health and Human Svcs. Office of the Insp. General and American Health Lawyers Association, "An Integrated Approach to Corporate Compliance: A Resource for Health Care Organization Boards of Directors," at 5,7 (discussing the critical role played by general counsel in investigating and responding to compliance failures and to third party requests for information) *available at* http://oig.hhs-gov/fraud/docs/complianceguidance/Tab%204E%20Appendx-Final.pdf.

[5] *See e.g., U.S. v. Philip Morris*, 314 F.3d 612, 618 (D.C. Cir. 2003) ("The privilege promotes sound legal advocacy by ensuring that the counselor knows all the information necessary to represent his client. Only by ensuring that privileged information is never disclosed will these important interests be advanced."); *see also* Testimony by Thomas J. Donahue, President & CEO,

U.S. Chamber of Commerce, U.S. Senate, Committee on the Judiciary, Hearings on: *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations*, September 12, 2006 (*available at* http://judiciary.senate.gov/print_testimony.cfm?id=20548wit_id=4378) (if company employees know that their conversations with counsel are not protected, they will choose not to seek legal guidance, and not to disclose conduct that could put the company at risk); Submission by Coalition to Preserve the Attorney-Client Privilege, U.S. Senate, Committee on the Judiciary, *Coerced Waiver of the Attorney-Client Privilege: The Negative Impact for Clients, Corporate Compliance, and the American Legal System*, September 12, 2006 at 10-11 (*available at* http://www.acca.com/public/attyclientpriv/coalitionsenjudtestimony.pdf) (reporting survey results that include: in house counsel confirm that clients are aware of and rely on privilege; absent privilege, clients will be less candid; existence of privilege enhances likelihood that company employees will come forward to discuss sensitive or difficult issues regarding compliance; corporate counsel believe that the existence of privilege improves counsel's ability to monitor, enforce, and/or improve company compliance).

[6] McNulty Mem. at 8-11.

[7] McNulty Mem. at 11-12.

[8] McNulty Mem. at 4; 12-16.

[9] Senator Arlen Specter has introduced a bill designed to address these issues in this Congressional session. *See* Cong. Rec. S 181-183, January 4, 2007.

[10] The nine factors are:

(1) the nature and seriousness of the offense, including the risk of harm to the public;

(2) the pervasiveness of wrongdoing within the corporation, including the complicity in or condonation of wrongdoing by management;

(3) the corporation's history of similar misconduct;

(4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of attorney-client and work product protection;

(5) the existence and adequacy of the corporation's compliance program;

(6) the corporation's remedial actions, including any efforts to implement an effective compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

(7) collateral consequences, including disproportionate harm to shareholders and impact on the public;
(8) the adequacy of the prosecution of individuals; and
(9) the adequacy of other remedies.
See Thompson Mem. at 2-3.

[11] Thompson Mem. at 3.

[12] Cooperation is included in the fourth and the sixth of the nine factors. Thompson Mem. at 3; McNulty Mem. at 4.

[13] *See* Thompson Mem. at 4 (to determine whether a corporation is cooperating, the prosecutor should consider "the corporation's willingness to identify the culprits within the corporation…; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection."); McNulty Mem. at 7 ("in gauging the extent of the corporation's cooperation, the prosecutor may consider…whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation"); *id.* at 8 ("[t]he disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.").

[14] Thompson Mem. at 5.

[15] McNulty Mem. at 11. While both the Thompson and McNulty Memoranda restrict these limitations to dealings with "culpable" employees, it is not unusual for corporations and prosecutors to have different views on whether or when a particular employee may fall in that category.

[16] *See e.g.*, Leonard Orland "Not a Real Remedy" National Law Journal, December 20, 2006 (reporting that between 2003-2006, DOJ resolved 45 criminal cases by either deferred prosecution or non-prosecution agreement and that of those resolved with a deferred prosecution agreement, nearly 80 percent include a waiver of the attorney-client privilege).

[17] All but two of the nine factors listed in the Thompson and McNulty Guidelines focus on a corporation's *past* practices. The facts that will drive discussion and debate in evaluating the nature and seriousness of the offense, the pervasiveness of the misconduct, and the existence of an effective compliance program at the time the misconduct occurred, for example, have already occurred once an investigation is underway, and cannot be changed. By contrast, the two forward-looking factors that invite a corporation to use its conduct during the course of the investigation to support a non-criminal

resolution of the matter focus on cooperation.

[18] *See e.g.*, Am. Chemistry Council, Ass'n of Corp. Counsel et al, *The Decline of the Attorney-Client Privilege in the Corporate Context, Survey Results*, at 14 (March 2006) ("To allow for this type of [waiver] request will merely result in many corporations no longer including in-house counsel in important decision-making processes, which may in fact lead to even more wrongdoing.")(quoting one survey respondent), available at http://www.acca.com/surveys/attyclient2.pdf; Sara Helene Duggin, *The Impact of the War Over the Corporate Attorney-Client Privilege on the Business of American Health Care*, 22 J. Contemp. Health L. & Pol'y, 301, 321-22 (Spring, 2006) (discussing November 2005 hearings before the United States Sentencing Commission, at which representatives of the American Bar Association and the National Association of Criminal Defense Lawyers testified to the chilling effect of current government policies on privilege on communications between corporate personnel and in-house counsel with respect to legal compliance issues).

[19] *See e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)(full and frank communication between counsel and client serves the public interest, but such communication can be safely achieved only when it is "free from the consequences or apprehension of disclosure") quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *U.S. v. Philip Morris, Inc*. 314 F.3d 612, 618 (D.C. Cir. 2003) (the erroneous release of information covered by attorney-client privilege would eviscerate the institutional interest in preserving privilege and, derivatively, in full and frank communication between client and attorney); Colin P. Marks, *Corporate Investigation, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth having at All?*, 30 Seattle U. L. Rev. 155, 157 (Fall, 2006) ("The policy underlying [the attorney-client privilege] is that open and frank communications with an attorney facilitates compliance with the law. Thus the privilege exists to promote full disclosure by the client and to foster a relationship of trust between the attorney and the client.").

[20] *Upjohn*, 449 U.S. at 392 (corporate attorneys are needed both to "formulate sound advice when their client is faced with a specific legal problem" and "to ensure their client's compliance with the law."); *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032, 1036-37 (2d Cir. 1984) ("The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in

given circumstances, but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law."); *see also*, Restatement (Third) of the Law Governing Lawyers, s. 68 cmt. c (the rationale for the modern privilege "is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services"); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1061 (1978) ("[T]he advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good…[and] the legal counselor can properly advise the client what to do only if the client is free to make full disclosure.").

[21] Under McNulty, a prosecutor must now make a written request for permission to request a waiver. That request must include an explanation of his "legitimate need" for the waiver sought. For certain types of information — factual summaries and organizational tools, crime-fraud material and advice of counsel defense material, a line prosecutor needs permission from his U.S. Attorney. For other attorney-client privileged or work product material, permission from the Assistant Attorney General is required. McNulty Mem. at 8-10.

[22] McNulty Mem. at 9-10.

[23] *In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005); *see also e.g., In re Grand Jury Investigation*, 445 F.3d 266, 274 (3d Cir. 2006) (government is required to make a prima facie showing that client was committing or intended to commit a fraud or crime and that the attorney-client communications at issue were in furtherance of that alleged crime or fraud).

[24] *See generally, In re Grand Jury Proceedings*, 219 F.3d 175, 182-183 (2d Cir. 2000) (a defendant who asserts an advice of counsel defense is thereby deemed to have waived his privilege with respect to the advice that he received); *In re Echostar Communications Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006) (same). If it is an employee who has asserted advice of corporate counsel as a defense to his own prosecution, the circumstances may differ in one respect. When an employee asserts this defense, the privilege in the advice at issue may be controlled by the corporation rather than the employee. Thus, it can and does happen that an employee who seeks to assert this defense is confronted with an employer (or former employer) who refuses to waive to grant the employee and the prosecutor access to the advice at issue. Prosecutors have pointed to such circumstances to defend including waiver of advice of counsel material in the calculation of a corporation's cooperation.

However, it is not clear why a corporation's decision not to waive under these circumstances bears on its cooperation with the government's investigation. If the prosecutor does not receive access to the advice at issue, it is the *employee* who is denied access to a *defense*, not the government to a theory of prosecution. Under these circumstances, it is unclear why DOJ would also want to brand the corporation "uncooperative."

[25] *See e.g., In re Richard Roe, Inc.*, 168 F.3d 69, 71 (2d Cir. 1999) ("[G]iven that the attorney-client privilege and work product immunity play a critical role in our judicial system…the limited exceptions to them…should not be framed so broadly as to vitiate much of the protection they afford.").

[26] McNulty Mem. at 8-9.

[27] These are the first and second factors in the legitimate need analysis. McNulty Mem. at 9.

[28] This is the third factor in the legitimate need analysis. McNulty Mem. at 9.

[29] *Id.*

[30] DOJ also supports amending FRE 502 to permit selective waiver of privileged material to the government. *See e.g.*, Testimony of Paul J. McNulty, Deputy Attorney General, before U.S. Senate Judiciary committee, *The Thompson Memorandum's Effects on the Right to Counsel in Corporate Investigations*, September 12, 2006 (*available at* http://www.usdoj.gov/dag/testimony/2006/091206dagmcnulty_testimony_thompson_memo.html). If this rule change goes into effect, this fourth factor — the only one that tends to mitigate against a need for waiver — will effectively become moot.

[31] McNulty Mem. at 11.

[32] McNulty Mem. at 11.

[33] McNulty Mem. at 4; 12-16