

COMMENT

THE DEATH OF SELECTIVE WAIVER: HOW NEW FEDERAL RULE OF EVIDENCE 502 ENDS THE NATIONALIZATION DEBATE

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ABSTRACT

New Federal Rule of Evidence 502 (“FRE 502”) will end the three-decade push to nationalize a corporate litigation protection known as the “selective waiver doctrine.” First adopted by the Eighth Circuit in 1978, the selective waiver doctrine holds that, when a corporation discloses privileged materials to a government agency during an investigation, the corporation retains its privileges against third-party litigants—i.e., the corporation may selectively waive its attorney-client privilege (and in other circuits its attorney work product protection). This flies in the face of traditional waiver rules, under which a waiver of privilege to one’s adversary generally is a waiver to all adversaries on that subject matter.

Based on years of frustration with discovery costs, fear of corporate fraud, and heavy burdens placed on administrative agencies, many legal scholars praised selective waiver as a cure for those ills. Recently, when the Advisory Committee on Evidence Rules met to discuss additions to the FRE, many called for the inclusion of a selective waiver provision. After much debate, the Advisory Committee determined that the selective waiver proposal for FRE 502 was too controversial. In its enacted form, FRE 502 does not contain a selective waiver provision.

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This paper: 1) addresses the problems that led to the resurgence of selective waiver commentary; 2) tracks the development of the selective waiver doctrine; 3) relates and analyzes the debate at the committee level for the proposal of FRE 502(c) Selective Waiver; 4) discusses FRE 502 as enacted; and 5) raises questions about the future application of FRE 502.

As this comment will demonstrate, the jurists and federal circuit courts that reject the doctrine have proven too strong an obstacle for selective waiver proponents. Nevertheless, in its current iteration, FRE 502 addresses some of the concerns raised by selective waiver supporters. Most notably, FRE 502 protects corporations from total subject matter waiver when it makes a genuinely inadvertent disclosure of privileged material to an agency. Along with the recently reintroduced Attorney Client Privilege Protection Act, FRE 502 potentially represents a step toward the protection of corporate evidentiary privileges in agency investigations and in future litigation against third parties. In the end, FRE 502 will have to affect change without a nationalized waiver provision since it will never materialize.

I. INTRODUCTION

Selective waiver permits a “client who has disclosed privileged communications to one party to continue asserting the privilege against other parties.”¹ There are many reasons for the revival of the selective waiver doctrine as a proposal for a new Federal Rule of Evidence (“FRE”). Correspondingly, there are various reasons for the proposal’s demise at the committee level. This paper will address the discussion surrounding selective waiver and argue that the decision to abandon a selective waiver proposal for a FRE 502 was the proper choice. Moreover, this comment will discuss the proposed and enacted forms of FRE 502 and ruminate over its potential effect on the corporate litigation milieu.

This paper is divided into four main segments. The first section of this paper discusses the current corporate litigation climate and the reasons for the resurrection of the selective waiver doctrine, which are many. First, a rise in corporate fraud in the past decade increased the desire for improved federal investigations and led to more cooperation by business organizations with agencies. Second, the enforcement practices of federal agencies are believed by many to impinge upon the corporate attorney-client privilege. Third, the rising cost of discovery, in terms of time and money, has raised concerns about the ability of corporations to protect their evidentiary privileges against inadvertent disclosures. Finally, the circuit split on selective waiver (though most reject the doctrine) has caused uncertainty and incongruous application of privilege waiver rules.

To understand the impetus for protecting corporate privileges, the second section of this paper briefly presents the principles behind evidentiary privileges and their corresponding waivers. First, the section covers attorney-client privilege, its application in the corporate setting, and how it is traditionally waived. Second, the section deals with attorney work product and the ability of a party to waive its protections.

Rather than discussing the application of selective waiver in the courts as a subsection of the “reasons for the resurrection of selective waiver,” this article will discuss that subject under its own heading. Therefore, the third area of this comment covers the development and nearly universal rejection of selective waiver in the federal circuits and in state courts.

1. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991).

Since courts inconsistently apply waiver privilege rules, selective waiver proponents have resorted to legislative proposals, namely FRE 502(c). The fourth section of this paper deals with the proposal for FRE 502(c) at the committee level and the arguments raised during the comment period.

While proposed FRE 502(c) did not survive the comment period, FRE 502 passed both houses and was signed into law on September 19, 2008 by President George W. Bush.² Its current iteration contains provisions dealing with selective disclosures to federal agencies during investigations. The fifth final part of this comment explains the provisions of the FRE 502 bill and raises questions about its effect in the future.

II. THE REASONS FOR THE REVIVAL OF THE SELECTIVE WAIVER DOCTRINE

A. *The Corporate Entity: Past Malfeasance and the Current Climate*

Corporations are legal fictions, a creation of state law, and only act via their agents.³ To retain the benefits of limited liability, corporate directors and officers must have compliance programs in place.⁴ Manipulation by corporate insiders harms employees, shareholders, and the consumer public.⁵ If a corporation suspects that its agents may have committed a crime, then common practice and common law dictate that the corporation hire independent outside counsel to investigate the problem.⁶ The internal investigation reports generated in independent investigations are highly informative and provide federal investigators with a roadmap for tracking corporate fraud.⁷ In many instances, increased cooperation between

2. Press Release, Office of the Press Secretary, President Bush Signs H.R. 6456 and S. 2450 into Law (Sept. 20, 2008), available at <http://federalevidence.com/pdf/2008/09-Sept/WhiteHouse200809201.pdf>.

3. Andrew J. McNally, Comment, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure of Corporate Wrongdoing by Restricting Third Party Access to Disclosed Materials*, 35 SETON HALL L. REV. 823, 833 (2005).

4. *Id.*

5. *Id.* at 823–24. McNally recognized that the issue underlying selective waiver is: whether it is beneficial to expand the scope of privileges in the corporate context? *Id.* To him, the best formulation of selective waiver would be a creation of a new corporate-government privilege in which a corporation that disclosed privileged documents pursuant to a confidentiality agreement with an agency would be protected from discovery requests submitted by third-party litigants. *Id.* at 828. In some ways, a nationalized selective waiver rule would be an adoption of a new “corporate-government privilege.”

6. *Id.* at 834.

7. Letter from Brian G. Cartwright, General Counsel, Securities and Exchange Commission, to Peter G. McCabe, Secretary, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, at 1–2 (Feb. 16, 2007), available at [http://www.uscourts.gov/rules/EV%20Comments%](http://www.uscourts.gov/rules/EV%20Comments%20)

corporations and agencies leads to increased fraud prevention and penalization of lawbreakers.

The Enron, Adelphia, and WorldCom scandals caused many to demand an increase in cooperation between investigating agencies and business entities.⁸ Some looked to selective waiver as a method for increasing cooperation, which, they argue, would increase the chance that criminals will be caught; this result, in turn, would cause a decrease in fraudulent activities, increased compliance, and reduced agency costs.⁹ Consequently, the current corporate climate has been a driving force behind the proposals for a nationalized selective waiver rule.

B. Enforcement Practices of Federal Agencies: the “Culture of Waiver”

Ironically, the investigative practices of federal agencies have also led to increased support by jurists and corporate counsel for selective waiver. “Culture of waiver” is a term used to describe the fact that federal investigators often demand the surrender of privileged corporate documents in exchange for more lenient penalties, which leads some corporations to believe that their attorney-client privilege and work product protection are under attack. Commentators suggest that selective waiver would ameliorate some of the problems associated with the exchange of privileged materials for leniency. While selective waiver would not end agency demands for privileged information, it would encourage corporations to cooperate since it would prevent third-party litigants from obtaining those same materials through traditional waiver rules.

1. Securities and Exchange Commission

Initiated in the 1970’s, the Securities and Exchange Commission’s (the “SEC” or the “Commission”) Voluntary Disclosure Program provided corporations the chance to avoid formal investigation and litigation in return for self-investigation and complete disclosure to the agency.¹⁰ Continuing that practice, in 2001, the SEC issued the “Seaboard Report,” which encouraged government officials to seek privilege waivers from corporations and made

202006/06-EV-062.pdf.

8. McNally, *supra* note 3, at 847.

9. *Id.*

10. *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984).

waiver of privilege a condition for receiving cooperation credit.¹¹ Over the past four decades, the SEC has maintained its approach, which some accuse of eroding corporate attorney-client privilege since the tactic places corporations between Scylla and Charybdis: does a corporation surrender its privilege to lessen the potential ill-effects of an SEC prosecution and risk vulnerability to third-party suits, or does it circle the wagons?

2. Federal Sentencing Guidelines

Formerly, the Federal “Sentencing Guidelines reward[ed] voluntary disclosure and cooperat[ion] with a reduction in the corporation’s offense level.”¹² In a 2004 amendment to the Sentencing Guidelines, the New Commentary stated that § 8C2.5 “authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to show ‘thorough’ cooperation with the government and thereby qualify for a reduction in the culpability score—and a more lenient sentence—under the Guidelines.”¹³ Before the amendment, the (old) Commentary did not mention a “requirement” of waiver for an organization to obtain clemency.¹⁴ This all changed when the Supreme Court held that mandatory sentencing guidelines are unconstitutional in *United States v. Booker*¹⁵ and in *United States v. Fanfan*.¹⁶ Consequently, in April of 2006, the Sentencing Commission unanimously voted to remove the privilege waiver commentary from the Sentencing Guidelines; the amendment is now effective.¹⁷ Since the Sentencing Guidelines are now advisory, incarcerations

11. American Bar Association, Governmental Affairs Office, *Independence of the Legal Profession: Attorney-Client Privilege, Work Product, and Employee Legal Protections*, Overview (2009), available at <http://www.abanet.org/poladv/priorities/privilegewaiver/>. See also Press Release, Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Comm’n Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Oct. 23, 2001), at ¶ 11 & n.3, available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

12. “Thompson Memo”: Letter from Larry D. Thompson, Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components and U.S. Attorneys, at 7 n.2 (Jan. 20, 2003), available at http://www.abanet.org/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.pdf (citing former U.S.S.G. § 8C2.5(g)).

13. American Bar Association, Governmental Affairs Office, *Independence of the Legal Profession: Attorney-Client Privilege, Work Product, and Employee Legal Protections*, Key Points (2009), available at <http://www.abanet.org/poladv/priorities/privilegewaiver/>.

14. *Id.*

15. 543 U.S. 220 (2005).

16. 542 U.S. 956 (2004). Zach Dostart, Comment, *Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine*, 33 PEPP. L. REV. 723, 755 (2006).

17. American Bar Association, Governmental Affairs Office, *Independence of the Legal Profession*:

and monetary penalties for criminal corporate acts are flexible.¹⁸ Nevertheless, federal prosecutors still can press less-harsh charges against white-collar criminals and federal juries still can consider whether a white-collar criminal cooperated with the government in determining sentencing.¹⁹

3. Department of Justice (U.S. Attorney's Office)

The Department of Justice ("DOJ") upheld the right of federal prosecutors to seek attorney-client privileged material in criminal investigations,²⁰ which means that prosecutors may consider a corporation's willingness to cooperate in determining appropriate criminal charges. Correspondingly, the DOJ reduces the sentences and fines sought when a corporation cooperates.²¹ The following paragraphs include a history of DOJ policies in the past decade.

In 1999, the DOJ's Holder Memorandum enumerated factors for the federal prosecution of corporations that informed prosecutors whether and how to charge an investigated corporation.²² The "Holder Memo" first addresses some of the purposes of prosecuting corporations and their employees: to encourage self-policing and self-remediation, general deterrence, specific deterrence, and protection against public harm.²³ The non-exclusive list of factors to be considered in charging a corporation includes whether a corporation timely and voluntarily discloses wrongdoing and its willingness to cooperate in the investigation.²⁴ Cooperation involves, if necessary, waiver of corporate attorney-client privilege and work product protection.²⁵ While the memo repeatedly cautions that these factors are discretionary, the letter gives lengthy treatment to how waivers of privilege should be construed.²⁶

Attorney-Client Privilege, Work Product, and Employee Legal Protections, Status (2009), available at <http://www.abanet.org/poladv/priorities/privilegewaiver/>.

18. Dostart, *supra* note 16, at 755.

19. *Id.* at 755–56.

20. Katherine M. Weiss, *Upjohn v. United States as Support for Selective Waiver of the Attorney-Client Privilege in Corporate Criminal Investigations*, 48 B.C. L. REV. 501, 502 (2007).

21. *Id.*

22. "Holder Memo": Letter from Eric H. Holder, Jr., Deputy Attorney General, U.S. Department of Justice, to All Component Heads and U.S. Attorneys, at 1 (June 16, 1999), available at http://www.abanet.org/poladv/priorities/privilegewaiver/1999jun16_privwaiv_dojholder.pdf.

23. *Id.* at 2, I.A.–B.

24. *Id.* at 3–4, II.A.4.

25. *Id.*

26. *Id.* at 6–8, VI.

The Holder Memo cites several obstacles to thorough agency investigations, including corporation size, split lines of authority within corporations, transhumance within corporations, and changing personnel within corporations.²⁷ In exchange for corporate cooperation, which can assist governmental attorneys in surmounting these obstacles, prosecutors may offer immunity, reduced sanctions, or amnesty, but only when timely cooperation is deemed necessary to the public interest and other methods of obtaining information is ineffective.²⁸

While the instruction to utilize a method of securing waivers in exchange for leniency is limited to “appropriate circumstances,” the Holder Memo advocates assessing the adequacy of a corporation’s cooperativeness by the completeness of its disclosure, which includes voluntary privilege waiver.²⁹ Waivers permit agencies to acquire statements of “witnesses, subjects, and targets without having to negotiate individual cooperation or immunity agreements.”³⁰ Importantly, the memo reminds prosecutors that the bargaining chip is in their hands: a corporation’s offer to cooperate does not automatically entitle it to immunity, and a corporation should not be able to avoid liability for the organization by using its directors, officers, and employees as scapegoats.³¹ Under the Holder Memo, the prosecutorial endgame turns on balancing the purposes of federal prosecution of corporations with the enforcement method chosen.³² Although waiver of privilege is a factor in corporate cooperation, which can lead to leniency, waiver of privilege alone will not result in sanction avoidance if the objectives of deterrence, compliance, and public protection are not fulfilled.³³

In 2003, Larry D. Thompson issued a memorandum, revising the mandate of the Holder Memo and its tactics against corporate fraud.³⁴ The “Thompson Memo” exhorted prosecutors to be vigilant for corporate strategies employed to avoid exposure of wrongdoings—tactics that include impeding

27. *Id.* at 6, VI.B.

28. *Id.* at 7, VI.B. However, reductions in charges may not be appropriate in cases of widespread fraud or crime. *Id.*

29. *Id.* Under the Holder Memo, waivers are to be limited to the factual internal investigation of the corporation and contemporaneous advice given to the corporation on the central issue. Waivers are not to be sought “with respect to communications and work product related to advice concerning the government’s criminal investigation.” *Id.* at 14 n.2.

30. *Id.* at 7, VI.B.

31. *Id.* at 8, VI.B.

32. *Id.* at 10–12, IX–XI.

33. *Id.*

34. Thompson Memo, *supra* note 12, at 1.

investigations while purporting to cooperate and establishing “paper programs” instead of proactive self-policing mechanisms for internal investigations.³⁵ Other examples of investigation obstructions include: instructions to employees not to cooperate fully; making misleading statements or omitting pertinent information; incomplete or delayed record disclosure; and failure to seasonably reveal known violations.³⁶ The substance of the privilege waiver discussion in the Thompson Memo differs little from that of the Holder Memo, but the Thompson Memo’s emphasis on alertness to corporate wagon circling suggests that the DOJ fell victim to corporate chicanery during investigations in the preceding interim.

On October 21, 2005, Acting Deputy Attorney General Robert D. McCallum, Jr. issued another memorandum, titled “Waiver of Corporate Attorney-Client and Work Product Protections.”³⁷ The “McCallum Memo” instructed all U.S. attorneys to initiate “a written waiver review process for your district or component.”³⁸ The problem with the McCallum Memo was that it did not “establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors.”³⁹

In response to clamor raised by the American Bar Association and other interested parties, the DOJ revised the Thompson Memo and supplanted the McCallum Memo with a letter by Paul J. McNulty, the Deputy Attorney General.⁴⁰ Citing four years of “unprecedented success” in fraud prosecution, the “McNulty Memo” supersedes its predecessors, but reaffirms the basic tenets of the former manifestos.⁴¹ The impetus for the McNulty Memo arose from complaints that DOJ practices discouraged “full and candid communications between corporate employees and legal counsel”—the very purpose of the attorney-client privilege.⁴² Gone from the list of factors to be considered by prosecutors was any reference to the willingness of a

35. *Id.*

36. *Id.* at 8.

37. “McCallum Memo”: Letter from Robert D. McCallum, Jr., Acting Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components and U.S. Attorneys, at 1 (Oct. 21, 2005), available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf.

38. *Id.*

39. American Bar Association, Governmental Affairs Office, *Independence of the Legal Profession*, Status (2009), available at <http://www.abanet.org/poladv/priorities/privilegewaiver.html>. The ABA feared a lack of uniformity or “token restraints” on prosecutors in demanding waivers. *Id.*

40. “McNulty Memo”: Letter from Paul J. McNulty, Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components and U.S. Attorneys (Dec. 12, 2006), available at <http://www.abanet.org/poladv/priorities/privilegewaiver/>.

41. *Id.* at 1–2.

42. *Id.* at 1.

corporation to waive privilege.⁴³ Nevertheless, the McNulty Memo gives extensive treatment to its plan for privilege waivers under VII. "Charging a Corporation: The Value of Cooperation," subsection 2. "Waiving Attorney-Client and Work Product Protections."⁴⁴

The McNulty Memo emphasizes that privilege waivers are not a prerequisite to determining that a corporation cooperated with investigators.⁴⁵ Finding that privilege waivers expedite agency processes and enable the government to determine the completeness and accuracy of disclosures, the McNulty Memo states that a prosecutor may only request a waiver "when there is a legitimate need for the privileged information to fulfill their law enforcement obligations."⁴⁶ Desirability and convenience are not to be considered elements of "need."⁴⁷ Need depends on: 1) the likelihood and degree to which privileged information will benefit the investigation; 2) whether information can be obtained in a timely and complete manner by utilizing other means; 3) "the completeness of the voluntary disclosures already provided"; and 4) "the collateral consequences to a corporation of a waiver."⁴⁸

To secure privileged information, the McNulty Memo recommends a multi-step approach, starting with the "least intrusive waiver necessary."⁴⁹ Before issuing a waiver request, "prosecutors must obtain written authorization from the U.S. Attorney, who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying a request."⁵⁰ Any request must contain an explanation of "need" and the scope of the waiver sought.⁵¹ All waiver requests must be maintained in the files of the U.S. Attorney.⁵² If the request is authorized, then the U.S. Attorney must send a written waiver request to the

43. *Id.* at 4.

44. *Id.* at 8–11.

45. *Id.* at 8.

46. *Id.*

47. *Id.*

48. *Id.* at 9. Collateral consequences include disproportionate harm to innocent shareholders, pension holders and employees and the impact on the public arising from the prosecution, counterbalanced by the nature, seriousness, and pervasiveness of the criminal activity (i.e., is it an accepted and known business practice within the company). *Id.* at 4.

49. *Id.* at 9.

50. *Id.*

51. *Id.*

52. *Id.*

corporation.⁵³ The corporation's response to the waiver request may be considered in evaluating its cooperativeness.⁵⁴

The first step in the McNulty waiver process permits prosecutors to seek only factual information.⁵⁵ In "rare circumstances," if the investigation is hampered by incompleteness, a prosecutor may seek attorney-client communications or non-factual attorney work product.⁵⁶ The second step⁵⁷ follows a similar procedure to the first step, but there is one key distinction: if the corporation declines the request to waive privileges under step two, the "prosecutors must not consider this declination against the corporation in making a charging decision."⁵⁸ In spite of this, the former statement is mitigated by the fact that a prosecutor may "always favorably consider a corporation's acquiescence to the government's waiver request" in determining cooperativeness.⁵⁹ Finally, waiver requests never need to be filed after a corporation voluntarily offers its privileged documents without a formal written request by the government.⁶⁰

On paper, the McNulty Memo throws roadblocks in the path of agency attorneys who seek privilege waivers; however, in practice, the McNulty Memo exacerbated the "culture of waiver."⁶¹ To this day, DOJ attorneys routinely seek privilege waivers and encourage "voluntary waivers" by corporations so that they can avoid the McNulty waiver process, and corporations often comply.⁶² As will be discussed *infra*, waivers of privilege in the absence of a full McNulty waiver process are more salient to our discussion than the choice of DOJ attorneys to evade the necessary prerequisites.

53. *Id.*

54. *Id.*

55. *Id.* at 10.

56. *Id.*

57. "Category II" does not include: 1) "legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon the advice-of-counsel defense"; or 2) legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege." *Id.* at 10. Those exceptions fall under "Category I" in step one. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 11.

61. Letter from David Brodsky, *Preserving the Attorney-Client Privilege*, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, at 2 (Apr. 19, 2006), available at www.uscourts.gov/rules/Brodsky.pdf.

62. American Bar Association, Governmental Affairs Office, *Independence of the Legal Profession: Attorney-Client Privilege, Work Product, and Employee Legal Protections*, Key Points (2009), available at <http://www.abanet.org/poladv/priorities/privilegewaiver/>.

In the end, many believe that the investigatory tactics of the SEC, DOJ, and other agencies has led to a “culture of waiver” that deprives corporations of their attorney-client privilege, and something must be done about it.⁶³

C. The Discovery Predicament: Document Review and Production Risks

In a time where discovery poses limitless obligations on parties involved in complex litigation, it is crucial to recognize that disclosing parties often make mistakes. Inadvertent disclosures of privileged information are common and find their source in the expense and time-consuming nature of document review. The Federal Rules of Civil Procedure recognize “claw back” and “quick peek” agreements between parties as efficient bulwarks against disclosures of privileged information.⁶⁴ While these agreements bind the parties, such protective measures afford no defense against non-parties.⁶⁵ Finding waivers for inadvertent disclosures and broad scope waiver for intentional disclosures provides incentive for corporations to closely monitor disclosures.⁶⁶ This leads to a thorny choice for corporations: expend energy and finances to scour all documents for privileged information or risk losing protection.⁶⁷

Expensive and time-consuming discovery is not only an issue for producing parties.⁶⁸ Often, the receiving party is saddled with a bevy of

63. For more information, see Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003).

64. Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal For Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 214 n.9, citing FED. R. CIV. P. 16(b)(6) advisory committee's note (discussing 2006 amendment); FED. R. CIV. P. 26(f)(4) advisory committee's note (discussing 2006 amendment).

65. *Id.* at 215 & n.10.

66. *Id.* at 216 and nn.17–18.

67. *Id.* at 217. Some suggest that corporations have “little choice” between cooperating with agencies, in exchange or leniency, and withholding privilege documents to preserve the privilege. See Weiss, *supra* note 20, at 502. However, many argue that corporations take a calculated risk in disclosing certain information to the government: gain leniency, but risk loss of privilege protection against third parties.

68. Letter from Keith Altman, Director of Adverse Event Analysis, Finkelstein & Partners, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, at 1 (Jan. 14, 2007), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-034.pdf>. In *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421, 425–26 (S.D.N.Y. 2002), “a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant \$120,000 and another defendant \$247,000, and that such review would take months.” ADVISORY COMMITTEE ON EVIDENCE RULES, 109TH CONG., [REVISED] REPORT ON THE PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE, COMMITTEE

documents from the producing party—sometimes as an attempt to snow-in the opposition.⁶⁹ While the costs of analysis for the receiving party can be enormous, storing costs are negligible.⁷⁰ However, receiving parties often copy the entire electronic library so that all parties to the case have complete copies, which means that when a producing party asks for a return of information, perhaps due to an inadvertent or sloppy disclosure, up to twenty electronic databases: 1) need to be returned to a central location; 2) have their index erased; and 3) have the privileged information erased. Similarly, all paper copies must be located and destroyed.⁷¹ Keith Altman estimates the cost of this process at \$5,000–\$10,000 per return request in a complex multi-firm litigation.⁷²

The current corporate environment, coupled with the expense of discovery and pressure from agencies to surrender privileged materials, leaves corporations uncertain about the status of their attorney-client and work-product privileges. To protect these privileges, to encourage cooperation with the government, and to save everyone time and expense, many have turned to the doctrine of selective waiver as their savior.

III. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN CORPORATE LAW

To understand the selective waiver proposal and why it failed, it is important to recognize the value and the nature of the privileges for which corporations seek protection. Moreover, an appreciation of the principles behind evidentiary privileges and the reasons for the traditional waiver rules associated with those privileges is salient to recognizing that selective waiver is inconsistent with the notions of equality and fairness that reinforce our adversarial system.

NOTE, at 8 (June 30, 2006), *available at* http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf.

69. Altman, *supra* note 68, at 1.

70. “For example, on a hard drive costing \$300, I can store 1,200 filing cabinets of paper documents or 12,000 filing cabinets of electronic documents.” *Id.* at 2.

71. *Id.*

72. *Id.*

A. Attorney-Client Privilege: Principles, Application, & Waiver

The attorney-client privilege is the oldest privilege in common law.⁷³ The purpose of the privilege is to encourage full and frank communication between lawyers and clients, which promotes the public interests of observance of law and administration of justice.⁷⁴

FRE 501 recognizes the authority of federal courts to develop testimonial privileges,⁷⁵ attorney-client privilege in particular. In enacting the FRE, Congress rejected nine additional privilege proposals and implicitly left the development of privileges to the courts.⁷⁶ In general, “[t]estimonial exclusionary rules and privileges contravene the fundamental principle that ‘the public . . . has a right to every man’s evidence.’”⁷⁷ Accordingly, evidentiary privileges are “strictly construed” and accepted only to the extent that the permitted exclusion of relevant evidence furthers a public policy goal that trumps the principal objective of trials—the ascertainment of truth.⁷⁸ For decades, the circuit courts have demarcated the scope and application of attorney-client privilege and its waiver. The creation of new evidentiary privileges is reserved to Congress’ discretion under 28 U.S.C. § 2074(b).

The “scope and contours of [corporate privileges] are different in important respects” from individual privileges.⁷⁹ Corporations are creatures of state creation and do not enjoy the constitutional protections against self-incrimination that individuals possess.⁸⁰ Corporate attorney-client privilege protects individual employees who confide in corporate counsel only as long as the corporation continues to invoke the privilege.⁸¹ Employees have no standing to object to a corporate waiver; a corporation has control over waiver since it has significant exposure for the acts of its employees.⁸²

In *Upjohn*,⁸³ the Supreme Court clarified the function of the attorney-client privilege in the corporate sphere. Before *Upjohn*, the circuits were split

73. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

74. *Id.*

75. *Trammel v. United States*, 445 U.S. 40, 47 (1980).

76. *Id.*

77. *Id.* at 50, *quoting* *United States v. Bryan*, 339 U.S. 323, 331 (1950).

78. *Id.*, *citing* *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

79. Advisory Comm. on Evidence Rules: Hearing on Proposal 502, 109th Cong., 26 (Apr. 24, 2006) (statement of James Robinson).

80. *Id.* Robinson identified the fact that corporate directors and investors have the benefit of doing business in the corporate vehicle, including limited liability. *Id.*

81. *Id.*

82. *Id.*

83. *Upjohn*, 449 U.S. at 386.

over the application of the attorney-client privilege in relation to corporations.⁸⁴ One approach, known as the “control group” test, privileged communications between corporate attorneys and executives who could participate in decisions regarding corporate legal matters.⁸⁵ Another approach, named the “subject matter” or “*Harper & Row*” test, privileged a communication if: 1) it was between a corporate attorney and an employee of the corporation; 2) the employee’s supervisor(s) directed the employee to make the communication; and 3) the subject matter of the communication involved the employee’s duties of his employment.⁸⁶ Before *Upjohn*, corporate attorneys either chose to interview lower-level employees and risked exposing that information to third parties for lack of privilege or chose not to interview lower-level employees and risked failing to uncover potential illegalities.⁸⁷ A major consideration in the Court’s decision was the fact that, since all employees can get a corporation into legal trouble, it is necessary for employees to have open lines of communication with corporate attorneys.⁸⁸ By ending the control group test and adopting the “subject matter test” in *Upjohn*, the Supreme Court ensured that corporate attorney-client privilege promotes compliance with the law and encourages self-policing.⁸⁹

Waiver of attorney-client privilege in corporate cases traditionally occurs when: 1) the party claiming privilege sought to use it in a way that is not consistent with the purpose of the privilege; 2) the party had no reasonable basis for believing that the documents would be kept confidential by the entity receiving the disclosure; and 3) waiver of the privilege would not hurt the policy elements inherent in the privilege.⁹⁰ Since evidentiary privileges are strictly construed, a party can easily waive its attorney-client privilege through an intentional, and sometimes an inadvertent, disclosure.

84. *Id.*

85. Weiss, *supra* note 20, at 504–05.

86. *Id.* at 505.

87. *Id.* at 507.

88. *Upjohn*, 449 U.S. at 391.

89. *Id.* at 392.

90. *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984). Some exceptions are allowed for disclosures that are necessary for obtaining legal advice, such as the assistance of the client’s doctor or agent of the client’s lawyer. *Westinghouse*, 951 F.2d at 1424.

B. Attorney Work Product Doctrine: Principles, Application, & Waiver

*Hickman v. Taylor*⁹¹ established the framework for the work product doctrine, which protects attorney work product from discovery in litigation.⁹² The “strong public policy” underlying the work product doctrine was reaffirmed in *United States v. Nobles*⁹³ and substantially incorporated into Fed. R. Civ. P. 26(b)(3).⁹⁴ Some elements of *Hickman* still control attorney work product not covered by Rule 26(b)(3).⁹⁵

In *Hickman*, the Supreme Court discussed the development of discovery techniques and the necessity of discovery.⁹⁶ The goal of discovery is to narrow and clarify the issues for trial or for settlement.⁹⁷ Primarily, discovery techniques, such as depositions and interrogatories, help parties ascertain facts about the case so that trials are not an exercise in surprise and are not conducted with parties “in the dark.”⁹⁸ Through discovery, “[c]onsistent with recognized privileges,” parties can “obtain the fullest possible knowledge of the issues and facts before trial.”⁹⁹

The tools of discovery, interrogatories in particular, are designed to extract information from the other party, not their lawyer.¹⁰⁰ Since a lawyer’s memoranda, statements taken, and mental impressions are not protected by attorney-client privilege, the Court in *Hickman* determined that it needed to protect those items from discovery.¹⁰¹

Historically, lawyers worked in private, and privacy has been deemed an essential facet of the adversary system.¹⁰² While the facts of the case are public domain, “inefficiency, unfairness and sharp practices would develop in the giving of legal advice and in the preparation of cases for trial” if attorney work product was discoverable.¹⁰³ Therefore, the Court created the work product doctrine to protect attorney work product fabricated in

91. 329 U.S. 495 (1947).

92. Fed. R. Civ. P. 26(b)(3).

93. 422 U.S. 225, 236–40 (1975).

94. *Upjohn*, 449 U.S. at 398, quoting *Nobles*, 422 U.S. at 236–40.

95. *In re Seagate Tech*, 497 F.3d 1360, 1376 (Fed. Cir. 2007).

96. *Hickman*, 329 U.S. at 500–01.

97. *Id.* at 501.

98. *Id.*

99. *Id.*

100. *Id.* at 504.

101. *Id.* at 508.

102. *Id.* at 510–11.

103. *Id.* at 511.

anticipation of litigation from discovery.¹⁰⁴ With the burden of proof on the party seeking discovery, Fed. R. Civ. P. 26(b)(3) limits that doctrine's application to items that could not be obtained without undue hardship, information that is inaccessible, or if the circumstances would place an unjust burden on the party seeking the information. Consequently, the protection of the work product doctrine is not absolute.

The scope and application of the work product doctrine, just like attorney-client privilege, is left to courts to determine, especially in applying both Fed. R. Civ. P. 26(b)(3) and *Hickman* as a two-pronged protection of attorney work product. The following case discusses waiver of work product protection.

The D.C. Circuit faced a unique waiver problem in *United States v. AT&T*.¹⁰⁵ The court first found that MCI had a right to intervene in litigation between AT&T and the government.¹⁰⁶ MCI sought intervention to stop the government from delivering to AT&T information protected by the work product doctrine that MCI gave to the government in an earlier investigation.¹⁰⁷ The documents were considered work product because MCI prepared the documents in anticipation of its antitrust lawsuit against AT&T.¹⁰⁸ Since MCI was admitted as a party to the litigation between the government and AT&T, it could assert work product protection.¹⁰⁹

The issue of whether a disclosure of work product to a party in a related litigation constitutes a waiver of protection to all parties in the litigation initially turned on the issue of "common interests."¹¹⁰ If parties share a common interest in the litigation or are co-parties and their fates in the litigation may turn on the success or failure of the other party, then those parties may share materials traditionally protected by the work product doctrine without waiving that privilege, typically under a joint defense agreement.¹¹¹ After all, the purpose of work product protection is to prevent adversaries, not the world, from obtaining sensitive material.¹¹² However, if a disclosure is inconsistent with the purpose of maintaining secrecy from an opposing party or if a disclosure substantially increases the risk that an

104. *Id.* at 512.

105. 642 F.2d 1285 (D.C. Cir. 1980).

106. *Id.* at 1296.

107. *Id.* at 1287.

108. *Id.* at 1298.

109. *Id.* at 1297.

110. *Id.* at 1298.

111. *Id.*

112. *Id.* at 1298–99.

opposing party will obtain the information, then the protection is waived.¹¹³ Therefore, unlike a waiver in the case of attorney-client privilege, voluntary disclosure of material protected by work product doctrine typically will not lead to a waiver of the privilege as to all parties.¹¹⁴

Since the court did not constrict “common interests” in the litigation to co-parties, and since MCI and the government shared a common interest in their antitrust suits against AT&T, the court held that MCI’s disclosures to the government did not constitute a waiver of work product protection.¹¹⁵ The standard for waiver of attorney work product is not the same in all circuits, but *MCI* expounded the basic principles for waiver of work product protection.

IV. THE DEVELOPMENT OF THE SELECTIVE WAIVER DOCTRINE

Selective waiver first appeared in federal courts in the late 1970’s, but garnered little support thereafter. Below is a non-exhaustive, chronological survey of the doctrine’s reception at the federal and state levels, mostly hitting the highlights. More importantly, these cases illustrate typical examples of corporate fraud, agency investigations, third-party suits, and privilege waiver issues.

A. Origin of Selective Waiver in the Eighth Circuit

The selective waiver doctrine originated in the Eighth Circuit.¹¹⁶ In *Diversified Industries, Inc. v. Meredith*, in a rehearing en banc, the court found that materials protected by both attorney-client privilege and the work product doctrine do not lose their protection from discovery after disclosure to a government agency.¹¹⁷ The underlying suit involved two companies, Diversified and Weatherhead, who formerly had a business relationship, under which Weatherhead purchased copper from Diversified.¹¹⁸ In 1974 and 1975, Diversified became embroiled in two lawsuits in federal court.¹¹⁹ The lawsuits revealed that Diversified might have created a “slush fund” that it used to bribe purchasing agents of other companies, including Weatherhead; the fund

113. *Id.* at 1299.

114. *Id.*

115. *Id.* at 1300–01.

116. *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978).

117. *Id.* at 611.

118. *Id.* at 600.

119. *Id.*

was also used for other unlawful purposes.¹²⁰ That information attracted the attention of the SEC, who investigated Diversified and later filed suit for an injunction against the company.¹²¹

Weatherhead sued Diversified in federal district court for unlawful conspiracy between Diversified and its own employees, tortious interference with contractual relationships, and violation of the Clayton Antitrust Act.¹²² During the discovery phase, Weatherhead sought many documents from Diversified that would normally be protected by attorney-client privilege and the work product doctrine.¹²³

The prior litigation involving Diversified settled before the SEC's involvement.¹²⁴ Shortly thereafter, Diversified's board of directors initiated an investigation into the company's business practices.¹²⁵ In early 1975, Diversified employed outside counsel to lead its internal investigation and report its findings to the board.¹²⁶ The law firm was not retained to represent Diversified in future litigation, but solely employed to investigate potential misconduct within the company.¹²⁷

The internal investigation generated reports that contained information about past employee behavior that would be useful if turned over to an opposing party, but would normally be protected by attorney-client privilege and possibly the work product doctrine.¹²⁸ When the SEC investigated Diversified's activities in the copper market, Diversified gave the reports prepared by outside counsel to the SEC pursuant to a subpoena.¹²⁹ Weatherhead sought production of the same documents, relying on the traditional rule that once a client waives attorney-client privilege to one party, it waives the privilege to all entities on that issue.¹³⁰

Since Diversified disclosed the documents "in a separate and nonpublic SEC investigation," the Eighth Circuit concluded that "only a limited waiver of [attorney-client] privilege occurred."¹³¹ The court reasoned that a waiver of

120. *Id.*

121. *Id.* A consent decree was entered in late 1976. *Id.*

122. *Id.*

123. *Id.* at 600–01.

124. *Id.* at 600.

125. *Id.*

126. *Id.*

127. *Id.*

128. *See id.* at 601.

129. *Id.* at 611.

130. *See id.* at 599.

131. *Id.* at 611.

the privilege following a release to a government agency would deter corporations from hiring “independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.”¹³² The “limited waiver” doctrine announced by the Eighth Circuit in *Diversified* is now commonly termed “selective waiver.”¹³³ As shown in the next section, the Eighth Circuit blazed a path that few circuits have followed.

B. Reaction against Selective Waiver in the Circuits

*1. D.C. Circuit in Permian*¹³⁴

The D.C. Circuit fired the first salvo at the selective waiver doctrine in *Permian v. United States*. The case concerned litigation between Occidental Petroleum Corporation and Mead Corporation over Occidental’s proposed exchange offer for shares of Mead.¹³⁵ Mead opposed the proposal and sued Occidental.¹³⁶ The litigation involved the production of millions of documents pursuant to discovery requests and multiple claims of privilege and confidentiality.¹³⁷

Meanwhile, Occidental was under an informal investigation by the SEC, which inquired into the legitimacy of Occidental’s registration statement for the exchange offer.¹³⁸ Occidental released 1.2 million pages of documents to the SEC, which negotiated with Occidental to obtain previously discovered and organized documents that Mead had obtained from Occidental.¹³⁹ Pursuant to a confidentiality agreement, Occidental allowed the SEC to obtain certain privileged documents.¹⁴⁰ Mead gave the thirty-six documents in issue to the SEC with Occidental’s knowledge.¹⁴¹ Shortly thereafter, the Department of Energy (the “DOE”) sought documents from the SEC for use in its investigation against Permian, a subsidiary of Occidental.¹⁴² Occidental

132. *Id.*

133. *See Westinghouse*, 951 F.2d at 1423 n.7 (stating that “limited” can either mean “partial” or “selective,” which are disparate concepts of waiver and that “selective waiver” is the most appropriate nomenclature).

134. *Permian v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

135. *Id.* at 1215.

136. *Id.*

137. *Id.*

138. *Id.* at 1216.

139. *Id.*

140. *Id.*

141. *Id.* at 1217.

142. *Id.*

objected, claiming that its confidentiality agreement with the SEC protected its privileged information, but the SEC communicated its intention to transmit the documents to the DOE and the main litigation commenced.¹⁴³

At the outset, the D.C. Circuit based its analysis on the principle that the “legal significance” of a corporation’s “arrangements for the question of waiver depends on the nature of the privilege asserted.”¹⁴⁴ While courts traditionally hold a “strict standard of waiver in the attorney-client privilege context,” courts often utilize a “more liberal standard” of waiver for attorney work product.¹⁴⁵ Accordingly, the court held that Occidental waived its attorney-client privilege when it sent documents to the SEC that would have been protected by attorney-client privilege.¹⁴⁶

Citing the Fourth Circuit,¹⁴⁷ the D.C. Circuit rejected Occidental’s request that it apply the selective waiver rationale of *Diversified*.¹⁴⁸ The court stated that selective waiver would not further the purpose of attorney-client privilege of keeping confidentiality between attorney and client.¹⁴⁹ Moreover, although cooperation with the government is laudable, attorney-client privilege should not be a “tool for selective disclosure” since it already inhibits the “truth-finding process.”¹⁵⁰ A client should not be able to “pick and choose” among his enemies for selective disclosure of privileged information when it suits him.¹⁵¹ Occidental willingly surrendered the privilege in order to expedite the SEC’s approval of the exchange offer, and, in doing so, knowingly risked waiving the privilege.¹⁵² Accordingly, the court held that Occidental could not prevent the sharing of the formerly privileged information between the SEC and the DOE.¹⁵³

On the issue of work product, the court determined that Occidental had not waived its protection since the district court’s finding that the work product was protected under a confidentiality agreement was not clearly erroneous.¹⁵⁴ Later, the D.C. Circuit held that a corporation could waive its

143. *Id.*

144. *Id.* at 1219.

145. *Id.*

146. *Id.*

147. *In re Weiss*, 596 F.2d 1185 (4th Cir. 1979).

148. *Permian*, 665 F.2d at 1220.

149. *Id.*

150. *Id.* at 1221.

151. *Id.*

152. *Id.*

153. *Id.* at 1222.

154. *Id.*

work product protection by disclosing documents to a government agency in exchange for leniency.¹⁵⁵ Oddly, the Eighth Circuit, which fashioned selective waiver in the context of attorney-client privilege, concurred with the D.C. Circuit's conclusion on disclosures of attorney work product.¹⁵⁶ Since a purported "common interest" in a settlement does not neutralize the act of disclosure between adversaries, the Eighth Circuit held that parties who disclose work product to adversaries in settlement negotiations waive work product protection.¹⁵⁷

2. *Second Circuit in John Doe Corp.*¹⁵⁸

The Second Circuit also rejected the selective waiver doctrine in the context of attorney-client privilege disclosures.¹⁵⁹ The attorney-client privilege is an exception to the duty of citizens to reveal relevant evidence in litigations, but it does not shield communications serving purposes other than those that are judicially recognized.¹⁶⁰ Once a corporation releases information for commercial purposes, no matter what the economic ramifications, the privilege is lost, regardless of voluntariness, because the "need for confidentiality served by the privilege is inconsistent" with divulgence.¹⁶¹ Like the D.C. Circuit in *Permian*, the Second Circuit revolted at the idea that clients could pick and choose among their adversaries for disclosures of privileged information.¹⁶²

3. *D.C. Cir. in Subpoena Duces Tecum*

Reaching the question again in 1984, the D.C. Circuit steadfastly held that a corporation waived its attorney-client privilege by producing documents to the SEC in response to the SEC's Voluntary Disclosure Program, discussed *supra* § II.B.1.¹⁶³

155. See *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982).

156. See *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844 (8th Cir. 1988).

157. *Id.* at 846.

158. *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982).

159. *Id.* at 489.

160. *Id.*

161. *Id.*

162. *Id.* (noting a particular distaste for such selective disclosures when no confidentiality agreement is in place between the disclosing party and the government).

163. *Subpoena Duces Tecum*, 738 F.2d at 1370. Initiated in the 1970's, the Voluntary Disclosure

The D.C. Appeals Court found that a waiver of attorney-client privilege is caused by three factors: 1) the party claiming privilege sought to use it in a way that is not consistent with the purpose of the privilege; 2) the party had no reasonable basis for believing that the documents would be kept confidential by the entity receiving the disclosure; and 3) waiver of the privilege would not hurt the policy elements inherent in the privilege.¹⁶⁴ The court articulated that, if a corporation were allowed to selectively disclose privileged information, it would gain a “double advantage” from the privilege—garnering both leniency from a government agency and protection against a third-party litigant.¹⁶⁵ When a corporation discloses privileged information to an agency, for instance the SEC under its Voluntary Disclosure Program, the corporation makes a calculated judgment that the advantage gained by disclosing to the SEC is greater than the loss caused by waiving the privilege for private litigants.¹⁶⁶

As for the work product doctrine, the D.C. Court in *Subpoena Duces Tecum* held that the corporation had also waived its privilege.¹⁶⁷ When a corporation is under investigation by the SEC, it is an adversary of the agency.¹⁶⁸ Moreover, it would be unreasonable for a corporation to fail to anticipate suits by third parties following an SEC investigation.¹⁶⁹ Additionally, it must be noted that in this case, as in many cases, the government agency did not guarantee confidentiality.¹⁷⁰ Therefore, it is inconsistent and unfair to allow selective waiver of work product protection. Finally, the D.C. Circuit added that if the SEC or Congress wants selective waiver to apply to privileged information in government investigations, then those entities should promulgate regulations or enact legislation to that effect.¹⁷¹

Program provided corporations the chance to avoid formal investigation and litigation in return for self-investigation and complete disclosure to the SEC. *Id.*

164. *Id.* at 1372.

165. *Id.*

166. *Id.* (citing *Sealed Case*, 676 F.2d at 822–23).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1373.

171. *Id.* at 1374.

4. *Fourth Circuit in Martin Marietta*¹⁷²

The Fourth Circuit muddled the waters of privilege in 1988 in case that involved disclosures by a corporation to the Department of Defense and the United States Attorney's Office while they were the corporation's adversaries.¹⁷³ The court refused to apply selective waiver to documents formerly protected by attorney-client privilege that Martin Marietta released to government agencies.¹⁷⁴ However, the Fourth Circuit's discussion of work product doctrine postulated a new formulation of its protections.

The Fourth Circuit held that Martin Marietta waived its work product protection for all non-opinion work product on the same subject matter when it divulged certain documents to the government since the agencies were its adversaries.¹⁷⁵ On the other hand, the court held that opinion work product would remain protected against discovery from third parties since: 1) opinion work product gets great protection; and 2) the underlying rationale for the doctrine of subject matter waiver has little application to the context of a pure expression of a legal theory or legal opinion.¹⁷⁶ The differences arise from the fact that there is little risk that a lawyer's theory or opinion will be used as a sword and shield to distort the fact-finding process—dissimilar to selective disclosure of non-opinion work product and especially unlike the dissemination of information guarded by attorney-client privilege.¹⁷⁷ The Fourth Circuit supported its holding that selective waiver only applied to opinion work product by citing Fed. R. Civ. P. 26(b)(3), which recognizes a distinction between opinion and non-opinion work product.¹⁷⁸

5. *Third Circuit in Westinghouse*

The most influential early case against the application of selective waiver in the corporate setting is *Westinghouse*. The Third Circuit first examined the application of waiver to the attorney-client privilege, and found that, once a client reveals information to a third party, the basic justification for the privilege no longer applies.¹⁷⁹ Exceptions are recognized when disclosures are

172. *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988).

173. *Id.* at 625.

174. *Id.* at 623.

175. *Id.* at 625.

176. *Id.* at 626.

177. *Id.*

178. *Id.* at 626 n.2.

179. *Westinghouse*, 951 F.2d at 1424.

necessary for obtaining legal advice, e.g. to a doctor, agent of the lawyer, or co-litigant, but a strict standard of waiver is applied when the information is given to adversaries and other third parties.¹⁸⁰

Westinghouse argued for selective waiver for corporations who disclose privileged information to government agencies, but the Third Circuit rejected this request, stating that selective waiver has little to do with assisting a client in obtaining legal advice.¹⁸¹ Although the Third Circuit did not find the “pick and choose”¹⁸² rationale or fairness argument of *Permian* convincing, the court agreed that selective waiver would take the privilege beyond its purpose of encouraging open communications between lawyer and client.¹⁸³

The Third Circuit noted that the Supreme Court has been reluctant to recognize a privilege where Congress has considered the policies, but rejected the privilege.¹⁸⁴ Previously, the SEC proposed and Congress rejected an amendment of the 1934 Securities Exchange Act that would establish selective waiver for disclosures to the government.¹⁸⁵ However, even if the privilege aided government investigations, the privilege must “promote . . . sufficiently important interests to outweigh the need for probative evidence.”¹⁸⁶

Weighing those considerations, the Third Circuit held that the need for probative evidence outweighed the governmental interest asserted by Westinghouse.¹⁸⁷ Westinghouse argued that public interest would be served by promoting corporate cooperation with government agencies and that this could be accomplished best through selective waiver.¹⁸⁸ However, the court decided that there was no need to encourage corporations to cooperate with the government since Westinghouse itself chose to cooperate by disclosing privileged materials without expecting protection from selective waiver.¹⁸⁹

The Third Circuit commented that selective waiver, if applied in cases of privileged disclosures to government agencies, might violate the Freedom of Information Act.¹⁹⁰ On a related issue, the court declared that a confidentiality

180. *Id.*

181. *Id.*

182. *Id.* at 1425; *Martin Marietta Corp.*, 856 F.2d at 626 (others have termed this the “sword and shield” technique of tactical disclosure).

183. *Westinghouse*, 951 F.2d at 1425.

184. *Id.* at 1425 (citing *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990)).

185. *Id.* at 1425.

186. *Id.* at 1425 (quoting *United States v. Trammel*, 445 U.S. 40, 50 (1980)).

187. *Id.* at 1425–26.

188. *Id.* at 1426.

189. *Id.*

190. 5 U.S.C. § 522; *Westinghouse*, 951 F.2d at 1426 n.10 (citing Beth S. Dorris, *The Limited Waiver Rule: Creation of an SEC-Corporation Privilege*, 36 STAN. L. REV. 789, 806–13 (Feb. 1984)).

agreement would not protect a party from waiving its privilege in disclosing documents to the government.¹⁹¹ The court found that corporations do not have a reasonable expectation of confidentiality and that agency regulations, which demand confidentiality during investigations, require documents to be circulated on request (if publication is not contrary to public interest).¹⁹² Consequently, the Third Circuit held that a corporation waives its attorney-client privilege as to third parties when it discloses privileged documents during a federal investigation.¹⁹³

As for the work product doctrine, the Third Circuit recognized the differing applications of waiver in disclosures made to adversaries and disclosures made to co-litigants.¹⁹⁴ Since Westinghouse was the target of multiple federal investigations, it clearly disclosed protected documents to adversaries when it sent information to the DOJ and the SEC.¹⁹⁵ Commensurately, the court held that a disclosure of work product to one adversary constituted a waiver of the doctrine's protection against all adversaries.¹⁹⁶ The court based its decision on the principle that evidentiary privileges are to be strictly construed.¹⁹⁷ Moreover, since the work product doctrine recognizes qualified protection and can be overcome by a showing of substantial need or hardship,¹⁹⁸ unlike attorney-client privilege, which gives absolute protection, the waiver test for work product doctrine cannot be more stringent than for attorney-client privilege.¹⁹⁹ The court feared that independent outside counsel retained by a corporation for an internal investigation might not fully investigate allegations of malfeasance if they know that their work will always be disclosed to agencies to obtain leniency.²⁰⁰ Accordingly, the Third Circuit held that a voluntary disclosure of

191. *Id.* at 1426–27.

192. *Id.* at 1427.

193. *Id.*

194. *Id.* at 1428.

195. *Id.*

196. *Id.* at 1429.

197. *Id.*

198. *Id.*

199. *Id.* at 1431 n.17 (noting the divergence in the philosophy between the Third Circuit and other courts, which differ in their comparisons of privileges in terms of which is easier to waive). *See, e.g.,* *United States v. Massachusetts Inst. Tech.*, 129 F.3d 681, 687 (1st Cir. 1997).

200. *Westinghouse*, 951 F.2d at 1429–30. This reflects the holding of *Hickman*, which attempted to eliminate the potential for sharp practices and feared that lawyers might become witnesses against their clients if their work product were admitted into evidence.

attorney work product to an adversary constitutes a full waiver of work product protection.²⁰¹

6. *Second Circuit in Steinhardt*²⁰²

In 1993, the Second Circuit finally reached the issue of selective waiver of attorney work product.²⁰³ In *Steinhardt*, Steinhardt Partners made voluntary disclosures of attorney work product to the SEC during an investigation.²⁰⁴ The Second Circuit held that Steinhardt and the SEC were adversaries at the time of the disclosure; therefore, Steinhardt waived its work product protection.²⁰⁵ The court limited its holding to the facts of the case, but noted the persuasive reasons against selective waiver.²⁰⁶

The Second Circuit agreed with other federal courts that a corporation makes voluntary disclosures to the SEC and other agencies because it believes that it can profit from those disclosures.²⁰⁷ To support that idea, the court cited an amicus brief submitted by the SEC that stated that selective waiver is not necessary for cooperation since many corporations cooperate without selective waiver.²⁰⁸ In addition, a corporation has incentive, based on leniency of treatment, to cooperate with the government regardless of whether a third party can get access to the documents through discovery in a later litigation.²⁰⁹ Therefore, it is up to an investigated company to decide if the benefits outweigh the risks of giving attorney work product to government agencies.²¹⁰

7. *Federal Circuit and First Circuit*

Latecomers to the selective waiver discussion included the Federal Circuit and the First Circuit. The Federal Circuit held that once attorney-client privilege is waived, it is “waived for all purposes and in all forums.”²¹¹

201. *Id.* at 1431.

202. *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993).

203. *Id.* at 232.

204. *Id.* at 236.

205. *Id.*

206. *Id.*

207. *Id.* at 235–36 (citing James D. Cox, *Insider Trading Regulation and the Production of Evidence*, 64 WASH. U. L.Q. 421 (1986) (“analyzing market incentives for disclosure of positive and negative information”)).

208. *Id.* at 236.

209. *Id.*

210. *Id.*

211. *Genentech, Inc. v. USITC*, 122 F.3d 1409, 1416 (Fed. Cir. 1997).

Similarly, the First Circuit refused to apply selective waiver based on a policy that predictability and ease of administration of cases comes with complete and non-selective waiver.²¹² The First Circuit preferred to leave the adoption of selective waiver to Congress since government agencies are supported in their need for cooperation by the legislative branch, while the courts protect client privileges.²¹³ Therefore, a corporation makes a foreseeable gamble when it chooses to disclose privileged information to a federal agency.²¹⁴

Unlike other circuits, the First Circuit determined that it is harder to waive work product protection than attorney-client privilege since work product protection is waived only when information is disclosed to adversaries.²¹⁵ Another rationale for this difference in treatment of waivers is the fact that attorney-client privilege protects its information absolutely, while attorney work product is discoverable upon a showing of need under Fed. R. Civ. P. 26(b)(3).²¹⁶ Nevertheless, the First Circuit found that the defendant waived its work product protection when it gave documents to an adversarial governmental agency.²¹⁷

8. *Sixth Circuit in Columbia/HCA*²¹⁸

Addressing the issue of attorney-client privilege waiver, the Sixth Circuit rejected the selective waiver doctrine for privileged documents released to the DOJ by Columbia/HCA.²¹⁹ The court reasoned that third-party litigants stand in the same position as the government in the truth-finding process and that the government should not benefit from selective waiver in a way that inhibits the truth-finding process.²²⁰ Furthermore, the government should not inhibit the truth-finding process by hiding illegalities, especially when it is the government's responsibility to root out corporate misdeeds—not enter into confidentiality agreements and give leniency to fraudulent actors.²²¹ Even if

212. *M.I.T.*, 129 F.3d at 685.

213. *Id.*

214. *Id.* at 686.

215. *Id.* at 687.

216. *Id.*

217. *Id.* at 687–88. The court limited the waiver to the actual documents produced and did not address the question of whether the waiver extended to all related documents. *Id.*

218. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002).

219. *Id.* at 302.

220. *Id.* at 303.

221. *Id.*

the government has limited resources and time, it can still obtain the information by other means.²²²

Upon reaching the issue of work product waiver, the Sixth Circuit reached the same conclusion as the Eighth Circuit in *Chrysler*, holding that Columbia/HCA waived its attorney work product protection by transmitting documents to the DOJ.²²³ The court noted that other than the requirement of disclosure to an adversary, the rationale for finding a waiver of attorney work product differed little from the reasons supporting a waiver of attorney-client privilege.²²⁴

9. Tenth Circuit in *Qwest*²²⁵

Today, the seminal case against selective waiver is *Qwest* since it came after the Enron and WorldCom debacles, which renewed the fervor for selective waiver.²²⁶ *Qwest* again addressed the issue of whether a corporation waived attorney-client and work product privileges as to third-party civil litigants by disclosing privileged documents to federal agencies during an investigation.²²⁷

The DOJ and the SEC began investigating Qwest's "business practices" in 2002.²²⁸ Qwest submitted documents under a subpoena and a written confidentiality agreement with each agency.²²⁹ Overall, Qwest produced 220,000 pages of documents protected by attorney-client privilege and work product doctrine, but chose not to produce another 390,000 pages of other privileged papers.²³⁰ The Tenth Circuit christened this a perfect example of a corporation utilizing its privileges as a sword and shield, not only picking and choosing between adversaries as to which would receive privileged

222. *Id.*

223. *Id.* at 305–06.

224. *Id.*

225. *In re Qwest Comm. Int'l, Inc., Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006).

226. David R. Wolfe, *The Future of Selective Waiver of Attorney-Client Privilege and Work-Product Protection After Qwest*, 46 WASHBURN L.J. 479, 496. Wolfe's assessment of why selective waiver did not meet the requirements of *Jaffe v. Redmond*, 518 U.S. 1 (1996), is accurate. *Id.* However, I disagree with Wolfe's suggestions that the Tenth Circuit ignored the recent scandals of the late twentieth century and the aught years of the twenty-first century, and that public interest would be better served by granting selective waiver to corporations that were under assault by securities regulators. *Id.* at 496–98.

227. *Qwest*, 450 F.3d at 1181.

228. *Id.*

229. *Id.* The Tenth Circuit noted that Qwest refused to disclose most documents unless it was required to do so, but that all disclosures by Qwest during the investigation were voluntary. *Id.* at 1181 n.1.

230. *Id.* at 1181.

documents, but also cherry picking the documents for which it waived privilege.²³¹

Prior to the investigations, several private suits were initiated against Qwest, and more suits were brought after the investigations began.²³² In the civil suits, Qwest produced millions of pages of documents during discovery, but refused to surrender any privileged documents, claiming that the information remained protected.²³³ Several litigants sought to compel production, and their motions were granted when the district court found that Qwest waived its privileges by submitting the documents to the DOJ and the SEC.²³⁴ On appeal, the Tenth Circuit upheld the decision of the district court.²³⁵

After rehashing the history of the attorney-client privilege and work product doctrine, the Tenth Circuit addressed the arguments of Qwest.²³⁶ The court sensed that Qwest was not asking for an extension or amendment of old privileges, but perhaps a grant of an entirely new privilege—a corporate-government privilege.²³⁷ Qwest claimed that selective waiver is necessary for a corporation to cooperate confidently and openly with the government.²³⁸ The Tenth Circuit rejected this suggestion, admonishing that Qwest, like Westinghouse before it, cooperated in the face of an overwhelming lack of support for selective waiver in state courts²³⁹ and the federal circuits.²⁴⁰ Moreover, the DOJ did not support Qwest's assertion that selective waiver is necessary for corporate cooperation, citing years of investigations without assurances of privilege for investigated corporations.²⁴¹

While the Tenth Circuit acknowledged that some federal circuits hold that confidentiality agreements tip the scale in favor of selective waiver and that Qwest had one in place with each administrative agency, the court concluded that confidentiality agreements hardly restrict the government's use of

231. *Id.* at 1196.

232. *Id.* at 1182.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 1184–90. This section of the case includes a brief summary of the cases encountered in other circuits.

237. *Id.* at 1192. *See McNally, supra* note 6, at 861–70, for an argument proposing a new privilege. Ostensibly, selective waiver could be construed as a new privilege and not simply a protection of traditional corporate privilege rules.

238. *Qwest*, 450 F.3d at 1193.

239. *Id.* at 1196–97.

240. *Id.* at 1193.

241. *Id.*

surrendered documents.²⁴² Often, documents are passed between agencies to facilitate investigations.²⁴³ Moreover, the court recognized that the government frequently shares its findings with third parties.²⁴⁴ In response, Qwest seemed to suggest that the onus for protection of privileged information rests with the DOJ and the SEC once confidentiality agreements are consummated.²⁴⁵ The Tenth Circuit gave no credence to this theory, finding it unfair to require an agency to comb through 220,000 pages and cull information to ensure that privileged information does not leave the confines of an enforcement office.²⁴⁶ After all, if corporate cooperation (stimulated by a guarantee of selective waiver) is supposed to decrease the time and expense of investigations for the government, then it would be counterproductive and counterintuitive to allow a corporation to inundate an agency with documents and leave the duty of redacting privileged information to the government.

The greatest problems that Qwest had in trying to convince the Tenth Circuit to adopt selective waiver arose from the fact that Qwest's situation did not present facts that suggested any iniquity fell on Qwest for its waiver of privileges. As stated above, Qwest hedged its bets by selectively disclosing privileged documents to the government and not releasing another 170,000 protected documents.²⁴⁷ Furthermore, although Qwest decried the practices of the DOJ and the SEC pursuant to their enforcement guidelines, there were no facts to suggest that either agency coerced Qwest into surrendering privileged documents, magnified by the fact that Qwest exchanged those documents for lenient treatment from the agencies.²⁴⁸ Since Qwest entered into a *quid pro quo* with the agencies and received value for its disclosures, the Tenth Circuit rejected Qwest's claim that it faced a Hobson's Choice when it was investigated.²⁴⁹

In general, the climate of corporate law in 2006 provided no support to Qwest's request for selective waiver.²⁵⁰ The Tenth Circuit decided to leave the

242. *Id.* at 1194.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 1196.

248. *Id.* at 1199 & n.9.

249. *Id.* at 1200. The Tenth Circuit noted that the Supreme Court rejected this type of argument in support of a "journalist's privilege" in *Branzburg v. Hayes*, 408 U.S. 665 (1972). *Id.* A Hobson's Choice is a situation in which only one option is offered, and one may take it or leave it. *Id.*

250. No state legislature supported selective waiver in 2006. *Id.* at 1199. Congress already rejected a proposal for selective waiver in 1984. *Id.* at 1198.

decision of adding selective waiver to the list of corporate privileges to Congress, noting that the Advisory Committee on Evidence Rules already proposed FRE 502 at that juncture.²⁵¹

C. Reception of Selective Waiver in State Courts

State courts typically refuse to follow the selective waiver doctrine.²⁵² Nolan Mitchell wrote an interesting article comparing how multiple state courts treated the same defendant corporation under the same set of facts—a corporation disclosed privileged information to a federal agency and third-party litigants, suing in several states, sought discovery of those materials.²⁵³ Each state court rejected the doctrine of selective waiver in its application to attorney-client privilege when it encountered its *McKesson-HBOC* case.²⁵⁴ However, interesting dissimilarities in treatment of selective waiver arose in the work product context.²⁵⁵ California and Georgia rejected selective waiver overall, while Delaware allowed selective waiver for work product.²⁵⁶

In 2004, a California appeals court rejected selective waiver protection for both attorney-client privilege and work product doctrine.²⁵⁷ Years earlier, while in the midst of a merger, McKesson discovered that its auditors uncovered improper corporate activities.²⁵⁸ The discovery led to shareholder lawsuits and investigations by the SEC and the U.S. Attorney's Office (the "USAO").²⁵⁹ Internal investigations produced several reports that the corporation shared with the SEC pursuant to a confidentiality agreement.²⁶⁰ McKesson believed that it had a common interest with the government in rooting out wrongdoings.²⁶¹

251. *Id.* at 1200.

252. *See id.* at 1196–97 (listing state cases denying selective waiver).

253. Nolan Mitchell, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power over State Courts*, 86 B.U. L. REV. 691, 717 (2006).

254. *Id.* at 721–22 (citing *McKesson HBOC, Inc. v. Superior Court of San Francisco County*, 115 Cal. App. 4th 1229 (Cal. Ct. App. 2004)).

255. *Id.* at 722.

256. *Id.*

257. *McKesson HBOC*, 115 Cal. App. 4th at 1236, 1241.

258. *Id.* at 1233.

259. *Id.*

260. *Id.* The agreements purportedly were meant to preserve both attorney-client privilege and work product doctrine. *Id.* at 1234.

261. *Id.* at 1234.

The SEC took no action against McKesson; meanwhile, the USAO filed criminal charges against several former HBOC executives.²⁶² Several civil actions were consolidated into a single case;²⁶³ meanwhile, a multiplicity of cases continued in other states. The private litigants motioned to compel production of the internal investigation reports that McKesson turned over to the government.²⁶⁴ The trial court granted the motions and the appellate court affirmed.²⁶⁵

The California appellate court quickly dismissed McKesson's claim that its attorney-client privilege had not been waived, finding that McKesson had no common interest with the agencies and that its disclosures were not necessary for its attorneys to provide sound legal advice, as would be in the case of an individual sharing privileged information with a doctor.²⁶⁶ Additionally, the court was persuaded by the argument that it is unfair for a defendant to pick and choose among its enemies.²⁶⁷ As for work product, the California court found the confidentiality agreements unenforceable and superfluous since the government had an interest in enforcement, not confidentiality.²⁶⁸

McKesson's work product protection claims received the same treatment in Georgia. In *McKesson Corp. v. Green*,²⁶⁹ the Georgia Supreme Court held that the objectives of stalling prosecution or hoping to obtain leniency from an agency are foreign to the doctrine of work product protection. Moreover, waiver does not hurt the doctrine since attorneys can still prepare cases in confidence as long as clients and lawyers do not turn over their documents.²⁷⁰ By upholding selective waiver, outside counsel will know in advance that their work will be surrendered, which means that sharp practices, which the doctrine strives to eliminate, will develop.²⁷¹ Therefore, preserving waiver protection while disclosing attorney work product to the government actually discourages attorneys from fully preparing cases.²⁷² Georgia's Supreme Court also refused to recognize the efficacy of confidentiality agreements, which are

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 1236–37.

267. *Id.* at 1237.

268. *Id.* at 1239–40.

269. 610 S.E.2d 54, 56 (Ga. 2005).

270. *Id.* at 56–57.

271. *Id.* at 57.

272. *Id.*

“far from airtight” since agencies can turn over documents if it is in the furtherance of their duties and responsibilities.²⁷³

As the *McKesson* cases demonstrate, for selective waiver to have uniform application in all courts, thereby buttressing the utility of the doctrine, Congress would have to enact a rule that preempts federal and state decisions on corporate privilege waiver.

By 2006, hope was all but lost for a nationwide adoption of selective waiver for in federal and state courts. Consequently, the battle shifted fields from the courts to commentary and, finally, legislative proposals.

V. THE PROPOSAL FOR NEW FEDERAL RULE OF EVIDENCE 502²⁷⁴

Even though courts have nearly foreclosed any chance for the adoption of selective waiver, the doctrine has survived in commentary for decades. The imbroglio of fraudulent corporate activity in the late 1990's and early 2000's related to Enron, Adelphia, and WorldCom led to the creation of the Sarbanes-Oxley Act of 2002,²⁷⁵ which Congress designed to increase corporate responsibility and ensure the accuracy of public financial disclosures.²⁷⁶ Additionally, the act established the Public Company Accounting Oversight Board to fulfill purpose.²⁷⁷ Following Sarbanes-Oxley's enactment, innumerable commentators published articles in journals and posted arguments on weblogs calling for the implementation of a nationwide selective waiver rule. Those authors believe that selective waiver would increase corporate reporting and remove any roadblocks for federal investigators who sought privileged items that might contain revealing material, such as internal investigation reports. The fervor blinded many to the fact that selective waiver might, in the end, benefit the corporations that committed the illegal acts more so than the investor public, government agencies, and third-party litigants.

These next sections track the development of FRE 502 and provide a reason for the failure of FRE 502(c) to garner a recommendation for enactment.

273. *Id.*

274. FED. R. EVID. § 502 advisory committee's comment hearing (Arizona 2007); FED. R. EVID. 502 advisory committee's comment hearing (New York 2007).

275. Public Company Accounting Reform and Corporate Responsibility Act, 15 U.S.C. § 7201 *et seq.* (2002).

276. 15 U.S.C. §§ 7241–46 & 7261–66 (2002).

277. 15 U.S.C. § 7211 (2002).

A. A Short History of Proposed New Federal Rule of Evidence 502

The Advisory Committee on Evidence Rules met on April 24 and 25, 2006 at Fordham Law School in New York City to entertain a proposed amendment to the Federal Rules of Evidence.²⁷⁸ The action item was Proposed Rule 502 on Waiver of Attorney Client Privilege.²⁷⁹

Drawing on years of dissatisfaction with the time, expense,²⁸⁰ and effort demanded by complying with discovery requests, particularly in protecting privileged information, the Committee sought to draft a rule to alleviate the burdens of discovery.²⁸¹ The Committee unanimously approved the proposal and the accompanying note, and recommended its submission to Congress.²⁸²

The Judicial Conference of the United States met on September 18, 2007, approved the recommendations of the Committee on Rules of Practice and Procedure, and approved the proposed addition of FRE 502.²⁸³ Among other sections drafted by the Advisory Committee for comment, the selective waiver section read:

502(c) Selective Waiver—

In a federal or state proceeding, a disclosure of a communication covered by the attorney-client privilege or work-product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.²⁸⁴

After the comment period, the committee was unconvinced of the value and effects of selective waiver, so it transmitted that proposed section to Congress in brackets.²⁸⁵

278. FED. R. EVID. 502 revised report of the Advisory Committee on Evidence Rules, at 1 (May 2006) (from the Honorable David F. Levi to the Honorable Jerry E. Smith).

279. *Id.*

280. *Id.* at 8.

281. *Id.* at 2.

282. *Id.* at 3.

283. Letter to Leahy and Specter dated Sept. 26, 2007, available at http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf.

284. *Id.* at 6–7.

285. *Id.* at 13. The committee decided not to include a confidentiality agreement requirement for disclosures from a corporation to an agency since it is difficult to foresee what types of agreements would

On December 11, 2007, Senator Patrick Leahy, Chair of the Senate Judiciary Committee, introduced Senate Bill 2450, proposing the addition of the new Federal Rule of Evidence 502.²⁸⁶ The bill was scheduled for debate on February 25, 2008, and passed in the Senate by unanimous consent.²⁸⁷ The bill passed the House of Representatives on September 8, 2008,²⁸⁸ and was signed into law on September 19, 2008.²⁸⁹

B. Analysis of the Arguments Surrounding FRE 502(c) Selective Waiver at the Committee Level

The Committee sent the selective waiver provision to Congress in brackets to indicate that the Committee had no position on the merits of the provision. At the time, the Committee asked for “statistical or anecdotal evidence tending to show that limiting the scope of waiver will 1) promote cooperation with government regulators and/or 2) decrease the cost of government investigations and prosecutions.”²⁹⁰ Numerous individuals and interest groups responded to the call. Below is a synthesis and analysis of their arguments, organized by topic, which tends to show that better judgment prevailed when the selective waiver provision was dropped from consideration.²⁹¹

The issues addressed in the letters to the Committee and discussed *infra* include: 1) consistent application of privilege waiver rules in the courts; 2) agency concerns; 3) corporate concerns; 4) furthering the purposes of corporate attorney-client privilege; 5) fairness; 6) discovery burdens; 7) confidentiality agreements & the Freedom of Information Act; 8) federalism; and 9) who benefits from selective waiver?

pass in any particular circumstance. *Id.*

286. S.B. 2450, 110th Cong. (2007) (enacted).

287. SEN. REP. NO. 110-264 (2008).

288. 154 CONG. REC. H7817–H7820 (Sept. 8, 2008), available at http://www.uscourts.gov/rules/Congressional_Record_re_S2450.pdf.

289. Press Release, Office of the Press Secretary, President Bush Signs H.R. 6456 and S. 2450 Into Law (Sept. 20, 2008), available at <http://federalevidence.com/pdf/2008/09-Sept/WhiteHouse200809201.pdf>.

290. [Revised] Report of the Advisory Committee on Evidence Rules, at 6 & n.6.

291. 2006 Evidence Rules Comments Chart, http://www.uscourts.gov/rules/2006_Evidence_Rules_Comments_Chart.htm (last visited June 9, 2009).

1. Consistent Application of Privilege Waiver Rules in the Courts

The disparate treatment of privileged disclosures in federal courts, specifically in relation to work product waivers, stimulates much of the discussion surrounding selective waiver.²⁹² Some corporate lawyers find it difficult to prepare cases for multiple jurisdictions, and the incongruous rulings of the federal circuits on waiver issues makes that preparation more complicated.²⁹³ However, the best argument against a nationalized selective waiver rule is the fact that over half of the federal appellate courts already rejected the proposal made for FRE 502(c).²⁹⁴ If the committee recommended 502(c) for legislation in the face of decades of circuit court precedent against selective waiver, the committee would be “telling [twenty-four] federal appellate judges from eight different circuits that their decisions were wrong.”²⁹⁵

Codification of common privileges that have developed successfully over thirty years in the courts is an unnecessary usurpation of powers that Congress intentionally left to the courts.²⁹⁶ Since courts respond to the “equities of individual cases rather than the special interests of lobbying groups,” the development of privileges is best left to the courts.²⁹⁷ Despite the fact that federal and state courts have almost entirely dismissed selective waiver, courts already accommodate corporations through “protective orders, which accomplish the same goal, but with judicial oversight.”²⁹⁸

All parties could benefit from the adoption of a consistent, nationwide approach to privilege waiver through legislation. Uniformity could be achieved by a rejection of selective waiver in every circuit, or a Supreme Court decision to that effect, just as easily as it could through nationwide adoption of selective waiver. As the arguments below demonstrate, selective

292. Letter from Philip R. Sellinger, Greenberg Traurig L.L.P., to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, at 2 (Jan. 23, 2007), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-006.pdf>.

293. *Id.*

294. David Stellings, Address at Fordham University School of Law, Advisory Committee on Evidence Rules: Hearing on Proposal 502, at 48–49 (Apr. 26, 2006).

295. *Id.* at 49.

296. See Paul R. Rice, *Federal Privileges in the 21st Century: Back to the Future with Privileges: Abandon Codification, Not the Common Law*, 38 LOY. L.A. L. REV. 739 (2004).

297. Letter from Paul R. Rice, Professor of Law, American University, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, at 1 (Oct. 23, 2006), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-007.pdf>.

298. *Id.* at 2. See *AT&T divestiture* case where protective orders were successfully used to protect documents produced to the government and third parties. *Id.* at 3.

waiver is not the best formulation of a national privilege waiver standard. Therefore, uniformity would be better achieved through other methods.

2. Agency Concerns: Can a Reduction in Investigation Costs & Promotion of Corporate Cooperation and Compliance be Achieved Through Selective Waiver?

The SEC is primarily “responsible for administering and enforcing federal securities laws, which are designed to protect investors and the integrity of . . . capital markets.”²⁹⁹ The bulk of the SEC’s resources are devoted to investigating possible violations of securities laws.³⁰⁰ During investigations, the SEC frequently acquires privileged documents from regulated organizations.³⁰¹ The SEC is most interested in the “reports and related materials prepared by retained counsel for companies conducting their own internal investigations into potential past violations of the securities laws.”³⁰² The SEC does not view waiver of privilege as an end, but as a means, when necessary, to obtaining critical factual information from materials, such as “memoranda of attorney interviews with company employees prepared as a part of [an] internal investigation.”³⁰³

Like many agencies, the SEC staff of approximately 3100 does not have the resources to pursue every hint of corporate malfeasance to the fullest.³⁰⁴ Richard Humes, drawing from his experience at the SEC in the General Counsel Office, found that corporations hesitate to cooperate with the SEC because they fear exposure to private litigation.³⁰⁵ In his opinion, the documents produced by independent outside counsel during a corporation’s internal investigation are the most helpful sources for the SEC to examine.³⁰⁶ For agencies, selective waiver would lead to swifter enforcement, save

299. Cartwright, *supra* note 7, at 1.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. Dostart, *supra* note 16, at 757. The number of SEC employees listed was accurate at the time of Dostart’s article in 2006.

305. Richard Humes, Advisory Committee on Evidence Rules: Hearing on Proposal 502, Address at Fordham University School of Law, at 53 (Apr. 26, 2006).

306. *Id.*

finances for agencies and corporations, encourage corporations to self-police and self-report,³⁰⁷ and help obtain “prompt relief for defrauded investors.”³⁰⁸

According to General Counsel Brian G. Cartwright, privileged information has saved the SEC incalculable resources and time in over “100 significant” investigations over the past ten years.³⁰⁹ This enabled the SEC to “bring cases faster and resolve them more expeditiously.”³¹⁰ For example:

In a major, high-profile financial fraud investigation, counsel for the Independent Directors Committee conducting the internal investigation devoted almost 50,000 to a broad investigation of improper accounting at the company.³¹¹ They reviewed nearly two million pages of documents, collected more than one million e-mail messages, and interviewed more than 120 current and former company employees. They provided the Commission staff with real-time progress reports of their investigations, binders containing key documents for witnesses, and a detailed annotated version of their 340-page investigative report. The information that the Commission obtained was extremely valuable to the Commission’s investigation and the staff was able to benefit fully from the work performed by dozens of attorneys and accountants conducting the internal investigation.³¹²

Cartwright assiduously acknowledges that the SEC must spend time and money to verify the accuracy and completeness of the corporation’s internal investigation, but “doing so is far less time-consuming and less difficult than starting and conducting investigations without internal reports.”³¹³ Not only do the SEC and, by extension, taxpayers benefit from the disclosure of the privileged information contained in internal investigation reports, but also companies can benefit by limiting the number of executives and employees whose testimony is sought by the Commission and by the agency’s enhanced ability to determine whether it must pursue an enforcement action against the company and its officers.³¹⁴

Turning to the issue of selective waiver, Cartwright comments that companies want to cooperate with the SEC by providing privileged information, but they are concerned about waiving their privilege for third-party litigants and often share less information with the agency.³¹⁵ Therefore,

307. *Id.* at 54.

308. Cartwright, *supra* note 7, at 2.

309. *Id.*

310. *Id.*

311. “50,000 hours at an hourly rate for Commission attorneys and accountants conservatively estimated at \$50.00 an hour is equivalent to over \$2.3 million.” *Id.* at 3 n.2.

312. *Id.* at 3. Cartwright also cites several other examples, *see id.* at 3–4.

313. *Id.* at 4.

314. *Id.* at 4–5.

315. *Id.* at 5.

the SEC believes that selective waiver would encourage companies to cooperate by providing all factual information to the SEC.³¹⁶ However, the SEC desires that selective waiver protect the privilege holder's communications to the SEC even if the materials are used in open court, disclosed to non-governmental personnel, or shared with other agencies by the Commission.³¹⁷ Cartwright reasons that the SEC should be able to use the materials without waiving the privilege because the SEC is not the holder of the privilege.³¹⁸ Although it is true that the agency cannot waive another party's privilege by disclosing the information, that point is irrelevant because the waiver, if at all, happens when the privilege holder makes the initial disclosure to its adversary, the agency.

Advocates of selective waiver claim that nationwide adoption of the doctrine would punish more criminal activity since it aligns the general corporate interest in following the law and the government's interest in ensuring that corporations obey the law.³¹⁹ Primarily, full disclosure by corporations to the government benefits the public at large by enabling agencies to punish criminals in a speedy and cost-effective manner.³²⁰ This argument suggests that the proper way to procure compliance is to accelerate the cleanup process, rather than at the front end of a transaction.³²¹ While selective waiver might encourage corporate cooperation with agencies (though it is doubtful), thereby lowering the costs of investigations, selective waiver does little to promote initial compliance with the law because corporations can obtain lenient lighter punishments through cooperation credit.

The selective waiver doctrine embraces the theory that a corporation has a lot to lose in admitting its own guilt and, often, a corporation gains little benefit from government leniency in comparison to potential civil liability.³²² Most jurisdictions refuse to recognize selective waiver, which means that third parties can use discoverable, privileged disclosures to agencies as a "road map" for civil suits.³²³ Since corporations fear third-party litigants that can wield privileged documents against them, corporations are discouraged from

316. *Id.*

317. *Id.*

318. *Id.* at 5–6.

319. McNally, *supra* note 3, at 824–25.

320. *Id.* at 825.

321. At best, this argument might be extended to mean that increased cooperation and more enforcement action will discourage illegalities in the future.

322. McNally, *supra* note 3, at 825.

323. *Id.* at 825–26.

cooperating with the government.³²⁴ In turn, that leads to increased time and expense of investigations and fewer cases handled by the government.³²⁵ It is suggested that with selective waiver the government could facilely target and castigate corporate criminals, while reducing investigation costs; meanwhile, corporations could enhance internal compliance and prevent future misconduct.³²⁶

While working at the DOJ in 1999, James K. Robinson helped draft the Holder Memo, which recognized that a corporation would be entitled to cooperation credit when it gave privileged documents to the agency.³²⁷ He responded to the American Bar Association's (the "ABA") claim that the Holder Memo led to a culture of waiver and eroded privileges by stating that corporations that want leniency from agencies should be expected to cooperate fully.³²⁸ In his mind, voluntary disclosures and internal corporate investigations lead to many prosecutions, many convictions, improved compliance, and deterrence of criminal activity.³²⁹ These ends spare the corporation and its shareholders disabling criminal prosecutions.³³⁰ Robinson supports selective waiver because it would essentially destroy the barrier between enforcement agencies and investigated corporations,³³¹ thereby bolstering the government's interest in rapid resolution of investigations and the shareholders' interest in limiting their corporation's exposure to liability.³³²

The problem with the foregoing arguments is that they assume that an increase in corporate cooperation is necessary when most corporations already cooperate with government investigations, as cases like *Westinghouse* and *Qwest* reveal.³³³ It is naïve to think that corporations cooperate because they want to comply, when corporations actually submit privileged materials to agencies for damage control—i.e., to obtain leniency.³³⁴ Investigated

324. *Id.* at 826. McNally claims that corporations are unlikely to fully cooperate with the government in the absence of selective waiver. *Id.* at 837. However, as cases like *Qwest* demonstrate, corporations have been cooperating with the government for decades without the protection of selective waiver. Corporations already gain lenient treatment from the government and do not need further incentive to cooperate.

325. *Id.* at 826.

326. *Id.*

327. [Revised] Report of the Advisory Committee on Evidence Rules, at 2.

328. *Id.* at 3.

329. *Id.* at 3–4.

330. *Id.* at 4.

331. *Id.*

332. *Id.* at 7–8.

333. See also *Steinhardt*, 9 F.3d at 236 (2d Cir. 1993).

334. McNally, *supra* note 6, at 858 n.271.

corporations complain that they have the unenviable choice between: cooperating with an agency, which leads to leniency from the government and increased exposure to third-party litigants; and not cooperating with an agency, which leads to harsher governmental penalties, but less exposure to third-party litigants. However, history and the following paragraphs show that the choice is not so difficult—corporations should and do choose to cooperate with the government since leniency is almost guaranteed, but a waiver to third-parties does not automatically disgorge the value of that lenient treatment since third-parties still have to prove their case against the corporation.

Early in the proposal process, the Advisory Committee requested comments that would impart “any statistical or anecdotal evidence.”³³⁵ Cyril V. Smith responded to the entreaty by submitting a report on his experience representing “targets, subjects, and witnesses in federal white-collar investigations.”³³⁶ In his career, the “risk of broader subsequent waiver for non-governmental parties has never been a factor in the ultimate decision whether or not to disclose information to a prosecutor or regulator”—which would mean the culture of waiver is partly a perceived problem.³³⁷ Mainly, disclosing parties only ask, not demand, the government for assurances that the information will not be disclosed to third parties.³³⁸

Smith’s comment includes a cost-benefit analysis that a corporation might employ in the face of an agency investigation.³³⁹ In one instance, a *qui tam* plaintiff, formerly employed by M&T Mortgage Corporation, filed suit against M&T’s residential mortgage unit alleging that employees “forged the signatures of both sellers and buyers on loan documents for federally-insured mortgage loans.”³⁴⁰ After the lawsuit was unsealed, M&T performed an internal investigation to appease HUD and fend off a suspension from the residential mortgage underwriting enterprise.³⁴¹ M&T interviewed employees,

335. Cyril V. Smith, Zuckerman Spaeder, L.L.P., to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, at 1 (Dec. 22, 2006), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-030.pdf>.

336. *Id.*

337. *Id.* at 1–3.

338. *Id.* at 2.

339. *Id.* at 2–3; and see attached exhibit 3 “M&T Mortgage Corporation Meeting with HUD,” June 10, 2004, at 5–19, available on PACER from the D.C. federal court. *Id.* at 3 n.4.

340. *Id.* at 2. “When certain loans went into default, HUD paid on the mortgage insurance, even though the insurance had been procured by the submission of false signatures—hence the *qui tam* claim.” *Id.*

341. *Id.*

reviewed documents, and executed other typical investigatory measures.³⁴² Then, M&T submitted a comprehensive documentation of its “investigatory findings and conclusions to date.”³⁴³ The incentive for M&T’s disclosure was that under HUD’s program, M&T had the right to be a direct endorser of residential mortgage loans, which meant that “M&T could guarantee federal insurance on a loan without a time-consuming underwriting review by HUD.”³⁴⁴ If investigators found fraudulent activity occurring within M&T’s residential mortgage unit, M&T could lose that concession.³⁴⁵

During the discovery phase of the *qui tam* action, the trial judge found a waiver as to the investigation report submitted to HUD, and in a subsequent proceeding, the magistrate ruled that there had been no broad “subject-matter waiver as to the underlying investigative materials.”³⁴⁶ The result of the case was that M&T evaded adverse regulatory action while making only a partial disclosure to the plaintiff in the *qui tam* case.³⁴⁷

Contrary to what many selective waiver promoters argue, Cyril Smith’s report on the M&T case exemplifies that the threat of prosecution to a public company is “so great that the business’ first priority is always to attempt resolution of the criminal investigation,” which means that “no further incentive is necessary” to encourage cooperation with government agencies.³⁴⁸ Consequently, businesses have an ever-present motivation to cooperate, which means that the government’s investigation and prosecution costs would not decrease substantially from the slight increase in corporate cooperation that selective waiver would bring.³⁴⁹ Therefore, since it is unnecessary to promote cooperation, selective waiver would provide a windfall to business organizations and do little to decrease the workload of the SEC.³⁵⁰

342. *Id.*

343. *Id.*; see also attached exhibit 3 “M&T Mortgage Corporation Meeting with HUD,” June 10, 2004, at 5–19, available on PACER from the D.C. federal court. *Id.* at 3 n.4.

344. *Id.* at 3.

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* at 2.

349. *Id.*

350. *Id.* at 3.

3. Corporate Concerns: Ending the “Culture of Waiver”

The ABA has outspokenly condemned the “culture of waiver” that has developed over the last few decades.³⁵¹ David Brodsky claims that the “culture of waiver” erodes the corporate attorney-client privilege and threatens its viability.³⁵² Since the privilege promotes legal compliance, ensures effective advocacy, provides access to justice, and promotes the proper function of the adversary system, the ABA opposes routine use of securing waivers to unearth criminal activities.³⁵³ With the government already designedly attacking attorney-client privilege by using waiver of privilege as a prerequisite for leniency, selective waiver would exacerbate the already coercive environment by removing the “voluntariness” from waivers, in effect creating an expectation of attorney-client privilege surrender.³⁵⁴

Brodsky argues that any selective waiver rule must be adopted outside of a culture of waiver.³⁵⁵ Fortunately, there are signs that the government may be changing its strategies for discovering corporate malfeasance.³⁵⁶ However, until agencies manifest a tactical change, waivers will continue to undermine client confidentiality and candor.³⁵⁷ Lawyers will be excluded from operating in a preventative, rather than reactive manner.³⁵⁸ Worse, lawyers will take fewer notes in meetings for fear of privilege waiver and risk being called as a witness against their own corporation.³⁵⁹ This creates a veritable conflict of interest between attorney and client and discourages corporations from

351. Brodsky, *Preserving the Attorney-Client Privilege*, *supra* note 61, at 2.

352. *Id.*

353. *Id.*

354. *Id.* at 2–3. “A recent survey administered jointly by the Association of Corporate Council—an organization representing nearly 19,000 public companies—and the National Association of Criminal Defense Lawyers found that nearly 75% of both inside and outside counsels state that in their experience, government agencies expect a company under investigation to waive legal privileges. 1% of in-house council and 2.5% of outside council disagreed with that statement. Of the respondents that confirmed that they or their clients had been subject to investigations in the past five years, approximately 30% of in-house council and 51% of outside council said that the government expected waiver in order to engage in bargaining for treatment that is more lenient. And of those who had been investigated, 55% of outside council said that the privilege waiver was requested either directly or indirectly. 27% of in-house council confirmed that experience.” David Brodsky, Address at Fordham University School of Law, Advisory Committee on Evidence Rules: Hearing on Proposal 502, at 15–16 (Apr. 24, 2006).

355. Brodsky, *Preserving the Attorney-Client Privilege*, *supra* note 61, at 4.

356. *Id.* at 4 n.11.

357. *Id.* at 5.

358. *Id.* at 5 & n.14, citing *Upjohn*.

359. *Id.* at 5.

seeking assistance from outside counsel.³⁶⁰ Since internal investigations are still a crucial tool for curbing criminal activity, the corporate attorney-client privilege must be protected to ensure compliance with the law and proper self-reporting.³⁶¹ Finally, Brodsky complains that selective waiver only puts a band-aid on injuries caused by harmful government policies, effectively destroying the voluntariness of waivers.³⁶² While speaking before the Committee at the Fordham Law School Hearing, Brodsky responded to an audience member's question, "realistically, how is this culture of waiver going to change," by stating that the culture of waiver would not change "any time soon."³⁶³

To avoid privilege waiver demands, companies can self-report in a manner that provides all necessary information to the SEC or DOJ without disclosing privileged documents.³⁶⁴ Some highly regulated industries, wherein government officials "already have the authority to review all corporate documents" at any time, might be good candidates for independently adopted rules of selective waiver that only cover certain industries.³⁶⁵ For instance, Section 607 the Financial Services Regulatory Relief Act of 2006 grants selective waiver to banks and financial services organizations that must routinely disclose any information to regulators upon request.³⁶⁶ Similar circumstances may also dictate a necessity for selective waiver, but these additions can be made to the governing statute and need not be adopted nationwide.³⁶⁷ Perhaps under the Public Company Accounting Oversight Board standards adopted after Sarbanes-Oxley, selective waiver could be used to protect corporate privileges when they turn over documents to auditors, who must seek all materials to ensure the veracity of corporate records and accounts.³⁶⁸ These small-scale selective waiver rules would pinpoint problem industries and not cause the ill effects of a nationalized selective waiver rule

360. *Id.* at 5–6.

361. *Id.* at 6.

362. *Id.* at 8.

363. Brodsky, Address, Hearing on Proposal 502, at 15–16.

364. Letter from Susan Hackett, Senior Vice President and General Counsel, Association of Corporate Counsel, to Donald F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States, at 4 n.7 (Jan. 9, 200[7]), available at <http://www.acc.com/public/policy/attyclient/accfre502comments.pdf>.

365. *Id.* at 5.

366. *Id.*

367. *Id.*

368. *Id.* (noting that some courts recognize selective waiver under the "common interest" doctrine for disclosures to auditors, while others consistently apply universal waiver for any disclosures to outside parties).

that would fail to meet public policy goals, would legitimate agency waiver tactics, and would compel corporations to relinquish privilege in almost all situations.³⁶⁹

A few years ago, the ABA backed a different measure to end the culture of waiver: a reintroduction of the Attorney-Client Privilege Protection Act (ACPPA), which was reintroduced by Senator Arlen Specter on July 12, 2007.³⁷⁰ After a debate on August 1, 2007, the House of Representatives passed H.R. 3013 by a voice vote on November 13, 2007. A Senate Companion bill, S. 3217, was introduced in the 110th Congress, but “failed to receive a vote.”³⁷¹ The bill was reintroduced as S. 445 in the 111th Congress on February 13, 2009.³⁷²

Almost all commentators in the selective waiver discussion demand the end to the “culture of waiver.” The proposed ACPPA of 2007³⁷³ would prohibit federal prosecutors from requesting disclosure of privileged information and using assertion of attorney-client privilege or work product protection as a factor in determining if the corporation has cooperated with a federal investigation.³⁷⁴ This means that a prosecutor could not consider cooperativeness in charging a corporation or its agents with lawbreaking, which presumably removes some government leniency.

The bill proposes to reverse not only the trend of agency action that has created the “culture of waiver,” but also prevent future application of similar tactics. However, the ACPPA would do little to encourage corporate cooperation with government agencies and voluntary disclosures. Nevertheless, since we know that corporations have cooperated with agencies in the absence of selective waiver, and even in this coercive environment, there are no facts to suggest that corporations would stop cooperating with agencies if they did not receive cooperation credit; they simply would not disclose as much privileged information. True, enactment of the ACPPA would not end the debate about selective waiver, but it would alleviate some of the maladies of the culture of waiver.

369. *Id.* at 6.

370. ABA, *Independence of the Legal Profession*, “Status” available at <http://www.abanet.org/poladv/priorities/privilegewaiver/>.

371. *Id.*

372. *Id.*

373. Attorney-Client Privilege Protection Act, S. 186, 110th Cong. (2007). The text of the proposed bill is available at <http://www.acc.com/public/s186.pdf>.

374. Weiss, *supra* note 22, at 527.

4. Furthering the Purposes of Corporate Attorney-Client Privilege: Open Communication Between Attorney and Client and Encouraging Self-Policing and Compliance with the Law

In *Upjohn*, the Supreme Court expressed three concerns about corporate attorney-client privilege:³⁷⁵ 1) predictability as to what communications will be disclosed to third parties;³⁷⁶ 2) promotion of free communication between attorney and client;³⁷⁷ and 3) encouragement of corporate self-policing and cooperation with regulatory investigations.³⁷⁸

Several courts have held that selective waiver would hinder the attorney-client privilege purpose of encouraging compliance with the law. *Qwest* holds that selective waiver might inhibit the free-flow of information from corporations to government agencies since officers and employers might be less forthcoming with their attorneys if it were all but guaranteed that their notated statements would be transmitted to the SEC or DOJ.³⁷⁹ Katherine Weiss opines that this is “speculative” and that selective waiver promotes internal investigations since it removes disincentives against collecting information by providing additional protections against disclosure to private litigants.³⁸⁰ Her argument, concurred with by others, fails to address the fears of *Qwest*. Stating that corporations will be encouraged to self-police does nothing to make employees be more forthcoming with sensitive, potentially incriminating information. The government may get increased disclosures from companies, but the veracity of those disclosures could diminish.

Like Brodsky, Theodore B. Van Itallie, Jr., Associate General Counsel at Johnson & Johnson, argues that selective waiver will exacerbate the culture of waiver and defeat the purpose of attorney-client privilege by destroying confidence between corporate clients and corporate attorneys.³⁸¹ Itallie decided that the main “issue is not whether investigative expenses are [saved by selective waiver], but whether the negative impact of selective waiver on the impulse to seek legal advice is too high a price to pay for any reduced

375. Weiss, *supra* note 20, at 506.

376. *Id.* The issues of predictability and uniformity in the circuit courts is discussed *supra*.

377. *Id.*

378. *Id.*

379. *Id.* at 533.

380. *Id.* at 534.

381. Theodore B. Van Itallie, Jr., Associate General Counsel, Chief, Litigation Group, Johnson & Johnson, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, at 2–3 (Jan. 8, 2007), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-035.pdf>.

government . . . costs.”³⁸² Further, he posits that legal compliance is best achieved through sound legal advice provided by corporate counsel to inquiring corporate clients at the outset.³⁸³ “[E]nforcement [cannot] yield the same degree of legal compliance as encouraging business leaders to seek advice about how to conform business conduct with the law.”³⁸⁴ Accordingly, while selective waiver might lead to better enforcement, the destruction of attorney-client confidentiality will decrease compliance overall and possibly lead to a greater need for enforcement.

5. Fairness: Privileges Preserve the Integrity of the Adversarial System

The central fairness argument, which did not sway the Third Circuit in *Westinghouse*, but did inform the decisions in other circuits, holds that corporations cannot and should not use the attorney-client privilege as a tactical weapon.³⁸⁵ Consequently, if selective waiver is adopted, then corporations will selectively disclose to the government, as Qwest did, and be allowed to pick and choose among its enemies, which may include other agencies.³⁸⁶ Weiss suggests that, like a decision to surrender privileged documents, an assertion of waiver is often a calculated decision, even if the goal is to protect attorney-client communications.³⁸⁷ Moreover, she avers that enforcing privilege against private litigants does not leave them any worse off than they would have been if the corporation had not disclosed privileged information to the government.³⁸⁸ By this, Weiss means that private litigants would not have access to privileged corporate materials under normal circumstances and that selective waiver not only increases the celerity of criminal prosecutions, but also selective waiver would not take away anything that private litigants would obtain without any privilege disclosures.

Proponents of selective waiver have not overcome the problems of the “pick and choose” or the “sword and shield” uses of privileged information. Courts often hold that privileges cannot be used selectively to block one party from penetrating attorney-client confidentiality, but to curry favor by disclosing that information to another party. Since third party litigants have

382. *Id.* at 3.

383. *Id.*

384. *Id.*

385. Weiss, *supra* note 22, at 537.

386. *Id.*

387. *Id.*

388. *Id.*

nothing to offer corporations, unlike the government, they cannot hope to garner the same information from corporations.³⁸⁹ Essentially, selective disclosure creates an unequal access to material facts.

In addition, the justification for the privilege lies in the fact that it is an acceptable obstacle in the truth-finding process.³⁹⁰ To balance the loss maintained by courts (not having access to everyone's information), the trade-off is that client must keep a strict curtain of confidentiality—otherwise, it is impossible to know if a corporation has disclosed all of the truth. That is what justifies waiver: privilege should not be a negotiable commodity.³⁹¹ The adversarial system is based on equality, and that parity is destroyed when adversaries are treated asymmetrically in a proceeding—remember, the government is an adversary of the corporation. Ideally, rules should be applied “equally to all who come before the before the court.”³⁹² Although selective waiver would benefit the government and corporations, it would “deny equal treatment to all other litigants.”³⁹³

6. Could Selective Waiver Lessen the Burdens of Discovery?

Selective waiver apologists bolster the doctrine by arguing that it will lessen the burden of discovery costs. Some, including Corporations Committee Business Law Section of the California Bar, have responded to that claim by asserting that litigation over discovery requests will increase with the adoption of selective waiver.³⁹⁴ In comments submitted to the Advisory Committee, members of the California Bar raised several questions, which, if unanswered before enactment of the selective waiver doctrine, harbinger continued litigation over selective waiver.³⁹⁵ First, the proposed selective waiver rule was not written to protect routine disclosures that agencies demand outside of the prosecutorial-context.³⁹⁶ Second, the proposal

389. Letter from Steven K. Hazen, Business Law Section, State Bar of California, to Peter G. McCabe, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, at 8 (Dec. 11, 2006), <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-023.pdf>.

390. *Id.* at 9.

391. *Id.*

392. *Id.* at 12.

393. *Id.*

394. Letter from Matthew R. Gemello & Steven B. Stokdyk, Co-Chairs, Business Law Section, State Bar of California, to Professor Daniel J. Capra, Reporter, Judicial Conference Advisory Committee on the Federal Rules of Evidence, at 3 (Apr. 14, 2006), <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-001.pdf>.

395. *Id.*

396. Hackett, *supra* note 364, at 2.

assumed that the best remedy for the culture of waiver is to protect further disclosures to third parties rather than eliminating the pressure for initial disclosures to the government. Finally, the selective waiver rule would worsen the culture of waiver since corporations will have no excuse not to comply with enforcement requests for privileged documents.³⁹⁷ Consequently, while a corporation might not spend as much money on document review and redaction, it will increase its costs of physical production. Moreover, this might allow corporations to simply dump their entire database on the government, which would increase the costs of document review for agencies in finding the relevant information.

Waiver of privilege sometimes acts as a disincentive for lazy production in that a party is punished for failing to perform due diligence and protect its own privileges. To be equitable, truly inadvertent disclosure should not be punished, but selective waiver goes beyond protecting companies from completely losing their privileges through inadvertent disclosures; it protects companies who make intentional disclosures to the adversary who offers the best *quid pro quo*. Selective waiver will not reduce the burden or expense of the discovery process and will remove the disincentive for lazy production that traditional waiver rules provide.³⁹⁸ Furthermore, any lack of clarity in a nationalized selective waiver rule would lead to increased litigation between corporations, private litigants, and the government.³⁹⁹ Although a rule that protects a corporation from subject matter waiver when it inadvertently produces privileged material might not reduce discovery costs, it would keep the disincentives provided by traditional waiver rules.

7. Confidentiality Agreements & the Freedom of Information Act

The Freedom of Information Act (FOIA) might present some problems for the secretive use of privileged corporate materials by administrative agencies through selective waiver.⁴⁰⁰ “[E]xisting law affords agencies some authority to withhold another person’s or entity’s privileged and protected information in response to a request from a private party.”⁴⁰¹ In theory,

397. *Id.*

398. Letter from Russell J. Wood & Bruce R. Deming, Co-Chairs, Business Law Section, State Bar of California, to Secretary of the Committee on Rules of Practice and Procedure, at 8 (Jan. 31, 2007), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-053.pdf>.

399. *Id.*

400. Cartwright, *supra* note 7, at 6.

401. *Id.*

privileged information falls within Exemption 7(A) as long as there is an “open investigation, and thereafter it will come within Exemption 4.”⁴⁰² Exemption 7(A) protects “‘information compiled for law enforcement purposes’ to the extent that it ‘could reasonably be expected to interfere with enforcement proceedings.’”⁴⁰³ Agencies can use Exemption 7(A) to withhold documents categorically.⁴⁰⁴ Documents from internal investigations would normally come under Exemption 7(A).⁴⁰⁵ Exemption 4 covers matters that are “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”⁴⁰⁶ Exemption 4 would normally protect information that would be protected by selective waiver, “although some risk exists.”⁴⁰⁷ Therefore, the SEC and others opine that selective waiver would not hinder a proper discharge of the agency’s duties under the FOIA.

Some parties who commented on the FRE 502(c) proposal recommended that any national selective waiver rule should state that the government can use information obtained through confidentiality agreements in whatever manner it sees fit.⁴⁰⁸ These types of suggestions may align with proposals for inter-agency sharing of released materials. However, the argument for unmitigated government usage echoes the confidentiality agreements that were not upheld in *Qwest* and other cases.⁴⁰⁹ Loose confidentiality agreements, which allow the government to employ privileged materials in any manner, have been held to provide no protection to corporations and no assurances that the agency will not publicize the information or release it pursuant to a third-party’s discovery request.⁴¹⁰ Indeed, such a clause would not support the purpose of a selective waiver rule.

402. *Id.* at 6, citing 4 U.S.C. § 552(b)(4), (7)(A).

403. *Id.* at 6, quoting 4 U.S.C. § 552(b)(7)(A).

404. *Id.* at 6.

405. *Id.*

406. *Id.* at 6, citing 5 U.S.C. § 552(b)(4). Parties cannot utilize the Freedom of Information Act, as a supplement to discovery tools, to obtain material that is normally privileged; a party’s showing of need to avoid unfairness does not mean that the material is routinely discoverable and outside the exemptions to Act. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801–02 & n.20 (1984).

407. Cartwright, *supra* note 7, at 6 & n.5: “See *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992); *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *Flathead Joint Bd. of Control v. United States Dep’t of the Interior*, 309 F. Supp. 2d 1217, 1221 (D. Mont. 2004); *Starkey v. United States Dep’t of the Interior*, 238 F. Supp. 2d 1188, 1195 (S.D. Cal. 2002).”

408. *Humes*, *supra* note 305, at 56.

409. *Qwest*, 450 F.3d at 1181.

410. *McKesson HBOC*, 115 Cal. App. 4th 1239–40.

In his comment, Paul R. Rice queries: what will happen to privileged disclosures to government agencies once the prosecution ends?⁴¹¹ If administrators obtain privileged materials from a corporation, presumably, the agency will utilize those documents in proceedings against the corporation.⁴¹² During or following the prosecution, those documents indubitably will be made public, and the confidentiality will be lost.⁴¹³ Is this a “temporary preservation” of privilege or will the information, once public, be deemed inadmissible against the corporation in a civil suit brought by a third-party litigant?⁴¹⁴ Perhaps a court order protecting the information from third-party use would be a practical solution.

It is possible that an agency could fulfill its duties under the FOIA if selective waiver doctrine were adopted. However, the fact that agencies routinely share the information received from corporations with other agencies and the fact that confidentiality agreements are not airtight might undermine selective waiver’s purpose of keeping information from third parties.

8. Federalization: Constitutional Preemption Issues

Without universal applicability, selective waiver would be useless.⁴¹⁵ Professor Timothy Glynn published a 2002 article on the basic case for why federalizing the law of attorney-client privilege would be a valid exercise of Congress’ Commerce Clause powers and would not offend the Tenth Amendment.^{416 417} He insists that the argument from his 2002 article would apply in the current discussion.⁴¹⁸ Indeed, the Committee for FRE 502 thought that it could bind litigants in state court with a congressionally adopted rule of privilege.⁴¹⁹ However, there may be problems with principles of federalism

411. Rice, Letter to McCabe, *supra* note 297, at 2.

412. *Id.*

413. *Id.*

414. *Id.*

415. Humes, *supra* note 305, at 56.

416. Timothy Glynn, Address at Fordham University School of Law, Advisory Committee on Evidence Rules: Hearing on Proposal 502, at 70 (Apr. 26, 2006). Timothy Glynn, *Federalizing Privilege*, 52 AM. U.L. REV. 59 (Oct. 2002).

417. For an article on 10th Amendment problems, see Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 970–73 (2001). Found at Broun & Capra, *supra* note 64, at 245.

418. Glynn, Address, *supra* note 416, at 70.

419. Broun & Capra, *supra* note 64, at 261.

in adopting a national privilege law, which would be an expansion of federal privilege-making power.⁴²⁰

The Rules Enabling Act (“REA”) grants Congress the sole right to adopt new evidentiary privilege rules.⁴²¹ Any such enactment covers all federal courts under Article III of the Constitution.⁴²² To ensure that a privilege rule would cover parties not under agency investigation, Congress must implicate its Commerce Clause powers under Article I of the Constitution.⁴²³

There are many examples of the ability of procedural rulings in federal courts to have a binding effect on litigation in state courts. Federal courts have the power to issue protective orders covering trade secrets, and these orders have been universally followed.⁴²⁴ Federal court rulings on the preclusive effects of litigation control in state courts.⁴²⁵ *Hanna v. Plumer*⁴²⁶ holds that, pursuant to the Necessary and Proper Clause, Congress can enact rules under the REA that fall between substance and procedure.⁴²⁷ Under *Hanna*, “the test must be whether a rule really regulates procedure, the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy or redress for disregard or infraction of them.”⁴²⁸ Additionally, the principle of federal supremacy has been applied to state procedural rules where federal substantive law is preemptive.⁴²⁹ These facts suggest that any federal court rule purporting to bind third parties would have to be procedural.⁴³⁰

Problems for congressional preemption arise from the fact that privilege law is not purely procedural.⁴³¹ During the adoption of 28 U.S.C. § 2074(b), Representative William L. Hungate stated that Congress must control the rules of privilege because privileges “reflect a substantive policy choice between

420. *Id.* at 245 & 262.

421. *Id.* at 240.

422. *Id.*

423. *Id.*

424. *Id.* at 241 & n.217, and *see* Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003).

425. *Id.* at 243.

426. 380 U.S. 460 (1965).

427. *Id.* *See also* Mitchell, *supra* note 253, 727–28, citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the Federal Arbitration Act had preemptive effect based on Congress’ power to enact substantive rules under the Commerce Clause, even in absence of mention of preemption of state law in the FAA itself). However, Mitchell argues that any selective waiver legislation must express an intent to bind state courts as well to be effective, especially since the FRE apply only to federal courts. *Id.* at 739.

428. *Id.* at 738, quoting *Hanna*, 380 U.S. at 464.

429. Broun & Capra, *supra* note 64, at 243.

430. *Id.* at 244.

431. Mitchell, *supra* note 253, at 738.

competing values, and this policy choice is legislative in nature.”⁴³² The reasons for privilege law being substantive derive from the REA and the Erie Doctrine.⁴³³ Privilege rules are designed to protect individual substantive interests that the state has regarded as more significant than free access of all to everyone’s information.⁴³⁴ Nolan Mitchell found that the Supreme Court has never determined if attorney-client privilege is substantive or procedural, but claims that the privilege is substantive under the *Hanna v. Plumer* test because it creates rights independent of those at issue in the underlying claim.⁴³⁵

Paul R. Rice suggests that Congress has no power to bind state courts with a FRE.⁴³⁶ First, attorney-client privilege is not a constitutional right and is procedural in nature.⁴³⁷ Second, it is debatable whether the attorney-client relationship is “commerce” within the meaning of the Commerce Clause.⁴³⁸ Finally, since attorneys are licensed, regulated, and controlled by state law, determinations on the privilege itself logically should be controlled by the common law in any jurisdiction, including federal courts.⁴³⁹ Along the same line, the Center for Constitutional Litigation has found that only 3% of all litigation occurs in federal courts.⁴⁴⁰ Therefore, litigation is primarily a function of the states, and the federal government should only interfere with the development of common law in “compelling circumstances.”⁴⁴¹ Fundamentally, CCL argues that regulating litigation privileges has nothing to do with “commerce” and that selective waiver is not “necessary” for proper functioning of federal courts.⁴⁴²

Another quandary could arise as a potential conflict of laws.⁴⁴³ Since state courts customarily follow their own rules of procedure, including evidentiary rules, and most states do not recognize the selective waiver doctrine, state

432. H.R. CONF. REP. 93-1597, 1974 U.S.C.C.A.N. 7098, 7111 (Statement of Representative William L. Hungate regarding adoption of 28 U.S.C. § 2074(b)).

433. Mitchell, *supra* note 250, at 738.

434. *Id.*

435. *Id.*

436. Rice, Letter to McCabe, *supra* note 296, at 3.

437. *Id.*; see also *Fisher v. United States*, 425 U.S. 391, 401 (1976).

438. Rice, Letter to McCabe, *supra* note 296, at 3.

439. *Id.* at 3–4.

440. Letter from John Vail, Vice President & Senior Litigation Counsel, Center for Constitutional Litigation, P.C., to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, at 2 n.1 (Jan. 16, 2007), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-013.pdf>.

441. *Id.* at 2.

442. *Id.* at 3.

443. Wood & Deming, *supra* note 398, at 7–8.

courts may not follow FRE 502; meanwhile, a federal court sitting in the same state could reach an opposite conclusion when presented with the same facts.⁴⁴⁴

Additionally, Russell J. Wood and Bruce R. Deming, Co-Chairs of the State Bar of California's Business Law Section, argue that jurisdictions will not apply federal selective waiver uniformly since FRE 502 likely would not preempt state law.⁴⁴⁵ First, the admission and regulation of attorneys is historically a state-run enterprise.⁴⁴⁶ "The states have a compelling interest in the practice of professions within their boundaries, and . . . as a part of their power to protect the health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."⁴⁴⁷ Second, California, like other states, has adopted rules for evidentiary privileges.⁴⁴⁸ Therefore, FRE 502 "intrudes on an area traditionally regulated by the states within the scope of their police powers."⁴⁴⁹

Intrusion through federal preemption may occur in limited circumstances.⁴⁵⁰ First, Congress can preempt state laws when a statute specifically expresses its preemptive intent.⁴⁵¹ Second, Congressional preemption can be implied under the doctrine of "field preemption" "where it is clear from the statute and surrounding circumstances that Congress intended to occupy the field, leaving no room for state regulation."⁴⁵² Congress has not demonstrated an intent to preempt this field in the past.⁴⁵³ Third, state law can be preempted under "obstacle preemption" if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁴⁵⁴ In light of these theories, Congress' ability to preempt state regulation of attorney activity is unconfirmed.⁴⁵⁵ Congress must clearly and manifestly express its preemptive purpose since

444. *Id.*

445. *Id.* at 6–8.

446. *Id.* at 6.

447. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). *See also Florida State Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

448. Wood & Deming, *supra* note 398, at 6.

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.* at 6–7, quoting *Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Devel. Comm.*, 461 U.S. 190, 203–04 (1983) (citations omitted); *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir. 2005).

455. Wood & Deming, *supra* note 398, at 7.

courts would be unlikely to find that Congress could occupy a field controlled for a century or more by the states and unlikely to hold that attorney-client privilege is an obstacle to any Congressional agenda.⁴⁵⁶

Congress is the only entity that can bind all parties in all courts to selective waiver.⁴⁵⁷ To achieve uniformity, federalization is necessary, and Congress must make its preemption explicit in the statute if selective waiver is to be effective.⁴⁵⁸ Without overriding state courts, which have been largely unreceptive to the idea of selective waiver, corporate privileges would be retained in federal court but will be lost to private litigants who successfully file actions against corporations in state court.

9. *Selective Waiver: Who Benefits From Its Adoption and Who Loses?*

Selective waiver proponents have raised an argument that is a *pareto optimal*: no person can be made better off without another being made worse off.⁴⁵⁹ This argument assumes that a corporation will never disclose without selective waiver.⁴⁶⁰ If that is true, private litigants will be in no worse position than they would have been if the disclosure had not been made.⁴⁶¹ Meanwhile, society as a whole benefits from a speedy resolution to government investigations.⁴⁶² Although a cost-benefit analysis is impossible to compute for this issue, some assert that the social benefits of selective waiver for all corporations outweigh the advantages gained by a few third-party litigants who now benefit in the absence of the doctrine.⁴⁶³ However, since corporations often disclose privileged information without the protection of selective waiver, which is the exact opposite of the basic assumption of the argument, the *pareto optimal* has little thrust.⁴⁶⁴

Greg Joseph believes that the problem is not that corporations live in a culture of waiver, but that they live in a “culture of settlement.”⁴⁶⁵ He characterized attorney-client privilege as a “litigation privilege” that is

456. *Id.*

457. Broun & Capra, *supra* note 64, at 240.

458. *Id.* at 218–19.

459. McNally, *supra* note 3, at 851.

460. *Id.* at 852.

461. *Id.*

462. *Id.*

463. *Id.* at 854.

464. See, e.g., *Westinghouse and Qwest*.

465. Greg Joseph, Address at Fordham University School of Law, Advisory Committee on Evidence Rules: Hearing on Proposal 502, at 22 (Apr. 26, 2006).

irrelevant because few people are willing to try cases anymore.⁴⁶⁶ Corporations have primarily made the push for selective waiver, and some suggest that “regulated industry is not in a position to be disputing with the regulator whether . . . it is going to waive privilege if that is going to be a condition of its ongoing business.”⁴⁶⁷ While that statement is debatable, it highlights the fact that corporations would benefit most from the adoption of a national selective waiver rule. Additionally, agencies generally supported FRE 502(c) since the rule appropriates court authority to make privilege determinations and legitimizes the practices established by the McNulty Memo and Seaboard Report.⁴⁶⁸ As a result, third-party litigants are the ones left out in the cold.

When it comes to corporate malfeasance lawsuits, not all litigants are treated equally⁴⁶⁹—i.e., the government has some tools at its disposal, such as subpoenas, that private litigants do not. Selective waiver supporters argue that selective waiver will not hurt private litigants, who could obtain similar, non-privileged information through other discovery techniques.⁴⁷⁰ However, selective waiver supporters fail to appreciate the advantage gained by corporations under selective waiver in comparison to the loss sustained by third parties.

Private litigants, who include individuals and other corporations, can vindicate public interest along with the government, but selective waiver adherents claim that the government is better suited to serve the public interest.⁴⁷¹ This logic is flawed for two reasons. First, if support for selective waiver is based on the belief that agencies are too understaffed and underfinanced to investigate all corporate fraud without selective waiver, then the government must not be able to serve the public interest to its fullest.⁴⁷² Second, illegal actions by corporations harm individuals and other business entities, not the “public interest.” True, the government serves the societal

466. *Id.*

467. *Id.*

468. Hackett, *supra* note 364, at 4. It is debatable whether the government would actually benefit from selective waiver since corporations already comply with requests for the surrender of privileged information.

469. McNally, *supra* note 3, at 855. Limited preference for administrative agencies in some investigative matters is not a sufficient justification for unequal access to privileged materials that would be available to all adversaries of a corporation under traditional waiver rules.

470. *Id.* at 827 and 839.

471. *Id.* at 855.

472. Adherents of selective waiver might retort that if selective waiver was in place then the government *could* serve public interest to its fullest, though it is doubtful that this is correct.

goals of punishing criminal acts and deterring future illegalities by prosecuting companies, but others often seek remuneration for the economic injuries they have suffered. Even if agencies were not understaffed and underfinanced, only third parties could seek redress for their own claims since the government infrequently levies pecuniary penalties against corporations for the benefit of bilked investors and those who were defrauded in business transactions.

Some commentators argue that private litigants do not sue in public interest, but sue for self-gain since their goal is damages, unlike the government, which sues to prevent future illegal acts.⁴⁷³ In particular, McNally states that since the government has the exclusive ability to levy criminal penalties, agencies should receive special treatment.⁴⁷⁴ The government may have the ability to exact criminal punishment on officers, employees, and corporations, but there is no reason to further safeguard corporations, which, after all, committed the misdeeds that instigated the lawsuits, while providing little advantage to the government, which already receives cooperation from corporations.⁴⁷⁵ The fact that federal business fraud laws contain private rights of action suggests that there is a public policy behind private litigation in these instances. Often, private litigants are the only entities that can seek and obtain legal recourse against corporations that violate the law. In that way, third parties act as a deterrent against corporate malfeasance and vindicate the interests of those hurt by unlawful activity.⁴⁷⁶

To counter the argument that the government is better suited for protecting public interest, Steven B. Singer, a plaintiff's attorney for securities investors and shareholders, submitted comments that demonstrate the effectiveness of third-party litigation, especially class action lawsuits, in jurisdictions that do not recognize selective waiver.⁴⁷⁷ Citing two cases

473. McNally, *supra* note 6, at 855.

474. *Id.* at 856.

475. The government does vindicate public interest, somewhat, by uncovering lawbreaking by corporate employees, but providing lenient treatment for corporations may actually be against public interest, or at least not be an even trade. Regardless of what the truth is, agencies have made a calculated choice to provide leniency in exchange for privileged information, just as corporations often make the decision that lenient treatment is worth more than maintaining privilege against third-party litigants.

476. Certainly, issues in private cases, especially those that are joined for discovery purposes under the Multi-District Litigation Act, 28 U.S.C. § 1407, may have "far more at stake and greater implications for segments of society than matters investigated by the government." Rice, Letter to McCabe, *supra* note 297, at 3.

477. Letter from Steven B. Singer, Bernstein Litowitz Berger & Grossmann L.L.P., to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, at 1-3 (Feb. 14, 2007), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-057.pdf>.

handled by his firm, Singer argues that third-party plaintiffs are situated as well as, if not better than, federal agencies to vindicate public interest.⁴⁷⁸ In *Ohio Public Employees Retirement System v. Freddie Mac*⁴⁷⁹ and *In re King Pharmaceuticals, Inc. Securities Litigation*,⁴⁸⁰ Singer's firm represented the "[l]ead Plaintiffs and recovered \$410 million for Freddie Mac stockholders and \$38.25 million for King Pharmaceuticals stockholders."⁴⁸¹ In each case, "stockholders were defrauded by the [company's] false and misleading statements about their financial results."⁴⁸² Both defendants waived their privileges by disclosing internal investigation reports to government agencies in return for lenient treatment.⁴⁸³ The documents obtained by the lead plaintiffs "as a result of the waiver provided valuable insights into the frauds and significantly strengthened the stockholders' cases against the defendants."⁴⁸⁴

The third-party litigants capably uncovered illegalities and obtained remuneration for the frauds, but the government's investigations resulted in no recovery for the stockholders.⁴⁸⁵ Although each company agreed to pay the government around \$125 million in civil fines, none of that money went for the benefit of the stockholders.⁴⁸⁶ Consequently, traditional waiver doctrine rules served their purpose of fairness: the corporation received lenient treatment from the government, the government penalized the companies for their actions, and the stockholders recovered for the damages they suffered and "fulfilled their 'private attorney general' function."⁴⁸⁷ The companies could have asserted their privileges against all plaintiffs and the government, but took a calculated risk—they decided that obtaining leniency from the government was more valuable than the losses the companies would sustain at the hands of third-party litigants.⁴⁸⁸ Singer's comments demonstrate that everyone would lose if selective waiver were adopted since third-party litigants are, at times, the most effective check against illicit activity.

478. *Id.* at 2.

479. Cited in text as S.D.N.Y. No. 03-CV-4261. *Id.* at 2.

480. Cited in text as E.D. Tenn. No. 03-CV-77. *Id.* at 2.

481. *Id.* at 2.

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

After the comment period, the Advisory Committee determined that nationalizing selective waiver was not the appropriate measure for protecting corporate privileges and improving the corporate litigation milieu. The selective waiver doctrine would have been only a stopgap for some issues and would have violated the traditional principles behind evidentiary privilege and waiver.

VI. FRE 502'S PROPOSAL & ENACTMENT IN 2008

Eventually, the Advisory Committee abandoned the selective waiver provision of 502(c) since the doctrine proved to be too divisive during the comment period and hearings.⁴⁸⁹ The Advisory Committee sent its final proposal to Congress for endorsement of FRE 502.⁴⁹⁰ The contents of FRE 502 and possible ramifications of its enactment are discussed below.

A. Text of FRE 502

The report to Congress from the Advisory Committee's proposed FRE 502 contained the exact same language as the final presentation submitted by Senators Leahy and Specter before Congress.⁴⁹¹ The proposal no longer covered state-to-state waiver problems, but only federal-to-state issues, meaning that it controls state rulings on disclosures initially made at the federal level or to a federal agency.⁴⁹² Additionally, the Committee omitted the "selective waiver" provision from its submission to Congress because it proved to be controversial during the Committee Hearings.⁴⁹³ However, the Committee drafted language for a selective waiver provision if Congress determined that it desired to have that specific language in FRE 502.⁴⁹⁴

489. See S. REP. NO. 110-264, at 4 (2d Sess. 2008), as reprinted in 2008 U.S.C.C.A.N 1305, 1308 ("[A]fter careful review of the competing interests involved in these 'selective waivers,' the advisory committee determined that it would not recommend this provision. Unlike inadvertent waivers, which raise the costs and burdens of the discovery phase of litigation, an area of great concern to the rules committees, the selective waiver provision addresses policy matters, principally the effectiveness of government investigations, which are largely outside the competence and jurisdiction of the rules committees.").

490. Letter from Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, to Honorable Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S. Senate (Sept. 26, 2007), available at http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf (last visited Apr. 15, 2009). The letter also provides a good chronology of proposed Rule 502's development.

491. *Id.*

492. *Id.* at 4–5.

493. *Id.* at 6.

494. *Id.*

Currently, FRE 502 reads:

Rule 502. Attorney-Client Privilege and Work-Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.**—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

(b) **Inadvertent Disclosure.**—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) **Disclosure made in a State Proceeding.**—When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

- (1) would not be a waiver under this rule if it has been made in a Federal proceeding; or
- (2) is not waiver under the law of the State where the disclosure occurred.

(d) **Controlling Effect of a Court Order.**—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) **Controlling Effect of a Party Agreement.**—An agreement of the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement unless it is incorporated into a court order.

(f) **Controlling Effect of This Rule.**—Notwithstanding Rules 101⁴⁹⁵ and 1101,⁴⁹⁶ this rule applies to State Proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

495. “These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in Rule 1101.” FED. R. EVID. 101.

496. Applicability of Rules. “(a) . . . These rules apply to the United States district courts . . . (b) . . . These rules apply generally to civil actions and proceedings . . . to criminal cases and proceedings, to contempt proceedings . . . (c) . . . The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.” FED. R. EVID. 1101.

(g) Definitions.—In this rule:

- (1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
- (2) “work product protection” means the protection that applicable law provides for tangible material (or its tangible equivalent) prepared in anticipation of litigation or for trial.⁴⁹⁷

B. The Potential Effects of FRE 502

The “Explanatory Note on Evidence Rule 502 Prepared by the Judicial Conference Advisory Committee on Evidence Rules” (Revised Nov. 28, 2007), is crucial to understanding the status of the selective waiver doctrine.⁴⁹⁸ The purposes behind the rule remain constant: 1) to resolve the dispute between courts concerning the effect of certain disclosures of privileged information, especially relating to subject matter waiver; and 2) to lower litigation costs due to protection of privileged information for fear of subject matter waiver.⁴⁹⁹

The Explanatory Note claims that the rule does not “purport to supplant applicable waiver doctrine generally.”⁵⁰⁰ The central question, then, is: will the rule affect current selective waiver holdings specifically? The likely answer is that courts will follow their own precedent on privilege waiver rules for selective corporate disclosure.

1. The Potential Effect of Subsection (a)

Subsection (a) “provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed.”⁵⁰¹ This creates a presumption against subject matter waiver for privilege disclosures.⁵⁰² Therefore, if a company submits to the SEC an internal investigation report on a potential stockholder fleecing by publication of misleading, material

497. The enacted form of Rule 502 is identical to the language proposed in a bill Senator Leahy introduced on Dec. 11, 2007. S. 2450, 110th Cong. (2007) (enacted), Dec. 11, 2007, *available at* <http://www.uscourts.gov/rules/S2450.pdf>.

498. FED. R. EVID. 502 advisory committee’s note.

499. *Id.*

500. *Id.* Specifically, the rule “governs only certain waivers by disclosure,” but not waivers that can result without disclosure of privileged information or work product. *Id.* at 5–6.

501. *Id.*

502. *Understanding New FRE 502 (Attorney Client Privilege and Work-Product Doctrine)*, 5 FED. EVIDENCE REV. 1454, 1457–58 (Oct. 2008), <http://federalevidence.com/pdf/2008/FRE502/502Excerpt.pdf> (last visited Apr. 15, 2009).

information, then the company has waived its privilege as to that submission, but not as to other privileged materials. “[S]ubject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.”⁵⁰³ To clarify, the Explanatory Note states, “subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner.”⁵⁰⁴ Put another way, “a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.”⁵⁰⁵ This rule extends to the effect of waiver in future federal and state proceedings.⁵⁰⁶

Generally, 502(a) allows selective, intentional waiver of attorney-client and work product material. This is not selective waiver, it is selective disclosure, but it can become selective waiver when read in conjunction with subsections (d) and (e). Impliedly, subsection (a) allows for selective disclosures, as long as those disclosures are not misleading and unfair. FRE 502 mitigates this confusion by providing a test, which might be extrapolated as: 1) was the disclosure made during a federal proceeding or to a federal office or agency; 2) did the disclosure include privileged materials; 3) if so, was the disclosure selective; 4) if so, was the disclosure misleading; and 5) if so, was the disclosure unfair? If the answer to all of those inquiries is “yes,” then there may be a total waiver of privilege, but if any of the answers are “no,” then the waiver is limited to the disclosure itself.

Could application of FRE 502(a) lead to a veritable catch-22 for corporations? Assume that a court holds that all selective disclosures are misleading and unfair as a matter of law. If the corporation disclosed some privileged materials to a government agency during an investigation, but not all documents, then the disclosure would be selective, misleading, and unfair. In that case, a third party could obtain access to all of the privileged documents. Effectively, that result would be identical to the result obtained

503. FED. R. EVID. 502 advisory committee’s note.

504. *Id.* The note goes on to state that inadvertent disclosure “can never result in a subject matter waiver.” *Id.* However, to make sense, the writer must mean that an “inadvertent disclosure” must meet the criteria set forth in subsection (b): 1) the disclosure was inadvertent; 2) the privilege holder took reasonable steps to prevent disclosure; and 3) the privilege holder took reasonable steps to rectify the error. Otherwise, a person could “inadvertently disclose” information, not meet the criteria of (b), and claim to be protected by (a).

505. *Id.*

506. *Id.*

when a corporation turned over all of its privileged documents to the government agency, since voluntarily disclosed materials are not protected by FRE 502. This paradox cannot be the intended result of the rule. Therefore, it is likely that courts will analyze on a case-by-case basis whether a disclosure was misleading and unfair, and presume that all selective disclosures are misleading and unfair. Unfortunately, FRE 502(a) provides no guidance as to what constitutes a “selective,” “misleading,” or “unfair” disclosure. Perhaps *Qwest* is paradigmatic of selective, misleading, and unfair disclosures.

2. The Potential Effect of Subsection (b)

Although Subsection (b) is the most potent of FRE 502, analysis of its language is best left to another article since any discussion within this heading would give it too little attention.

3. The Potential Effect of Subsection (c)

Subsection (c) addresses the following problem: what happens when a privileged disclosure is made at the state level, the information is offered into evidence in a subsequent federal proceeding, and the state law conflicts with federal law on the issue of waiver?⁵⁰⁷ The Committee decided that a federal court should apply the law that is “most protective of privilege and work product.”⁵⁰⁸ Consequently, the court must apply either state or federal law, whichever will provide the most protective of the holder’s privilege.⁵⁰⁹ This subsection, (c), fails to resolve this problem: what happens when the state court determines that a subject matter waiver occurred based on a disclosure that would otherwise meet the requirements of subsection (a)? Subsection (c) does not refer back to subsection (a), but one can infer that if federal law is the most protective of the privilege, then the rule under subsection (a) would govern. To be protected from waiver, the disclosure must not be selective, misleading, and unfair. Therefore, while a party could lose protection in state court, it could magically retrieve its privilege shield if it could remove the proceeding to federal court or if subsequent suits were in federal court. That result could unintentionally provide incentive for forum shopping.

507. *Id.*

508. *Id.*

509. *Id.*

4. The Potential Effect of Subsection (d)

Recognizing the importance of confidentiality orders, the Committee recommended subsection (d) to limit the “costs of privilege review and retention, especially in cases involving electronic discovery.”⁵¹⁰ The rule provides that a confidentiality order entered in federal court is effective in all future proceedings in any court.⁵¹¹ Subsection “(d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal.”⁵¹² Consider what would happen if a federal court determined that a litigant waived all protection in subsequent proceedings, perhaps for failing to satisfy the requirements of subsection (a). Assumedly, that decision, although not binding under the interpretation set forth in the Explanatory Note, would be upheld in other proceedings. For example, when a court determines under subsection (a) that a disclosure is selective, misleading, and unfair, and finds that a subject matter waiver has occurred, subsequent courts will be likely to follow this lead. However, the purportedly binding nature of FRE 502(a) on state courts under FRE 502(d) has not been established since state courts are not bound by federal evidentiary rules.

5. The Potential Effect of Subsection (e)

Subsection (e) “codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them.”⁵¹³ Concededly, “such an agreement can bind only the parties to the agreement.”⁵¹⁴ Hence, if parties want the agreement to bind future parties, then they must seek a court order to that effect under subsection (d).⁵¹⁵ This provision fails to address the difficulty that most confidentiality agreements present—confidentiality agreements with the government are not airtight. Most confidentiality agreements only require an agency to keep quiet until it must disclose the privileged information to fulfill its statutory duties, which means that the public can obtain the information as soon as the investigation is unsealed or when demands for the information are registered with the

510. *Id.*

511. *Id.*

512. *Id.*

513. FED. R. EVID. 502 advisory committee’s note.

514. *Id.*

515. *Id.*

agency. One has to wonder: if a court enters an order validating a weak confidentiality agreement, then must the order be sustained in future litigations? Theoretically, the answer is “no” if the agreement is not equally binding on the parties to it in the first place—i.e. an agency cannot maintain confidentiality if it would interfere with its duties. In addition, if the confidentiality agreement is not unassailable, then the agreement cannot pass as hermetically sealed in a future litigation, regardless of whether there is a court order in place. Therefore, there is a great risk that FRE 502(e) could become a paper tiger.

6. The Potential Effect of Subsection (f)

Subsection (f) explains that “Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings.”⁵¹⁶ This subsection overcomes the tension between the proposed rule and the limitations of the FRE as laid out in FRE 101 and FRE 1101.⁵¹⁷ Possibly, this would be enough to meet the preemption requirements for federalization of privilege, but that debate will not be settled until the first state court encounters such a case.

At the very least, FRE 502 will be interpreted to protect corporations from complete subject matter waiver when a corporation makes an inadvertent disclosure of privileged materials. It is also possible that FRE 502 will be interpreted in some courts to protect privileged information that is covered by a confidentiality agreement and a court order. It is likely that courts will construe FRE 502 as a rejection of selective waiver, in that an intentional, misleading, selective disclosure will not be entitled to protection from third parties. The situation could change drastically and courts could uniformly and predictably apply the rule,⁵¹⁸ as the Committee desires, but it is more likely that the circuits will maintain their course. If courts stick to their plan of developing common law privilege and waiver concepts, FRE 502 will not leave corporate counsel in a greater state of confusion.

516. *Id.*

517. *Id.*

518. FED. R. EVID. 502 advisory committee’s note.

C. Conclusion and Unresolved Issues

The failure of the selective waiver provision to pass the committee level of the proposal process for FRE 502 portends the death of the selective waiver doctrine, at least as a national rule in federal courts. Given the resounding rejection of the doctrine in the appellate courts and state courts, it is likely that only a few circuits will cling to it in the coming years. While the corporate fraud of the early aught years of this century reawakened the doctrine in scholarly commentary, the drive will probably subside.

There may be a way to make selective waiver palatable, but the failed proposal will not resurface any time soon. In modern practice, a corporation would gain a double benefit from the enactment of a selective waiver rule, while government agencies would gain some insight into corporate records (although most companies already release plenty of information to investigators) and third parties would gain nothing. If corporations could not receive “cooperation credit” from federal prosecutors, not just for the surrender of privileged information, then it might ameliorate some of the ill effects of selective waiver, or at least make it more acceptable. Since a corporation would gain nothing from the government, a corporation’s decision to release privileged information would only be determined by the choice between potentially opening itself up to harsh penalties from the government or fending investigators off under traditional rules. Under this formulation, a corporation would have no fear of broad subject matter waiver, and third parties could at least have the satisfaction of knowing that either the investigating agency would not gain an advantage by having the privileged information or the agency would come down with its full force on the corporation if it did obtain the privileged documents. Of course, this plan could only decrease discovery costs for a corporation if it chose to surrender all of its information. Also, it would do nothing to lessen the burden on investigating agencies. However, the plan would preserve the integrity of the adversarial system in more cases, ensure that “public interest” was served with harsher penalties, and encourage corporations to preserve their privileges, much to the delight of in-house counsel.

Unfortunately, the problems that led many to support selective waiver are still extant: high discovery costs, agency expectations of privilege waivers, high investigative costs for agencies, tentative cooperation by corporations with agencies, and the erosion of corporate privileges. Perhaps the ACPPA, if enacted, and FRE 502 can assuage some of the fears of corporate counsel by making “cooperation credit” a thing of the past and by limiting the

exposure of corporation who inadvertently disclose privileged materials or disclose in a non-misleading, non-selective fashion to federal investigators.

Yet, questions surrounding the future application of FRE 502 remain. Among them:

- 1.) Will state courts honor the rulings of federal courts and obey 502(b)'s rule on inadvertent disclosure? Moreover, can Congress constitutionally preempt state law in the area of evidentiary privileges related to the practice of law (attorney-client privilege and work-product doctrine)?
- 2.) FRE 1101(a) states that the FRE apply to federal district courts. Can Congress override that with FRE 502(f)?
- 3.) Will intergovernmental sharing of privileged information from investigations violate the "controlling effect of a party agreement" and a court order made on the viability of that agreement under FRE 502(d) and (e)?
- 4.) Will FRE 502 be construed to allow selective waiver through combining FRE 502(a), (d), and (e), or will courts hold as a matter of law that any intentional disclosure is always selective, misleading, and unfair?⁵¹⁹
- 6.) Will FRE 502 be construed as a substantive or a procedural rule? This may have affect on its application in cases depending on whether the case is in federal court under federal question jurisdiction or diversity jurisdiction.

519. "Selective" disclosure is always "misleading and unfair." Memorandum from Jinjian Huang, to Advisory Committee on Evidence Rules 2-3 (Feb. 12, 2007), *available at* <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-055.pdf> (last visited Apr. 15, 2009).