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# Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?

*Colin P. Marks*<sup>†</sup>

## I. INTRODUCTION

Imagine that a federal agent approached you at work and informed you that you were under investigation for fraud and embezzlement. After recovering from the initial shock, and possibly a mild heart attack, you would likely seek the services of an attorney. Imagine, however, that this same federal agent then told you that you could attempt to avoid indictment by cooperating, and in that vein, waiving your attorney-client privilege, including past and future communications with your attorney. You would likely be outraged at the federal agent's attempt to force a waiver of one of the longest standing common-law privileges. Yet this very situation is occurring every day to corporations in modern governmental investigations.

Beginning in 1999, the Department of Justice (DOJ) articulated new policies establishing factors it would consider when deciding whether to charge corporations.<sup>1</sup> One of the factors the DOJ will consider is whether the corporation under investigation has "cooperated," which often includes waiver of the attorney-client privilege. The Securities Ex-

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1. See Memorandum from Eric Holder, Deputy Attorney General to All Component Heads and United States Attorneys (June 16, 1999) [hereinafter Holder Memo], <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>; Memorandum from Larry D. Thompson, Deputy Attorney General to Heads of Department Components and United States Attorneys (Jan. 20, 2003) [hereinafter Thompson Memo], [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

change Commission (SEC) and other governmental agencies appear to be following suit. Waiver of the attorney-client privilege in the context of a governmental investigation, however, usually also means waiver as to third parties, thus opening companies to larger liability in the context of third-party civil suits. As a result, corporations face a Hobson's choice: they either waive the privilege to avoid possible indictment, thereby essentially making the privileged materials available to third parties, or assert the privilege, thus risking an indictment or stiffer penalties from an agency such as the SEC.

As a possible solution to this Hobson's choice, some commentators have advocated the adoption of a "selective" or "limited" waiver of the privilege, whereby waiver to a governmental agency would not waive the privilege to third-party litigants. Selective waiver is even being proposed as an amendment to the Federal Rules of Evidence.<sup>2</sup> Though adoption of selective waiver may have, at first blush, some appeal, does it do anything more than simply remedy a corporation's fear that waiver of privilege to the government also waives privilege to third parties? In other words, does selective waiver address any of the other various issues and problems that arise with waiver of the attorney-client privilege, such as the erosion of open and frank communications with counsel? If the purpose of the attorney-client privilege is to promote open and frank communications between a client and an attorney to, in part, promote compliance with the law, then does a policy that encourages disclosure of attorney-client materials to the government destroy the underlying purpose of the privilege in the first place? In that sense, is a half privilege worth having at all?

This article will explore both the various problems that arise with a policy that essentially mandates waiver of the attorney-client privilege as well as the limited appeal of the selective waiver theory as a compromise position. It concludes that selective waiver is inadequate in addressing the many problems created by policies that coerce waiver and that a more desirable solution is to eliminate or amend the governmental policies that coerce waiver. Part II of this article explains and explores the metes and bounds of the attorney-client privilege and work-product protection. Part III explains the development of the selective waiver theory, as well as its relation to the current charging policies of the DOJ. In Part IV, the various problems that arise from the DOJ's policy are explored. Part V then discusses the adequacy of selective waiver in addressing these problems, and ultimately concludes that selective waiver essentially eviscerates the

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2. Proposed Rule Fed. R. Evid. 502 and Committee Note, Memorandum to Advisory Committee on Evidence Rules from Dan Capra, Reporter, and Ken Broun, Consultant, Mar. 22, 2006, available at <http://www.prestongates.com/images/pubs/DATG/ER502Memo3.22.06.pdf>.

purposes of attorney-client privilege and work-product protection and thus has limited appeal. Finally, Part VI concentrates on what efforts are underway to rectify the situation and what efforts can be made in the future to restore the sanctity of the attorney-client privilege to its pre-1999 status.

## II. A REVIEW OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION

Before delving into the problems and perils of waiving the attorney-client privilege and work-product protection, a brief review of the metes and bounds of these privileges is useful. This is no mere academic exercise, as the policies underlying the privilege and protection are fundamental to understanding the erosive effect of coerced waivers upon the privilege. An understanding of both is also important in understanding to what degree privileged or protected materials are even necessary in a government investigation of a corporation.

### *A. Attorney-Client Privilege*

The attorney-client privilege is one of the oldest existing legal privileges. Dating back to ancient Rome, the attorney-client privilege was initially used as a means to prevent an attorney from being called as a witness in his client's case.<sup>3</sup> The attorney-client privilege has evolved over the years and now protects certain communications between the attorney and client and allows "unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily, or involuntarily, in any legal proceeding."<sup>4</sup> The policy underlying this privilege is that open and frank communications with an attorney facilitates compliance with the law. Thus, the privilege exists to promote full disclosure by the client and to foster a relationship of trust between the attorney and the client.<sup>5</sup>

However, the attorney-client privilege is just that—a privilege. The privilege represents a balance between the truth-seeking function of the judicial process and the benefit that can be gained through open and frank communications with one's attorney.<sup>6</sup> Thus, it has been said that

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3. JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 1.04 (3d ed. 2001).

4. *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978).

5. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985); *Palmer v. Farmers Ins. Exchange*, 861 P.2d 895, 904-05 (Mont. 1993).

6. See GERGACZ, *supra* note 3, §§ 1.13 & 1.14.

the attorney-client privilege should be “strictly confined within the narrowest possible limits consistent with the logic of its principle.”<sup>7</sup>

In asserting the attorney-client privilege, a party must understand which governing law will influence the court’s decision regarding whether the privilege is applicable. In diversity cases, for instance, federal law mandates that state law governs the attorney-client privilege.<sup>8</sup> However, where the court’s jurisdiction is premised upon a federal question, the attorney-client privilege is defined by federal common law.<sup>9</sup> Thus, the elements of the attorney-client privilege are satisfied (and thereby permanently protected from disclosure unless waived) when legal advice of any kind is sought from a professional legal advisor, in his capacity as such, and the communications relating to that purpose are made in confidence by the client.<sup>10</sup> More generally stated, in order to claim protection by the court under the attorney-client privilege, a party must show: (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.<sup>11</sup>

There are a few notable nuances and exceptions to the privilege. To begin, one of the most important nuances pertains to the element of con-

7. 8 J. WIGMORE, EVIDENCE § 2291, at 554 (McNaughton rev. 1961); *see also* Avianca, Inc. v. Corriea, 705 F. Supp. 666, 675 (D.D.C. 1989).

8. FED. R. EVID. 501.

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

10. *Banner v. Hamilton*, 99 Fed. Appx. 29, 36 (6th Cir. 2004) (citing *Reed v. Baxter*, 134 F.3d 351, 355–56 (6th Cir. 1998)); *United States v. Bisanti*, 414 F.3d 168, 171 (1st Cir. 2005) (articulating nearly identical standard).

11. EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE* 35 (3d ed. 1996); *Wilson v. Foti*, 2004 WL 744874, at \*2 (E.D. La. 2004) (citing EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE* 35 (3d ed. 1996)); *see also Upjohn Co.*, 449 U.S. at 395 (discussing elements of confidentiality and communication); *Fisher v. United States*, 425 U.S. 391, 403 (1976) (confidential disclosures by a client to an attorney made to obtain legal assistance are privileged). Though individual state and federal courts have articulated variations of this standard, these four basic prongs remain consistent. For instance, the Third Circuit described the elements as:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is the member of the bar of court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the propose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

*In re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3d Cir. 1979). Though this standard adds some nuances, such as the crime-fraud exception to the privilege, the basic standard remains the same. Furthermore, though this standard is articulated in terms of communications from a client to an attorney, the privilege also covers communications from an attorney to a client. *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 618 (D. Kan. 2001) (citing *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370–71 (10th Cir. 1997)).

fidentiality. Disclosure of communications to third parties can lead to a waiver of the attorney-client privilege, as is discussed more fully below. It is also worth noting that the communication must be for the purpose of securing *legal* advice. Simply advising an attorney or in-house counsel of events to keep them up-to-date may not qualify as a privileged communication. This can become particularly problematic in companies where an in-house counsel also serves in a business role, potentially requiring a hard look into whether the communication was being made for a business or legal purpose. “Business communications are not protected merely because they are directed to an attorney, and communications at meetings attended or directed by attorneys are not automatically privileged as a result of the attorney’s presence.”<sup>12</sup>

Additionally, in cases where in-house counsel serve a dual legal/business role, courts will look at the nature of the communication to determine whether its primary purpose was to obtain or provide legal assistance.<sup>13</sup> For example, in *United States v. Lipshy*, the question was whether the Vice President and General Counsel of Zale Corporation acted in a business or legal capacity when he conducted interviews of company officers and employees.<sup>14</sup> The interviews were conducted to investigate allegations involving improper reimbursements for political campaign contributions.<sup>15</sup> After reviewing the applicable standard for the attorney-client privilege, the court noted that when the in-house counsel serves a dual legal/business role, the privilege would apply where the in-house counsel is “performing services of a legal nature when he made or received the communication.”<sup>16</sup> The court then concluded that because the investigation was conducted for the purpose of obtaining information needed to advise on legal issues, in-house counsel was acting in his role as an attorney.<sup>17</sup>

Furthermore, underlying facts are widely held to be not privileged. In other words, merely communicating facts of a case to an attorney does not protect disclosure of those facts.<sup>18</sup> “Only the actual attorney-client

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12. *Kramer v. Raymond Corp.*, 1992 WL 122856, at \*1 (E.D. Pa. 1992).

13. *Id.*; *MSF Holding, Ltd. v. Fiduciary Trust Co. Int’l*, 2005 WL 3338510, at \*1 (S.D.N.Y. 2005); *Avianca v. Corriea*, 705 F. Supp. 666, 676 (D.D.C. 1989) (“Where the communication is with in-house counsel for a corporation, particularly where that counsel also serves a business function, the corporation must clearly demonstrate that the advice to be protected was given in a professional legal capacity.” (internal quotations omitted)).

14. 492 F. Supp. 35, 41 (N.D. Tex. 1979).

15. *Id.* at 40.

16. *Id.* at 41 (citing *Garner v. Wolfenbarger*, 430 F.2d 1093, 1102 n.18 (5th Cir. 1970)).

17. *Id.* at 41–42.

18. *Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981); *United States v. Rakes*, 136 F.3d 1, 3–4 (1st Cir. 1998); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994).

communications are privileged."<sup>19</sup> Thus, as the Missouri Supreme Court noted in *Great American Ins. Co.*, investigative reports that would not otherwise fall under the privilege do not become protected by the attorney-client privilege simply because they are attached to or discussed in letters to a corporation's attorney.<sup>20</sup>

Finally, one of the most notable exceptions to the attorney-client privilege is the crime-fraud exception. Generally speaking, under the crime-fraud exception, "[c]ommunications between an attorney and a client concerning an intended or continuing crime are not protected by the attorney-client privilege."<sup>21</sup> Federal courts have recognized the crime-fraud exception to the attorney-client privilege under the justification "that because the client has no legitimate interest in seeking legal advice in planning future criminal activities, society has no interest in facilitating such communications."<sup>22</sup>

### B. Work-Product Protection

A doctrine related to the attorney-client privilege is the work-product protection. However, the work-product protection is distinct from and broader than the attorney-client privilege, and it extends beyond confidential communications to "any document prepared in anticipation of litigation by or for the attorney."<sup>23</sup> "Proper preparation of a client's case demands that an attorney assemble information, sift . . . the relevant from the irrelevant facts, prepare . . . legal theories and plan . . . strategy without undue and needless interference."<sup>24</sup> Courts thus exempt work-product from discovery to "establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary's preparation."<sup>25</sup>

Similar to the attorney-client privilege, a party must look to the governing law to establish the work-product protection. But unlike the governing laws for the attorney-client privilege, federal law for the work-product protection governs *all* proceedings in federal court, including diversity cases, because federal courts have deemed that the work prod-

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19. *Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 385 (Mo. 1978).

20. *Id.* at 385. However, had the investigation been conducted by the corporation's attorney, the privilege would attach. *See United States v. Lipshy*, 492 F. Supp. 35, 44 (N.D. Tex. 1979).

21. *See GERGACZ*, *supra* note 3, § 4.03.

22. *In re Burlington Northern Inc.*, 822 F.2d 518, 524 (5th Cir. 1987) (internal citations and quotations omitted) (expanding the exception to the work-product protection as well); *see also Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992).

23. *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986).

24. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 460-61 (Tex. 1993).

25. *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995).

uct rule is not a substantive privilege within the meaning of Rule 501.<sup>26</sup> Federal law protects attorney work-product from discovery.<sup>27</sup> To qualify as work-product, information must: (1) be in the form of documents or tangible things; (2) be prepared in anticipation of litigation; and (3) be prepared by the party or its representative, including an attorney.<sup>28</sup> Nevertheless, an exception exists in federal courts, and an opposing party may obtain work-product materials upon a showing that “the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”<sup>29</sup>

In applying this rule, courts distinguish between ordinary or “fact” work-product and “opinion” work-product.<sup>30</sup> Ordinary or “fact” work-product is the “written or oral information transmitted to the attorney and recorded as conveyed by the client.”<sup>31</sup> Such ordinary or “fact” work-product may be obtained, despite the privilege, upon a showing of substantial need and an inability to otherwise obtain the privileged work-product without material hardship.<sup>32</sup> In this sense, the work-product protection is not an absolute protection, but more akin to a qualified protection.<sup>33</sup> “However, absent waiver, a party may not obtain the ‘opinion’ work-product of his adversary; i.e., ‘any material reflecting the attorney’s mental impressions, opinions, conclusions, judgments, or legal theories.’”<sup>34</sup> Thus, core work-product enjoys a greater level of protection than “fact” or ordinary work-product.

### *C. The Extension of the Attorney-Client Privilege and Work-Product Protection to Corporations*

At one time, a number of federal courts adopted a “control group” test to determine if communications with corporate employees were within the scope of the privilege or protection.<sup>35</sup> Under the control group

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26. See *Interphase Corp. v. Rockwell Int’l Corp.*, 1998 WL 664969, at \*4 (N.D. Tex. Sept. 22 1998); *Dawson v. New York*, 901 F. Supp. 1362, 1367–68 (N.D. Ill. 1995); *First Pacific Networks v. Atl. Mut. Ins.*, 163 F.R.D. 574, 577 (N.D. Cal. 1995).

27. FED. R. CIV. P. 26(b)(3).

28. *Id.*; *Ferko v. NASCAR, Inc.*, 218 F.R.D. 125, 136 (E.D. Tex. 2003).

29. FED. R. CIV. P. 26(b)(3).

30. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002).

31. *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986).

32. *Toledo Edison Co. v. G.A. Tech’s, Inc.*, 847 F.2d 335, 339–40 (6th Cir. 1988); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1467 (11th Cir. 1984).

33. EPSTEIN, *supra* note 11, at 288.

34. *In re Columbia/HCA*, 293 F.3d at 294 (quoting *In re Antitrust Grand Jury*, 805 F.2d at 163–64).

35. See *United States v. Lipshy*, 492 F. Supp. 35, 42–43 (N.D. Tex. 1979).



test, the privilege applied if the employee making the communication was in a position to control or take a substantial part in a decision about any action which the corporation might take upon the advice of the attorney, or if the employee was an authorized member of a body or group which had the authority such that he, in effect, personified the corporation. However, this approach was squarely rejected by the Supreme Court in *Upjohn Company v. United States*.<sup>36</sup>

In *Upjohn*, the Supreme Court addressed the scope of the attorney-client privilege in the corporate context.<sup>37</sup> The petitioner, Upjohn Company, maintained that questionnaires sent by its attorneys to Upjohn employees were privileged.<sup>38</sup> The questionnaires were part of an internal investigation to discover whether subsidiaries had made payments directly to or for the benefit of foreign government officials to secure government business.<sup>39</sup> Upjohn's attorneys also interviewed the recipients of the questionnaire and thirty-three other Upjohn officers or employees as part of the investigation.<sup>40</sup> Subsequently, the Internal Revenue Service issued a summons demanding production of these materials.<sup>41</sup> Upjohn "declined to produce the documents on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of an attorney prepared in anticipation of litigation."<sup>42</sup> The United States filed a petition to enforce the summons and, upon the recommendation of the magistrate, the court ordered the production of the disputed materials.<sup>43</sup> On appeal, the Sixth Circuit held that the attorney-client privilege did not apply to communications that were made by officers and agents who were not responsible for directing Upjohn's actions in response to legal advice, thus adopting the control group theory.

The Supreme Court rejected the control group approach, stating that the approach overlooked "that the privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice."<sup>44</sup> The Court noted that it is frequently employees, who are beyond the control group, who possess the information needed by the corporation's lawyers to adequately advise the client with respect to ac-

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36. 449 U.S. 383, 391-92 (1981).

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

38. *Id.* at 388.

39. *Id.* at 386.

40. *Id.* at 387.

41. *Id.* at 387-88.

42. *Id.* at 388. The company "voluntarily submitted a preliminary report to the Securities and Exchange Commission . . . disclosing certain questionable payments." *Id.* at 387.

43. *Id.* at 388. The magistrate also concluded that Upjohn had waived the attorney-client privilege, but the Sixth Circuit rejected this finding. *Id.*

44. *Id.* at 390.

tual or potential legal difficulties.<sup>45</sup> According to the Court, “[t]he control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.”<sup>46</sup> The Court concluded that the communications by Upjohn employees to counsel were covered by the attorney-client privilege, and thus, the responses to the questionnaires and any notes reflecting responses to interview questions were protected by the privilege.<sup>47</sup>

As a result, under federal law today, communications from lower echelon employees are within the privilege as long as the factors listed above are satisfied and the communications are made to the attorney in confidence to assist him or her in giving legal advice to the client corporation.<sup>48</sup>

#### *D. Waiver of Attorney-Client Privilege and Work-Product Protection*

One of the key elements of the attorney-client privilege is that the communication must be made *in confidence*.<sup>49</sup> Even if a communication is initially confidential, subsequent disclosure of the communication to a third party “who lacks a common legal interest” will waive the privilege.<sup>50</sup> Thus, if the client or its attorney reveals documents initially protected by the privilege to such a third party, those documents will no longer be protected.<sup>51</sup> In fact, disclosure “of any significant portion of a confidential communication” may result in waiver of the privilege “*as to the whole*.”<sup>52</sup> Examples of third party individuals to whom a corporation

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45. *Id.* at 391.

46. *Id.* at 392.

47. *Id.* at 397. The Court also concluded that the work-product protection was possibly applicable to some attorney notes and memoranda of interviews. *Id.*

48. *Painewebber Group, Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 991–92 (8th Cir. 1999); *United States v. El Paso Co.*, 682 F.2d 530, 538 n.8 (5th Cir. 1982) (citing *Upjohn Co.*, 449 U.S. at 388–96). The Eighth Circuit, prior to *Upjohn*, adopted the following factors to determine whether a communication to a client representative would be privileged: (1) The communication was made for the purpose of securing legal advice; (2) The employee making the communication did so at the direction of his corporate superiors; (3) The superior made the request so that the corporation could secure legal advice; (4) The subject matter of the communication is within the scope of the employee’s corporate duties; and (5) The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977) (emphasis added). Though the Court did not cite to these factors, it did cite approvingly to the *Meredith* decision regarding the extent of the privilege, and these factors may be persuasive. *Upjohn*, 449 U.S. at 391–92.

49. *El Paso Co.*, 682 F.2d at 538 (emphasis added).

50. *Ferko*, 218 F.R.D. at 134.

51. *Id.*

52. *El Paso Co.*, 682 F.2d at 538 (emphasis added).

might reveal confidential communications, and thereby possibly waive the privilege, include auditors, accountants, and tax analysts.<sup>53</sup>

For example, in *El Paso Co.*, the Fifth Circuit held that the disclosure by El Paso of information contained in its "tax pool analysis,"<sup>54</sup> and associated memoranda to independent auditors for purposes of certifying the corporation's books (as required by the SEC) waived any potential attorney-client privilege that might have existed as to those documents.<sup>55</sup> Consequently, El Paso had to produce the documents to the IRS, which was performing a routine tax audit of the company.<sup>56</sup>

The attorney-client privilege is not waived, however, if a corporation or its attorney discloses communications or documents protected by the attorney-client privilege to a third party *for purposes of assisting the attorney in rendering legal advice*.<sup>57</sup> For example, attorneys or their clients can retain an accountant and share confidential communications with that accountant to facilitate the rendition of legal services.<sup>58</sup> However, the reason for sharing information with the accountant must be so that the lawyer can provide legal advice; if communications are disclosed to the accountant simply to obtain accounting advice, the attorney-client privilege is not preserved.<sup>59</sup>

The rules for waiving the work-product protection are slightly different, as it is more difficult to waive by disclosure in federal court. Unlike the attorney-client privilege, which is waived by disclosure to any third party that does not share a common legal interest, the work-product protection is not necessarily waived by "mere voluntary disclosure to a third person."<sup>60</sup> To waive the work-product protection, the disclosure "must be inconsistent with maintaining the secrecy of an attorney's trial preparation."<sup>61</sup> Thus, under federal law, one must disclose the information to an adversary or disclose it in such a way that an adversary's opportunities to obtain it are substantially increased to waive the work-product protection.<sup>62</sup> For example, requesting a witness to disclose in-

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53. *Ferko*, 218 F.R.D. at 134.

54. A tax pool analysis is an analysis of "soft spots" in a corporation's tax returns used to determine contingent future tax liabilities on a corporation's balance sheet. *El Paso Co.*, 682 F.2d at 534.

55. *Id.* at 540.

56. *Id.* at 545.

57. *Ferko*, 218 F.R.D. at 134 (emphasis added).

58. *Id.* at 134-35.

59. *Id.* at 135.

60. *Shields v. Sturm, Ruger, & Co.*, 864 F.2d 379, 382 (5th Cir. 1989); accord *Varel v. Banc One Capital Partners, Inc.*, 1997 WL 86457, at \*2 (N.D. Tex. 1997).

61. *Varel*, 1997 WL 86457, at \*2.

62. *Id.*; *Ferko*, 218 F.R.D. at 136; *Aiken v. Texas Farm Bureau Mut. Ins. Co.*, 151 F.R.D. 621, 623 (E.D. Tex. 1993).

formation protected by the privilege in court or failing to object when such information is offered would result in waiver of the privilege.<sup>63</sup>

### III. THE DEVELOPMENT OF SELECTIVE WAIVER IN CORPORATE INVESTIGATIONS

Despite the general principles surrounding waiver of the attorney-client privilege and work-product protection, a limited number of courts have recognized a “limited” or “selective waiver” doctrine. Under this doctrine, disclosures of privileged information to government agencies would not waive the privileges. This concept has been largely rejected by the courts. However, newly adopted policies of the DOJ and other governmental agencies have revitalized the relevancy of selective waiver, especially in the context of internal corporate investigations.

#### *A. Origin of the Selective Waiver Doctrine: Diversified Industries, Inc. v. Meredith*

The origin of the selective waiver doctrine can be traced to the 1978 en banc decision of *Diversified Industries, Inc. v. Meredith*.<sup>64</sup> In *Meredith*, Diversified Industries (Diversified), a scrap copper company, defended against an action brought by Weatherhead, its client, regarding an alleged unlawful conspiracy between Diversified and Weatherhead employees whereby the Weatherhead employees were paid sums of money out of a “slush fund” to procure purchases of inferior copper from Diversified.<sup>65</sup> This alleged slush fund came to light due to prior litigation surrounding a “proxy fight” that raised the interest of the SEC.<sup>66</sup> The alleged slush fund caused the SEC to conduct an official investigation of the affairs of Diversified.<sup>67</sup> In response to a SEC subpoena, Diversified voluntarily produced materials that were subject to the attorney-client privilege.<sup>68</sup> In the subsequent *Meredith* litigation, Weatherhead sought to compel Diversified to produce these materials, claiming that the materials were either not covered by the attorney-client privilege or alternatively that any originally existing privilege was waived when Diversified turned the materials over to the SEC.<sup>69</sup>

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63. *Shields*, 864 F.2d at 382. It should be noted, however, that not all state courts impose additional requirements for waiving the work-product protection beyond non-privileged disclosure to a third party. *See, e.g.*, *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. App. 1993).

64. 572 F.2d 596, 611 (8th Cir. 1978) (en banc).

65. *Id.* at 599–600.

66. *Id.* at 600.

67. *Id.*

68. *Id.* at 599.

69. *Id.*

Diversified sought to protect the contents of these materials from discovery through a writ of mandamus.<sup>70</sup> The Eighth Circuit denied Diversified's petition for a writ of mandamus, reasoning that the materials were not protected by the attorney-client privilege.<sup>71</sup> The en banc court disagreed with the panel's opinion and determined that some of the materials were, in fact, protected by the attorney-client privilege.<sup>72</sup> With regard to Weatherhead's waiver argument, the court held that voluntary disclosure of attorney-client privileged materials to the SEC pursuant to an agency subpoena did not waive the privilege.<sup>73</sup> According to the en banc court,

As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred. To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.<sup>74</sup>

Thus, from this lone paragraph the selective waiver doctrine was born.<sup>75</sup>

### *B. The Decline of the Selective Waiver Doctrine*

Despite the Eighth Circuit's adoption of the selective waiver doctrine, the concept gained little judicial support in subsequent years. Just three years after the *Meredith* decision, the D.C. Circuit rejected the selective waiver doctrine in *Permian Corp. v. United States*.<sup>76</sup> However, unlike the *Meredith* court's decision, which involved a third party seeking disclosure of attorney-client privileged material, the *Permian* court was faced with a government entity seeking disclosure of attorney-client privileged and work-product protected material.<sup>77</sup>

In *Permian*, the Occidental Petroleum Corporation and its subsidiary, the Permian Corporation (collectively "Occidental"), sought to enjoin the SEC from passing on documents to the U.S. Department of Energy (that Occidental had produced to the SEC) by claiming the documents were subject to the attorney-client privilege and work-product pro-

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70. *Id.* at 598.

71. *Id.* at 604.

72. *Id.* at 610–11.

73. *Id.* at 611.

74. *Id.* at 611 (internal citations omitted).

75. Interestingly, the court did not justify the selective waiver doctrine based upon a need to divulge confidential information to the government, but rather based its decision on a policy of encouraging internal investigations by corporations. *Id.*

76. 665 F.2d 1214, 1221–22 (D.C. Cir. 1981).

77. *Id.* at 1216.

protection.<sup>78</sup> The documents at issue had been made available to the SEC during an SEC inquiry into the inadequacies of a registration statement by Occidental.<sup>79</sup> The district court agreed with Occidental, finding that despite being produced to the SEC, the documents were subject to the attorney-client privilege and work-product protection.<sup>80</sup> On appeal, Occidental asked the D.C. Circuit to follow the reasoning of *Meredith* and to create a limited or selective waiver exception to the disclosure of attorney-client privileged materials.<sup>81</sup> The D.C. Circuit rejected this theory, finding that a limited waiver would not “serve the interests underlying the common-law privilege for confidential communications between attorney and client.”<sup>82</sup>

The court noted that “the privilege depends upon the assumption that full and frank communication will be fostered by the assurance of confidentiality, and the justification for granting the privilege ‘ceases when the client does not appear to have been desirous of secrecy.’”<sup>83</sup> The court further noted that to adopt a selective waiver exception would effectively transform the privilege into a tactical litigation tool, which is not a purpose for which the privilege was designed.<sup>84</sup> Finally, the court rejected Occidental’s argument that public policy concerns, i.e., the SEC’s regulatory purpose, supported adoption of the selective waiver exception, stating that “[i]mportant though the SEC’s mission may be, we are aware of no congressional directive or judicially recognized priority system that places a higher value on cooperation with the SEC and on cooperation with other regulatory agencies, including the Department of Energy.”<sup>85</sup> Interestingly, the D.C. Circuit upheld the district court’s finding that a majority of the documents, despite production to the SEC, continued to be protected under the work-product protection, and the court noted that though the record did not compel such a conclusion, the lower court’s finding was not clearly erroneous and must be affirmed.<sup>86</sup>

In subsequent years, a number of circuits followed the D.C. Circuit’s lead in *Permian* and rejected adoption of the selective or limited waiver doctrine, including the First Circuit,<sup>87</sup> Second Circuit,<sup>88</sup> Third

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78. *Id.* at 1215.

79. *Id.* at 1216.

80. *Id.* at 1215.

81. *Id.* at 1220.

82. *Id.*

83. *Id.* (quoting 8 J. WIGMORE, EVIDENCE § 2311, at 599 (McNaughton Rev. 1961)).

84. *Id.* at 1221.

85. *Id.*

86. *Id.* at 1222.

87. *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) [hereinafter MIT] (rejecting the *Diversified* approach and forcing MIT to hand over audits to the Internal Revenue Service that had been previously obtained by the Department of Defense); *but see United States v.*

Circuit,<sup>89</sup> Fourth Circuit,<sup>90</sup> Seventh Circuit,<sup>91</sup> and Federal Circuit.<sup>92</sup> Recently, in *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, the Sixth Circuit joined these circuits in rejecting the selective waiver doctrine as to both the attorney-client privilege and the work-product protection.<sup>93</sup> In that case, a number of private insurance companies and private individuals brought suit against Columbia/HCA Healthcare Corporation (Columbia/HCA), claiming that Columbia/HCA overbilled them for various services.<sup>94</sup> Several years prior to the litigation, Columbia/HCA conducted a number of internal audits on its Medicare patient records in response to an investigation by the DOJ.<sup>95</sup> Pursuant to negotiations with the DOJ, Columbia/HCA agreed to produce some of these audits to the government, and in exchange for its cooperation, the DOJ agreed that certain stringent confidentiality provisions would govern the documents.<sup>96</sup> After producing the documents, the DOJ and Columbia/HCA settled on the fraud investigation.<sup>97</sup> The private litigants adverse to Columbia/HCA sought an order from the district court compelling Columbia/HCA to produce the audits that Columbia/HCA handed over to the DOJ.<sup>98</sup> Columbia/HCA refused to produce the audits by claiming protection under both the attorney-client privilege and work-product protection, and by arguing that, based on the *Diversified* decision, disclosing information to the government did not waive the protec-

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Billmyer, 57 F.3d 31, 37 (1st Cir. 1995) (stating that “[i]f there ever were an argument for limited waiver, it might well depend importantly on just what had been disclosed to the government and on what understanding”).

88. *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982) (agreeing with the *Permian* court’s decision and reasoning); but see *In re Steinhardt Partners*, 9 F.3d 230, 236 (2d Cir. 1993) (denying application of selective waiver under the particular facts before the court, but declining to adopt a per se rule that all voluntary disclosures waive work-product protection).

89. *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3rd Cir. 1991) (stating that “selective waiver does not serve the purpose of encouraging full disclosure to one’s attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose”); see also *In re Steinhardt Partners*, 9 F.3d at 235 (stating that “selective assertion of privilege should not be merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage”).

90. *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988).

91. *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (rejecting selective waiver, but leaving open the possibility that selective waiver conditioned on the presence of a confidentiality agreement might be sustainable).

92. *Genentech Inc. v. United States Int’l Trade Comm’n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (relying on the *Permian* decision and rejecting the limited waiver theory).

93. 293 F.3d 289, 306–07 (6th Cir 2002).

94. *Id.* at 292.

95. *Id.* at 291–92.

96. *Id.* at 292.

97. *Id.*

98. *Id.* at 293.

tions of the two privileges.<sup>99</sup> In addition, Columbia/HCA argued that because it obtained a confidentiality agreement with the DOJ, Columbia/HCA reserved its right to assert the attorney-client privilege and work-product protection.<sup>100</sup>

The district court granted the plaintiffs' motion to compel production of the audits, and Columbia/HCA appealed.<sup>101</sup> After conducting a thorough review of case law discussing the selective waiver doctrine, the Sixth Circuit rejected the selective waiver concept in any of its various forms.<sup>102</sup> Citing the Third Circuit's decision in *Westinghouse*, the Sixth Circuit agreed that the selective waiver approach adopted in *Diversified* encouraged voluntary disclosure to government agencies, but that the attorney-client privilege was never designed "to protect conversations between the client and the government, i.e., an adverse party, rather, it pertained only to conversations between the client and *his or her* attorney."<sup>103</sup>

The Sixth Circuit also rejected other arguments, including the argument that the privileges would remain intact because Columbia/HCA had entered into an agreement with the government and that Columbia/HCA had preserved the privilege.<sup>104</sup> Further, the court questioned whether the Government should even enter into such agreements which obfuscate the truth-finding process.<sup>105</sup> Finally, the court held that both the work-product protection and the attorney-client privilege were waived, stating that "the standard for waiving the work-product doctrine should be no more stringent than the standard for waiving the attorney-client privilege"—once that privilege is waived, waiver is complete and final."<sup>106</sup>

In the summer of 2006, the Tenth Circuit also weighed in on selective waiver and similarly rejected its application.<sup>107</sup> In *In re Qwest*, Qwest Communications International, Inc. ("Qwest") urged adoption of the selective waiver doctrine by seeking a writ of mandamus ordering that Qwest had not waived the attorney-client privilege and work-product doctrine as to third-party litigants when it released privileged materials to federal agencies.<sup>108</sup> Qwest had supplied over 220,000 pages of docu-

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 302.

103. *Id.* (citing *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3rd Cir. 1991)) (emphasis added).

104. *Id.* at 303

105. *Id.*

106. *Id.* at 307 (quoting *Westinghouse*, 951 F.2d at 1429) (internal footnote omitted).

107. *In re Qwest Commc'ns Int'l. Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006).

108. *Id.* at 1181.



ments to the DOJ and SEC pursuant to subpoenas and written confidentiality agreements between Qwest and each agency.<sup>109</sup> Prior to the federal investigations, Qwest became involved in a number of civil suits involving many of the same issues as the federal investigations, and the suits were still continuing during these investigations.<sup>110</sup> The plaintiffs in these civil suits sought to obtain the same materials Qwest handed over to the DOJ and SEC, but Qwest refused, claiming that it had not waived the attorney-client privilege and work-product protection.<sup>111</sup> The magistrate judge disagreed, and the district court upheld the magistrate judge's ruling.<sup>112</sup>

On appeal, the Tenth Circuit noted that adoption of selective waiver was an issue of first impression in the Tenth Circuit.<sup>113</sup> After reviewing the many circuit decisions that analyzed selective waiver, including *Columbia/HCA*, the court concluded that the record did not "justify adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material."<sup>114</sup> The court went on to rebut Qwest's arguments in favor of selective waiver:

The record does not establish a need for a rule of selective waiver to assure cooperation with law enforcement, to further the purposes of the attorney-client privilege or work-product doctrine, or to avoid unfairness to the disclosing party. Rather than a mere exception to the general rules of waiver, one could argue that Qwest seeks the substantial equivalent of an entirely new privilege, i.e., a government-investigation privilege. Regardless of characterization, however, the rule Qwest advocates would be a leap, not a natural, incremental next step in the common law development of privileges and protections. On this record, "[w]e are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination."<sup>115</sup>

Thus, the Tenth Circuit appears to have joined the majority of circuits in rejecting adoption of selective waiver.

However, although a majority of circuit courts have rejected selective waiver, circuit and district courts remain divided on the issue. This division can be parsed into three basic camps: (1) selective waiver is permissible; (2) selective waiver is never permissible; and (3) selective waiver is permissible only in situations where the government has signed, prior to the

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109. *Id.*

110. *Id.* at 1182.

111. *Id.*

112. *Id.*

113. *Id.* at 1181.

114. *Id.* at 1192.

115. *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972)).

disclosure, a binding confidentiality agreement with the corporation.<sup>116</sup> There is an additional variation in the third camp, as at least one court has allowed selective waiver to opinion work-product, but not to fact work-product.<sup>117</sup> As this article is concerned with the overall policy implications of adopting any form of selective waiver, the nuances of this third camp need not be discussed here.<sup>118</sup>

### C. The Reemergence of Selective Waiver

With so many courts rejecting selective waiver, it would be easy to conclude that corporations would be better off to simply refuse to share privileged materials rather than risk that disclosed materials would fall into the hands of third-party litigants. However, recently adopted policies of the DOJ and other governmental agencies seem to require disclosure of such materials in order for the government to deem the corporation as “cooperating.”

#### 1. The Holder and Thompson Memos

The beginning of the perceived waiver requirement can be traced to a 1999 memorandum issued by then Deputy Attorney General Eric Holder, known as the “Holder Memo.”<sup>119</sup> Prior to this memo, the DOJ did not have a clear policy regarding the factors to consider in determining whether to formally indict corporations.<sup>120</sup> This policy changed with the Holder Memo, which set out eight factors to be considered. The Holder Memo states,

In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

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116. Zach Dostart, Comment, *Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine*, 33 PEPP. L. REV. 723, 734 (2006).

117. See *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 2006 WL 278279, \*1 (D. Colo. 2006).

118. As the court explained in *In re Columbia/HCA*, “any form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into ‘merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.’” *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 300 (6th Cir. 2002) (quoting *In re Steinhardt Partners*, 9 F.3d 230, 235 (2d Cir. 1993)).

119. Holder Memo, *supra* note 1.

120. Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 113–14 (2003) (noting that prior to the Holder Memo and the 1991 institution of the Sentencing Guidelines chapter regarding sentencing of organizations, the only real guidance came in the form of the United States Attorney’s Manual, which was primarily geared toward individuals).

- 1) The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
- 2) The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
- 3) The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
- 4) The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work-product privileges;
- 5) The existence and adequacy of the corporation's compliance program;
- 6) The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
- 7) Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and
- 8) The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.<sup>121</sup>

Of particular relevance is factor 4, which provides that cooperation could include "if necessary, the waiver of the corporate attorney-client and work-product privileges."<sup>122</sup> Thus, this provision alarmed many, as it essentially gave prosecutors the discretion to pressure corporations to disclose privileged materials even before there was any actual finding of wrongdoing.

Despite these concerns, in 2003 the new Deputy Attorney General, Larry Thompson, reiterated these factors in what has been dubbed the

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121. Holder Memo, *supra* note 1 (internal cross-references omitted).

122. *Id.*

“Thompson Memo.”<sup>123</sup> The Thompson Memo essentially is a restatement of the Holder Memo with an added ninth factor regarding the “adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.”<sup>124</sup> The Thompson Memo also provides that the advancing of attorneys’ fees to culpable employees may be considered by the DOJ in evaluating whether a corporation has cooperated,<sup>125</sup> which many view as essentially encouraging corporations to leave its employees high and dry despite the presumption of innocence.<sup>126</sup> Furthermore, the Thompson Memo makes abundantly clear the importance of a corporation lending its full cooperation:

One factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work-product protections, both with respect to its formal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, with-

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123. The Thompson Memo states:

In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. the corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work-product protection;
5. the existence and adequacy of the corporation’s compliance program;
6. the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution;
8. the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and
9. the adequacy of remedies such as civil or regulatory enforcement actions.

Thompson Memo, *supra* note 1, § II.A (internal cross-references omitted).

124. *Id.*

125. *Id.* § VI.B.

126. *Corporate Injustice*, Review & Outlook, WALL ST. J., Apr. 6, 2006, at A14; Nathan Koppel, Marketplace, *U.S. Pressures Firms Not to Pay Staff Legal Fees*, WALL ST. J., Mar. 28, 2006, at B1.

out having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation.<sup>127</sup>

Thus, corporations are understandably fearful of being perceived as giving anything less than full cooperation due to the risk of being deemed uncooperative.

## 2. The Seaboard Report

A few years after the DOJ issued the Holder Memo, and perhaps encouraged by its aggressive posture toward corporations, the SEC adopted similar measures in October 2001 in the Report of Investigation and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, commonly referred to as the *Seaboard Report*.<sup>128</sup>

The *Seaboard Report* resulted from an investigation of improper accounting entries that overstated Seaboard's assets and understated its expenses.<sup>129</sup> The SEC ultimately filed a lenient settlement against the Seaboard employee most responsible for the improper conduct but brought no charges against the company itself.<sup>130</sup> In explaining its decision not to take action against the corporation, the SEC cited Seaboard's quick response to the alleged wrongdoing, its enactment of prophylactic measures, its dismissal of culpable employees, and Seaboard's full cooperation.<sup>131</sup> The SEC then set forth thirteen factors that it would consider in deciding whether and how to take enforcement actions.<sup>132</sup> Of particular interest is the eleventh factor, which considers,

Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review?

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127. Thompson Memo, *supra* note 1, § VI.B.

128. Report of Investigation Pursuant to § 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 34-44969, 76 SEC Docket 220 (Oct. 23, 2001) [hereinafter *Seaboard Report*], available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

129. *Id.*; Russell G. Ryan, *Cooperation in SEC Enforcement: The Carrot Becomes the Stick*, 19 LEGAL BACKGROUNDER No. 33, at 2 (Wash. Legal Found. Oct. 1, 2004), also available at <http://www.kslaw.com/library/pdf/WLFarticle.pdf>.

130. See Ryan, *supra* note 29, at 2.

131. Seaboard Report, *supra* note 128, at \*1-2.

132. *Id.* at \*1-4.

Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?<sup>133</sup>

Though this factor does not explicitly state that waiver of attorney-client privilege and work-product protection will be sought, footnote 3 to the above factor states, “In some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege, the work-product protection and other privileges, protections and exemptions with respect to the Commission.”<sup>134</sup> Though this footnote does not unequivocally require waiver of the attorney-client privilege and work-product protection, corporations fear that without waiver, the corporation will not receive adequate credit for cooperation or may even be perceived as hiding information from the Commission.<sup>135</sup>

### 3. The Development of a “Culture of Waiver”

Though neither the Holder Memo, the Thompson Memo, nor the *Seaboard Report* explicitly require the disclosure of privileged materials for a corporation to be deemed as “cooperating,” corporate decision-makers perceive the above *Seaboard* factor as having become, in effect, a requirement they must follow to avoid indictment or a large penalty.<sup>136</sup> This has led to what some commentators have termed a “culture of waiver” of the attorney-client privilege in corporate investigations, i.e., the fear of the negative impacts of failing to disclose privileged materials has caused corporate decision-makers to feel obligated to waive the privilege on a regular basis.<sup>137</sup> Indeed, a recent survey of inside and out-

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133. *Id.* at \*3 (internal footnote omitted).

134. *Id.* at \*4.

135. U.S. Chamber of Commerce, *Report on the Current Enforcement Program of the Securities and Exchange Commission*, 35 (Mar. 2006) [hereinafter Commerce Report]. This perception was likely re-enforced by the SEC’s next public announcement of a settlement with Xerox Corporation in which the SEC not only charged Xerox in federal court with securities fraud, but also imposed a \$10 million penalty, basing the penalty, in part, on Xerox’s “lack of full cooperation with the investigation.” SEC Press Release No. 2002-52 (Apr. 11, 2002), available at <http://www.sec.gov/news/press/2002-52.txt>; see also Ryan, *supra* note 129, at 2.

136. See Testimony of Gerald B. Lefcourt Before the ABA Task Force on Attorney-Client Privilege, Apr. 21, 2005, at 1–2, available at [http://www.nacdl.org/public.nsf/Legislation/WhiteCollar001/\\$FILE/Lefcourt\\_Testimony.pdf](http://www.nacdl.org/public.nsf/Legislation/WhiteCollar001/$FILE/Lefcourt_Testimony.pdf); *Attorneys—Corporate Counsel Uncertainty Over Attorney-Client Privilege Eroding Client Communication, Speakers Say*, 73 U.S. L. WK. No. 42, at 2661; Commerce Report, *supra* note 135, at 32, 35; see also Nathan Koppel, *U.S. Pressures Firms Not to Pay Staff Legal Fees*, WALL ST. J., Mar. 28, 2006, at B1.

137. Marcia Coyle, *Lawyers Fear a DOJ “Culture of Waiver”*: Corporate Investigations Rely Too Often on Waiving Privilege, *Attorneys Say*, NAT’L. L. J., Mar. 24, 2006, at 13 (“A survey of in-house and outside counsel by a coalition of business and legal organizations reports that a ‘culture of

side counsel conducted by, among others, the National Association of Criminal Defense Lawyers (NACDL) and Association of Corporate Counsel (ACC), found that nearly 75% of some 1,400 respondents reported that a culture of waiver has evolved in which government agencies expect corporations to waive legal privileges.<sup>138</sup> A similar study conducted by the NACDL found that 87% of respondents believed the attorney-client privilege and work-product protection were currently being challenged by various entities, including federal government agencies.<sup>139</sup>

Despite these survey results, the DOJ and SEC have maintained that waivers are rarely sought. Defenders of these waiver policies often point to a survey conducted in 2002 by a DOJ Ad Hoc Advisory Group where prosecutors were asked about the frequency with which waivers were requested.<sup>140</sup> According to U.S. Attorney Mary Beth Buchanan, this survey “revealed that requests for waiver of the attorney-client privilege or work-product protection were the exception rather than the rule.”<sup>141</sup> The accuracy of this survey has been called into question, however, due to the results of the more recently conducted NACDL and ACC surveys as well as on the basis of the types of questions asked.<sup>142</sup> Ultimately, however, the frequency with which government agents *explicitly* request waivers may be of little consequence, so long as it is implicitly required,

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waiver’ of the attorney-client privilege now exists in corporate investigations by the U.S. Department of Justice and other federal agencies.”); *Attorneys—Corporate Counsel Uncertainty Over Attorney-Client Privilege Eroding Client Communication, Speakers Say*, 73 U.S. L. WK. No. 42, at 2661 (reporting that waiver has become “the norm rather than an option”); Commerce Report, *supra* note 134, at 37 (“Interviewees generally expressed the view that, as a result of the recent policies advanced by the DOJ and [SEC], corporations have felt intense pressure to waive attorney-client privilege and work-product protection during SEC investigations.”).

138. *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results*, at 3, available at <http://www.acca.com/Surveys/attyclient2.pdf>; see also Coyle, *supra* note 137.

139. Executive Summary, *NACDL Survey: The Attorney-Client Privilege is Under Attack*, at 2 (hereinafter NACDL Survey), available at [http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC\\_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf).

140. Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 597–98 (Fall 2004).

141. *Id.*; see also Coyle, *supra* note 137.

142. Coyle, *supra* note 137 (“But the Buchanan survey was conducted several years ago and its questions were asked in a very narrow way, said Susan Hackett, senior vice president and general counsel of the Association of Corporate Counsel . . . .”); *Corporate Lawyers Launch Attack on “Culture of Waiver.”* CORP. CRIME REP., Mar. 6, 2006, <http://www.nacdl.org/public.nsf/whitecollar/WCnews025> (noting that in its survey, the government asked the U.S. Attorneys if they formally requested privilege waivers on a routine basis, but that they could all say no and still be asking on a periodic basis). A recent review of corporate pre-trial agreements with the DOJ (post-Thompson Memo) also suggests that privilege waivers are sought more often than not. Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, ST. LOUIS U. L.J. (forthcoming 2006) (noting that of the thirty post-Thompson Memo pre-trial agreements reviewed, twenty-one included privilege waivers).

or at least perceived as such. As white collar criminal defense attorney and former Assistant U.S. Attorney William M. Sullivan articulated in his statement before the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security:

In the wake of the Holder and Thompson Memoranda, and the *Seaboard Report*, the corporate defense bar has witnessed an unprecedented surge in government demands for access to privileged communications and work product. It is often said that perception is reality, and on this issue the two easily merge. Whether or not admitted by prosecutors and regulators, cooperation has become synonymous with waiver.<sup>143</sup>

So long as government agencies have the power essentially to coerce a waiver of the attorney-client privilege and work-product protection, the perception will remain that waivers are required, and thus, the reality is that a culture of waiver will continue to evolve.

#### IV. THE NEGATIVE IMPACT OF WAIVER

In September 2004, the American Bar Association formed a Task Force on the Attorney-Client Privilege (ABA Task Force) to “evaluate issues and recommend policy related to the attorney-client privilege and work-product doctrine.”<sup>144</sup> In forming its recommendation, the ABA Task Force investigated, among other things, institutional practices by government agencies that threaten the attorney-client privilege and work-product doctrine.<sup>145</sup> Based on its investigation, the ABA Task Force made the following recommendation that was also later adopted by the ABA:

RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice; and

FURTHER RESOLVED, that the American Bar Association opposes policies, practices and procedures of governmental bodies that

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143. *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers Before the H. Comm. On the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security*, 109th Cong. 4 (2006) (testimony of William M. Sullivan, Jr. Esq., Partner, Winston & Straw, LLP).

144. ABA Task Force on Attorney-Client Privilege, Task Force Report, May 2005, at 1, available at <http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf>.

145. *Id.*



have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections.

FURTHER RESOLVED, that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client or work product doctrine through the granting or denial of any benefit or advantage.<sup>146</sup>

While the ABA Task Force's investigation and recommendation focused on the erosive effect of a culture of waiver, and this is certainly a very important concern, the negative effects go further, by touching upon the individual constitutional rights of employees and even ethical concerns of attorneys.<sup>147</sup> As will be explored below, these problems create a difficult tension between the interests of attorneys, clients, corporate employees, and government agencies.

#### *A. Erosion of Policies Underlying the Attorney-Client Privilege and Work-Product Protection*

One of the most notable impacts of governmental policies that encourage waiver is the erosion of the attorney-client privilege. These policies undercut the purpose of the privilege, as articulated by the Supreme Court in *Upjohn*:

[The] purpose [of the attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyers being fully informed by the client.<sup>148</sup>

If clients know that their communications will be revealed to governmental investigators then they will be less willing to engage in full and frank communications with their attorneys. These governmental policies similarly cut against the underlying policy behind the work-product doctrine of "establish[ing] a zone of privacy for strategic litiga-

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146. ABA Task Force on Attorney-Client Privilege, Task Force Recommendations as adopted, at 111, available at [http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation\\_adopted.pdf](http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf).

147. The ABA Task Force Report also specifically left open the question of the desirability of adopting or legislating selective waiver, but did note that previous legislation considering implementation of an exception to general waiver principles for disclosure to government agencies had failed. ABA Task Force Report, *supra* note 144, at 22 (citing H.R. 2179, 108th Cong., 2d Sess., § 4).

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

tion planning and to prevent one party from piggybacking on the adversary's preparation,"<sup>149</sup> as corporate attorneys must now presumably operate under the assumption that their work product will ultimately fall into the hands of the government.

Recent surveys reveal that an erosion in these privileges has already begun. According to a survey conducted by the ACC of in-house counsel, approximately one-third of those surveyed responded that they had personally experienced an erosion in their corporate clients' privilege rights.<sup>150</sup> A similar study conducted by the NACDL revealed that 48% of outside counsel reported an erosion of the attorney-client privilege and work-product protection.<sup>151</sup> Furthermore, 95% of respondents in the NACDL survey responded that "the weakening of the [attorney-client privilege and work-product protection] chills a client's frank discussion of legal issues."<sup>152</sup>

To illustrate this erosive effect, consider the following hypothetical. Imagine Company ABC, a large international oil company that does business in South America. Employee John Doe, one of the country managers for ABC in South America, becomes aware that bribes are being made to customs officials. John Doe is vaguely aware that certain bribes may be excusable under the Foreign Corrupt Practices Act (FCPA), but is unsure of exactly what is permissible under the FCPA.<sup>153</sup> John Doe remembers that the DOJ indicted his predecessor some three years earlier and that the company handed over email communications with ABC's in-house counsel to the DOJ. John Doe is understandably leery of emailing or otherwise communicating with counsel about his concerns and instead assumes that because the bribes are small, he is better-off turning a blind eye. Thus, because John Doe is unsure of the confidentiality of his communications with counsel, he does not engage in open and frank communications with counsel, which, in turn, discourages compliance with the law.<sup>154</sup>

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149. *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995).

150. Association of Corporate Counsel Executive Summary, *Association of Corporate Counsel: Is the Attorney-Client Privilege Under Attack?*, at 2 (Apr. 6, 2005), available at <http://www.acca.com/Surveys/attyclient.pdf>.

151. NACDL Survey, *supra* note 140, at 2.

152. *Id.* at 3.

153. The FCPA contains an exception for "facilitating or expediting payment[s] to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action." 15 U.S.C. § 78dd-1(b) (2000). Only very small payments fall under the exception, however, and only if the payment is for the purpose of securing the performance of "routine governmental action," which is defined in the statute. *Id.* § 78dd-1(f).

154. This point was recently articulated by the Tenth Circuit as part of its reasoning in rejecting selective waiver:

### B. The Deputation of Corporate Counsel

One of the major results of the “cooperation” standards set forth by governmental agencies is what has been dubbed as the “deputation” of a corporation’s outside counsel.<sup>155</sup> To understand this term, it is important to understand how a company’s counsel is utilized. “Cooperation” in the context of a government investigation often means much more than simply handing over privileged documents—it also means hiring counsel to conduct an internal investigation, including conducting interviews with employees.<sup>156</sup> Increasingly, corporations are being pressured not only to waive their attorney-client privilege with regard to these interviews and the outside counsel’s findings and recommendations, but also to refuse to indemnify their employees or otherwise fund their defense should criminal charges against the employee be brought.<sup>157</sup> Corporations are also being pressured by government agencies into requiring their employees to waive Fifth Amendment protections, under threat of discharge, in order that the corporation be deemed as cooperating.<sup>158</sup> Because the notes of these interviews and the findings of the internal investigation are often

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If officers and employees know their employer could disclose privileged information to the government without risking a further waiver of the attorney-client privilege, they may well choose not to engage the attorney or do so guardedly. Such reticence and caution could be heightened where, as here, further disclosures by the government mean that the information may be disclosed to countless others.

*In re Qwest Comm’n. Int’l. Sec. Litig.*, 450 F.3d 1179, 1195 (10th Cir. 2006).

155. Finder, *supra* note 120, at 111–12; Ben Florey, *When the Government Knocks, Stick to the Script*, TEX. LAWYER, Mar. 6, 2006, at 10 (noting that in such investigations, the in-house counsel’s role becomes essentially that of a government agent).

156. John Hasnas, *End the Draft*, 28 NAT’L L. J. No. 33, Apr. 24, 2006, at 23 Opinion (likening the DOJ’s policy of conscripting corporations into becoming deputy law enforcement agents to the draft).

157. Florey, *supra* note 155, at 10 (noting that prosecutors have sought restraining orders to keep companies from paying attorneys’ fees).

158. Testimony of Henry W. Asbill, on Behalf of the National Association of Criminal Defense Lawyers, to the United States Sentencing Commission, Nov. 15, 2005, at 4, available at [http://www.usc.gov/corp/11\\_15\\_05/Asbill.pdf](http://www.usc.gov/corp/11_15_05/Asbill.pdf) (stating that companies do not hesitate to fire employees who refuse to “cooperate” on Fifth Amendment grounds, in part in keeping with a statement made by Timothy Coleman, Deputy Attorney General, at the American Bar Association’s White Collar Institute on March 3, 2005, that “[c]orporate employees have no right not to talk to internal investigators.”) (citing also Laurie P. Cohen, *Prosecutors Tough new Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1, and Theo Francis and Ian McDonald, *AIG Fires Two Top Executives As Probe Intensifies*, WALL ST. J., Mar. 22, 2005, at A1); Statement of Donald C. Klawiter, Chair of the ABA Antitrust Law Section, on Behalf of the American Bar Association, appearing before the United States Sentencing Commission, Nov. 15, 2005, at 7, available at [http://www.usc.gov/corp/11\\_15\\_05/klawiter-ABA.pdf](http://www.usc.gov/corp/11_15_05/klawiter-ABA.pdf) (noting that privilege waivers place employees of companies in a very difficult situation as they must choose between their disclosed statements possibly being turned over to the government or risk their employment); see also Robert J. Sussman, *Practicing White Collar Criminal Defense in the Post-Enron Era: Some Changes in the System*, 43 THE HOUSTON LAWYER 26, 28 (Nov./Dec. 2005) (postulating that as a result of the Thompson Memo, requirements of Fifth Amendment waivers as a condition of employment are likely).

sought by investigating agencies through a waiver of the attorney-client and work product protections, this practice leads to serious legal and ethical concerns.

### 1. Fifth Amendment Concerns

With regard to individual employees, the deputation of outside counsel has serious Fifth Amendment implications when a corporation is pressured into requiring its employees to waive their Fifth Amendment rights.<sup>159</sup> While the corporation itself does not have any Fifth Amendment rights, its individual employees do. Interestingly, by utilizing outside counsel and pressuring corporations through the guise of “cooperation,” government agencies not only avoid the need to read *Miranda* warnings to employees, but are also capable of achieving what they could not otherwise achieve by conducting the interviews themselves, i.e., coerce a waiver of an individual’s Fifth Amendment rights.

The U.S. Supreme Court has held that self-incriminating statements made under threat of termination are coerced and, therefore, violate the Fifth Amendment.<sup>160</sup> Similarly, the Supreme Court has held that a state cannot terminate an employee for exercising his or her Fifth Amendment rights. For example, in *Uniformed Sanitation Men Ass’n, Inc. v. Commissioner of Sanitation of the City of New York*, the Court considered whether fifteen employees of the Department of Sanitation of New York City were wrongly dismissed from employment in violation of their constitutional rights when they refused to waive their Fifth Amendment guarantees.<sup>161</sup> The employees/petitioners had been questioned by the Commissioner of Investigation of New York City during the course of an investigation into whether sanitation employees were failing to charge private cartmen fees for use of certain city facilities or keeping fees for themselves.<sup>162</sup> The Commissioner summoned the employees before him and advised them that, in accordance with the New York City charter, if the employees refused to testify on the grounds of self-incrimination, their employment and eligibility for other city employment would terminate.<sup>163</sup> The employees refused to testify and were subsequently dismissed from employment.<sup>164</sup> The Court held that the state could not terminate the employees when the plain impact of the proceedings against

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159. Finder, *supra* note 120, at 122–23.

160. *Garrity v. New Jersey*, 385 U.S. 493, 497–98 (1967) (holding that statements made by police officers under threat of termination were obtained in violation of the Constitution and could not be used in the subsequent criminal prosecution in state court).

161. 392 U.S. 280, 281–82 (1968).

162. *Id.* at 281.

163. *Id.* at 281–82.

164. *Id.* at 282–83.

the employees was to “present them with a choice between surrendering their constitutional rights for their jobs.”<sup>165</sup>

The Court has extended its reasoning to a variety of contexts, including the loss of a job, loss of state contracts, loss of future contracting privileges for the state, loss of political office, loss of the right to run for political office in the future, and revocation of probation.<sup>166</sup> Thus, a state may not “impose substantial penalties because a witness elects to exercise his Fifth Amendment privilege not to give incriminating testimony against himself.”<sup>167</sup> But governmental agencies are nevertheless able to obtain the results of these interviews because the “cooperating” corporations ultimately waive their attorney-client and work-product protections. Thus, governmental agencies are in fact imposing substantial penalties on witnesses who might otherwise seek to exercise Fifth Amendment rights, even if indirectly.

## 2. Ethical Concerns for Attorneys

The deputation of outside counsel also raises a number of ethical concerns because of the dual nature of employees as both a part of the corporation represented and an individual with interests that may be adverse to the corporation and government agencies. The ABA Model Rules of Professional Conduct provide:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.<sup>168</sup>

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165. *Id.* at 284 (noting, however, that had the state demanded that petitioners answer “questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so,” the case may have been decided differently).

166. *Sanitation Men*, 392 U.S. at 284–85 (loss of a job); *Lefkowitz v. Turley*, 414 U.S. 70, 77–84 (1973) (loss of future contracting privileges for the state); *Garrity v. New Jersey*, 385 U.S. 493, 499–500 (1967) (loss of political office); *Lefkowitz v. Cunningham*, 431 U.S. 801, 804–08 (1977) (loss of right to run for political office in the future); *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984) (revocation of probation); see also *United States v. Frierson*, 945 F.2d 650, 657–58 (3d Cir. 1991) (summarizing cases).

167. *Cunningham*, 431 U.S. at 805.

168. MODEL RULES OF PROF’L CONDUCT R. 4.3 (2002).

Though most interviews with employees begin with a boilerplate statement that the attorney conducting the interview represents the corporation and not the employee, the import of this statement may be lost on an employee, particularly a lower echelon and possibly less educated employee. What happens when the employee discloses information that the attorney knows is criminally damaging to the employee, though the employee himself does not realize it? Should the attorney stop the interview and advise the employee that he should seek an attorney? What if the employee begins asking the attorney questions? Under the commentary to the Model Rules, the attorney is supposed to refrain from giving advice other than the advise to obtain counsel.<sup>169</sup> But how is the attorney to distinguish between advice being given to the employee as a member of the company as opposed to the employee as an individual?

Another ethical dilemma concerns the point at which an attorney's obligations to the client, i.e., the corporation, to obtain information overrides these ethical concerns. After all, repeating to an employee that he can obtain outside counsel, or stopping an interview where the employee is revealing personally damaging information, will likely hinder the attorney's ability to get information from the employee. In other words, though it may be permissible for an attorney to advise an employee that he or she may seek outside representation, it may not be in the corporation's best interest for the employee actually to secure such representation.<sup>170</sup> As the Bar Association of the City of New York recently articulated, "Because affirmatively advising a corporate employee to secure counsel may work against the interests of the corporation, we believe it is appropriate for corporate counsel to be reluctant to render that advice – at least in the absence of the consent of his client to do so."<sup>171</sup>

Furthermore, in light of the Fifth Amendment concerns raised above, an attorney may arguably be in violation of the Model Rules of Professional Conduct when questioning such an employee. Model Rule 4.4 states: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, *or use methods of obtaining evidence that violate the legal rights of such a person.*"<sup>172</sup> If an employee is only consenting to the interview and waiving Fifth Amendment protections out of a fear of termination, then arguably the attorney is using methods of obtaining evidence

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169. MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. (2002).

170. Paul B. Murphy & Lucian E. Dervan, *Watching Your Step: Avoiding the Pitfalls and Perils of Corporate Internal Investigations*, 16 ALAS LOSS PREVENTION J. 2, 4–5 (Summer 2005).

171. Ass'n of the Bar of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2004-02 (2004).

172. MODEL RULES OF PROF'L CONDUCT R. 4.4 (2002) (emphasis added).

that violate the employees' constitutional rights. This concern is heightened in situations where it is in the corporation's best interest to find a scapegoat, thus making the relationship with the employee adversarial.

These concerns demonstrate the awkward position in which outside counsel are placed when acting as "deputies" of the government—a situation brought about in large part because the resulting communications, interview notes, and other work-product are sought by the investigating agencies through waiver of the attorney-client and work-product protections. These concerns could be ameliorated if the interviews were conducted by the government itself. There would be no question as to the adversarial nature of the DOJ conducting an interview, and employees would be more likely to obtain outside representation. Furthermore, Fifth Amendment waivers would be harder to obtain, as the governmental agencies would likely have to play a more direct role in obtaining them through coerced threats of termination, which would likely risk the validity of such waivers. Thus, these policies should be condemned because the so-called deputization of counsel not only contributes to and encourages violations of employees' Fifth Amendment protections, it also places outside counsel in an ethical dilemma that could be avoided by returning the task of interviewing employees to a more naturally adverse party, i.e., government agents and attorneys.

### *C. Policy of Diminishing Returns*

Another drawback to governmental policies that encourage waiver is that these policies may ultimately be self-defeating, at least in part. If corporate employees will be "chilled" from speaking frankly and openly with corporate counsel as a result of a developing culture of waiver, then it is logical to conclude that both the quantity and quality of information collected as a result of waivers will diminish. According to the NACDL Survey, 90.5% of respondents reported that the existence of the attorney-client privilege enhances the likelihood that company employees "will come forward to discuss or agree to be interviewed about sensitive or difficult issues regarding the company's compliance with the law."<sup>173</sup> Without the protections of the privilege, however, it is likely that employees will not discuss sensitive issues. Just as with the hypothetical above involving John Doe of the ABC Corporation, employees may very well choose to operate without the advice of counsel or simply choose not to be interviewed (or perhaps be less frank in their interviews).

This situation ultimately has two results. The first is less compliance with the law, which is contrary to a basic underpinning of the attor-

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173. NACDL Survey, *supra* note 139, at 6.

ney-client privilege.<sup>174</sup> The second is that the value in obtaining the waivers will diminish. Despite corporate America having spread the word of the erosion of the privilege and acceptance of a culture of waiver, the absolute disappearance of valuable information is unlikely; however, the trust employees have in their corporations' counsel will nonetheless diminish.<sup>175</sup> Therefore, these governmental policies, which encourage waiver in favor of a supposed public policy supporting the furtherance of governmental investigations, will not only destroy the valuable, centuries-old public policy supporting the privilege, but also will eventually realize fewer gains from the waivers as well, thus leading to a lose-lose situation in which neither public policy is significantly advanced.

#### D. Waiver as to Third-Parties

The end-result of governmental policies that encourage waiver is that the privilege is also waived as to third-party litigants. As explained above, confidentiality is a cornerstone of the attorney-client privilege.<sup>176</sup> Once a client intentionally discloses the substance of confidential attorney-client communications, the privilege is waived.<sup>177</sup> This waiver extends to other third-party litigants. Thus, as previously acknowledged, corporations are faced with a "Hobson's Choice" of either withholding privileged or protected material and thereby risking indictment and/or substantial penalties, or waiving the privilege or protection and thereby opening themselves up to possibly greater liability in private suits from third-parties.<sup>178</sup> It is from this concern that the "selective waiver" doctrine was created.

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174. *Attorneys—Corporate Counsel Uncertainty Over Attorney-Client Privilege Eroding Client Communications, Speakers Say*, LAW WEEK VOL. 73, No. 42, May 10, 2005, at 2661 (noting that speakers opposing governmental policies encouraging waiver believe that the "chilling" effect of waiver in turn hinders corporate compliance programs).

175. Brad D. Brian, *Corporate Responsibility: The Lawyer's Role*, 32 LITIGATION No. 3, 1, 62 (Spring 2006) (noting that waivers are ultimately counterproductive).

176. See *supra* Part II.A.

177. GERGACZ, *supra* note 3, § 5.07, at 5–8.

178. Richard M. Strassberg & Sarah E. Walters, *White Collar Crime: Is Selective Waiver of Privilege Viable?*, New York L.J., July 7, 2003, available at <http://library.findlaw.com/2003/Aug/11/132975.html>. See also Andrew J. McNally, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure of Corporate Wrongdoing by Restricting Third Party Access to Disclosed Materials*, 35 SETON HALL L. REV. 823, 824 (2005); Jody E. Okrzesik, *Selective Waiver: Should the Government Be Privy to Privileged Information Without Waiving the Attorney-Client Privilege and Work-Product Doctrine?*, 34 U. MEM. L. REV. 115, 170–71 (Fall 2003); Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 605–06 (Fall 2004); Testimony of William M. Sullivan, Jr. Esq., *supra* note 143, at 5.



## V. THE LIMITED APPEAL OF SELECTIVE WAIVER

In response to the third-party waiver problem, some commentators have advocated for the broad adoption of the selective waiver doctrine, arguing that it furthers public policy interests of encouraging cooperation with governmental investigations and aids investigators with limited resources.<sup>179</sup> These advocates appear to have temporarily found some footing with the Advisory Committee on Evidence Rules. At its meeting in April 2006, the Advisory Committee on Evidence Rules convened a mini-conference on a proposed new evidentiary rule<sup>180</sup> concerning waiver of the attorney-client privilege and work-product doctrine:

### Rule 502. Attorney-Client Privilege and Work-Product; Waiver By Disclosure

Waiver by disclosure in general.—A person waives an attorney-client privilege or work product protection if that person – or a predecessor while its holder – voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

Exceptions in general.—A voluntary disclosure does not operate as a waiver if:

....

. . . (3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigations.<sup>181</sup>

The Advisory Committee chose to approve for publication the proposed Rule, which was considered by the Committee on Rules of Prac-

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179. Ashok M. Pinto, *Cooperation and Self-Interest Are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege Through Production of Privileged Documents in a Government Investigation*, 106 W. VA. L. REV. 359, 367–68 (Winter 2004) (noting the limited resources of the federal government in conducting investigations); Okrzesik, *supra* note 178, at 171 (concluding that selective waiver will promote efficient government policing of corporations); McNally, *supra* note 1788, at 824 (advocating for a modified selective waiver approach).

180. See Federal Rulemaking, Evidence Rules Committee Approved for Publication Proposed New Rule on Privilege Waiver, <http://www.uscourts.gov/rules/index.html#advisoryspring06>.

181. Proposed Rule Fed. R. Evid. 502, available at [http://www.uscourts.gov/rules/Excerpt\\_EV\\_Report\\_Pub.pdf#page=4](http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf#page=4). The proposed rule also addresses inadvertent disclosure. *Id.*

tice and Procedure at its June 2006 meeting.<sup>182</sup> The Committee on Rules of Practice and Procedure approved the recommendations of the Advisory Committee regarding New Evidence Rule 502, which is to be published for comment in August 2006.<sup>183</sup> This Rule is not without opposition, however, as a group of individuals, made-up of the same members as the ABA Task Force on the Attorney-Client Privilege, wrote to the Advisory Committee and advised that the selective waiver provision be dropped from further consideration.<sup>184</sup> This group warned that such a provision “continues an alarming trend threatening the viability of the corporate attorney-client privilege.”<sup>185</sup> As will be explored further below, not only does selective waiver exacerbate many of the problems inherent in a culture of waiver, but it is also based on questionable justifications.

### A. False Justifications for Selective Waiver

As previously described, selective waiver is often justified as being necessary to encourage corporations to cooperate with governmental investigations.<sup>186</sup> In this sense, selective waiver depends on the viability of the justification of waiving the privilege or protection in the first place, i.e., do government investigators really need privileged materials to make their case? The Thompson Memo states that waivers “should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue.”<sup>187</sup> The Organizational Sentencing Guidelines, upon which the Thompson Memo’s view of waiver and cooperation is supposedly based,<sup>188</sup> state that for cooperation to be deemed thorough, “cooperation should include disclosure of all pertinent information known by the organization,” and “[a] prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.”<sup>189</sup> From these statements, it

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182. See *supra* note 180.

183. See Federal Rulemaking, Standing Committee Action: June 2006 Meeting, <http://www.uscourts.gov/rules/index.html#advisoryspring06>.

184. Comments to the Judicial Conference Advisory Committee on Evidence Rules on Proposed Rule of Evidence, Rule 502, *Preserving the Attorney-Client Privilege*, at 1–2, <http://www.abanet.org/buslaw/attorneyclient/home.shtml>.

185. *Id.*

186. McNally, *supra* note 178, at 826–27; Pinto, *supra* note 179, at 367–68; Okrzesik, *supra* note 178, at 169–71.

187. Thompson Memo, *supra* note 1, § VI.B, at n.3.

188. Buchanan, *supra* note 140, at 589, 593–95; Finder, *supra* note 120, at 113–14.

189. U. S. Sentencing Guidelines Manual (U.S.S.G.), § 8C2.5, at Application n.12 (2005). Interestingly, though the Organizational Sentencing Guidelines added a provision to its application

can be concluded that what is primarily sought by these privilege waivers is a factual roadmap to assist government investigators.<sup>190</sup> But such a roadmap could largely be obtained without waiving the attorney-client privilege and work-product protection.

As explained above, the work-product protection is not absolute, and ordinary or fact work product may be obtained, despite the privilege, upon a showing of substantial need and an inability to otherwise obtain the privileged work product without material hardship.<sup>191</sup> Thus, the factual internal investigations could very well be discovered without a broad waiver. Also, corporations could still cooperate by making available relevant documents, lists of relevant employees, and even the factual work product of corporate investigating attorneys that do not contain or reflect those attorneys' mental impressions.<sup>192</sup> Regardless of whether a witness has discussed the facts of his particular case with corporate counsel, the underlying facts communicated to an attorney may not be protected from disclosure.<sup>193</sup> Also, if the communications are not in furtherance of legal advice, the privilege does not attach.<sup>194</sup> Finally, some communications may not be protected under the crime-fraud exception to the attorney-client privilege.<sup>195</sup> "Communications between an attorney and a client concerning an intended or continuing crime are not protected by the attorney-client privilege."<sup>196</sup> Thus, there are a number of ways that cooperation, without waiver, will disclose information sufficient for the government to identify "the nature and extent of the offense and the individual(s) responsible for the criminal conduct."<sup>197</sup>

This is not to say that waivers are not easier. Applying one of the above exceptions, such as the crime-fraud exception, would likely re-

notes allowing for the consideration of privilege waivers in 2004, it has recently backtracked, and the waiver provision is slated for removal. *See infra* Part VI.

190. Indeed, the Thompson Memo explicitly downplays the need for attorney-client communications and core work-product, stating that "[e]xcept in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation." Thompson Memo, *supra* note 1, § VI.B, at n.3. Though this is termed as an exception, this begs the question of whether such an exception is even necessary.

191. *Toledo Edison Co. v. G.A. Tech., Inc. Torrey Pines Tech. Division*, 847 F.2d 335, 339–40 (6th Cir. 1988); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1467 (11th Cir. 1984); *see also United Kingdom v. United States*, 238 F.3d 1312, 1322 (11th Cir. 2001) (applying substantial need standard in criminal context).

192. Buchanan, *supra* note 140, at 596–97.

193. *Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981); *see United States v. Rakes*, 136 F.3d 1, 3–4 (1st Cir. 1998); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994).

194. *Kramer v. Raymond Corp.*, 1992 WL 122856, at \*1 (E.D. Pa. 1992).

195. *See, e.g., In re Sealed Case*, 162 F.3d 670, 673–74 (D.C. Cir. 1998).

196. *See GERGACZ*, *supra* note 3, § 4.03.

197. U.S.S.G., *supra* note 189, § 8C2.5, at Application n.12 (2005).

quire the government to review a privilege log and request enforcement of a subpoena in court. Also, there will no doubt be some material that the government will not see because it will remain protected. But this type of conduct is the exact type of compromising that courts frowned upon because it did not preserve the public policy behind having the privilege—furthering compliance with the laws. And the mere fact that a small pocket of evidence does not come to light under the protection does not prevent government agencies from making their case. As one court noted when reviewing the value of the attorney-client privilege, “the heavens will not fall if all relevant and competent evidence cannot be admitted.”<sup>198</sup>

### *B. Reducing Attorney-Client Privilege to a Half-Privilege*

Another problem with selective waiver is that it essentially creates a governmental exception to the attorney-client privilege and work-product protection where none was ever intended. As the *Permian* court recognized, though encouraging cooperation is a laudable goal, it has little to do with the confidentiality link that is a cornerstone of the attorney-client privilege.<sup>199</sup> But, while the attorney-client privilege was never meant to exempt governmental agencies from its scope, in light of the current culture of waiver that has developed due to waiver policies, selective waiver reduces the attorney-client privilege and work-product protection to protections in the private civil litigation context only, thus transforming the attorney-client privilege and work-product protection into a half-privilege or half-protection.

The creation of such a half-privilege does nothing to advance the purposes of the privilege. Indeed, it is unlikely that a corporate client will feel encouraged to have open and frank conversations with counsel if the client is aware that the substance of the communications could end up in the hands of a governmental agency. Though proponents of selective waiver argue that government agencies have a public policy interest in obtaining privileged materials,<sup>200</sup> it is arguable that private litigants have no less of an interest and may be better suited to achieving the goals of

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198. *Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 383 (Mo. 1978).

199. *Permian Corp. v. United States*, 665 F.2d 1214, 1220–21 (D.C. Cir. 1981); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3rd Cir. 1991).

200. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 312 (6th Cir. 2002) (Boggs, J., dissenting); Okrezesik, *supra* note 1788, at 167–68. But see Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN. ST. L. REV. 381, 411–12 (Fall 2005) (positing that there is nothing to suggest that selective waiver is necessary to encourage parties to voluntarily conduct internal investigations, nor can an exception “be justified on the basis that government investigations are ‘generally more important’ than civil litigation arising out of the same set of facts”).

deterrence and punishment of corporations.<sup>201</sup> In this sense, limiting waiver to only select governmental agencies has been deemed to have “no logical terminus.”<sup>202</sup> The following example, borrowed from Douglas R. Richmond, illustrates this point:

Consider a case in which a large corporation engages in accounting fraud so serious that investors are ruined, or employees lose their pensions. The fact that the government may extract a large fine from the corporation, or send its officers to prison, may give investors or employees some sense of satisfaction, but it does nothing to lessen their financial harm. On the other hand, civil litigation against those who allegedly perpetrated or aided and abetted the fraud may restore some of the losses suffered by shareholders or employees. In these circumstances, civil litigation is by any objective measure “more important” than an associated government inquiry. As for subjective considerations, such as deterrence, large judgments and settlements in civil cases deter other potential offenders just as well as regulatory penalties or criminal fines.<sup>203</sup>

Given that there are many cases where private litigants have just as great an interest in receiving the benefits of waiver, an arbitrary rule that grants waiver to governmental agencies but not to private litigants would reduce the privilege to a mere tactical litigation tool.<sup>204</sup> The privilege was not intended to be used to gain tactical or strategic advantage, and once the confidentiality for which the privilege was created is destroyed, it is destroyed as to all parties.<sup>205</sup> In this sense a half-privilege is not worth having at all, as once the client has sacrificed the confidentiality of the communications, no vestige can remain.<sup>206</sup>

### C. Exacerbating Existing Problems with Waiver

Finally, selective waiver fails to address or ameliorate the many problems created by a culture of waiver save one: waiver to third-party litigants. Indeed, the erosive effects on the attorney-client privilege and

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201. Dostart, *supra* note 116, at 759 (“Private plaintiffs’ firms . . . may be the necessary parties to achieve the deterrence and punishment necessary to stop corporate fraud.”); Richmond, *supra* note 200, at 411–12.

202. MIT, *supra* note 87, at 686 (noting that as far as the “truth-finding process” is concerned, a private litigant stands on nearly equal ground as the government); *In re Columbia/HCA*, 293 F.3d at 303 (citing MIT).

203. Richmond, *supra* note 200, at 411–12 (internal footnotes omitted); see also *In re Columbia/HCA*, 293 F.3d at 303 (noting that in numerous instances, litigants essentially act as attorneys general and vindicate the public interest).

204. *Permian*, 665 F.2d at 1221.

205. *In re Columbia/HCA*, 293 F.3d at 302–03.

206. *Permian*, 665 F.2d at 1221. As the Supreme Court stated in *Upjohn Co.*, “An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

the constitutional and ethical dilemmas raised by a culture of waiver would only be exacerbated as a result of selective waiver.<sup>207</sup> “Any pretense of requests for waivers being infrequent would be lost, and such request[s] would become item 1 in the playbook of regulators and enforcement agencies even at the earliest stages of the most generic investigations.”<sup>208</sup> In other words, selective waiver of the attorney-client privilege and work-product protection solves the dilemma of waiver for third-party litigants at the expense of the very purpose of the privileges. Selective waiver is thus a band-aid fix that fails to address the real problem, i.e., the policies which have led to a culture of waiver in the first place.<sup>209</sup>

## VI. RESTORING THE SANCTITY OF THE PRIVILEGE

A number of entities and organizations have loudly complained that the attorney-client privilege and work-product protection are under attack by governmental policies such as those embodied in the Thompson Memo.<sup>210</sup> In response to the numerous concerns voiced in light of the DOJ’s policies, acting Deputy Attorney General Robert D. McCallum Jr. has issued a memorandum (McCallum Memo) calling for each of the 93 districts’ or components’ heads around the country to develop local written procedures for when and how they will authorize their prosecutors to seek privilege waivers.<sup>211</sup> The McCallum Memo, however, still allows

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207. Comments to the Judicial Conference Advisory Committee on Evidence Rules on Proposed Rule of Evidence, Rule 502, *Preserving the Attorney-Client Privilege*, at 3–4, <http://www.abanet.org/buslaw/attorneyclient/home.shtml>; *In re Qwest Comm’n. Int’l. Sec. Litig.*, 450 F.3d 1179, 1195 (10th Cir. 2006) (noting that selective waiver is likely to inhibit communications between employees and counsel).

208. Comments to the Judicial Conference Advisory Committee on Evidence Rules on Proposed Rule of Evidence, Rule 502, *Preserving the Attorney-Client Privilege*, at 3, <http://www.abanet.org/buslaw/attorneyclient/home.shtml>.

209. *Id.* at 8.

210. Michael S. Greco, *Privilege Under Attack, Attorney-Client Communications Must be Kept Confidential to Protect Public*, 92 A.B.A. J. 6 (May 2006) (calling on state and local bar associations to help preserve the privilege against such attacks); John Caher, Editorial, *Bar Task Force Fights Waivers of Privilege*, NEW YORK L.J., Mar. 28, 2006, at 1, 5 (noting the New York State Bar Association’s opposition to waivers); *Erosion of Attorney-Client Privilege*, 183 N.J. L.J. 214, Jan. 23, 2006; James O. Heiting, President, State Bar of California, *Confidentiality Under Siege*, CALIF. BAR J., Mar. 2006 (stating that “the attorney-client privilege and confidentiality are being attacked on all sides”); NACDL STATEMENT ON ATTORNEY-CLIENT PRIVILEGE, Mar. 2, 2006, [http://www.nacdl.org/public.nsf/WhiteCollar/WCnews024/\\$FILE/Privilege\\_Statement06.pdf](http://www.nacdl.org/public.nsf/WhiteCollar/WCnews024/$FILE/Privilege_Statement06.pdf).

211. Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Department Components United States Attorneys (Oct. 21, 2005) (re: “Waiver of Corporate Attorney-Client and Work Product Protection”) [hereinafter *McCallum Memo*], [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00163.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm); see also Michael S. Greco, President American Bar Association, *U.S. Department of Justice Should Rethink Policy of Coercing Waiver of Attorney-Client Privilege*, <http://www.abanet.org/media/releases/opedattorneyclient.html>.

each district to form its own policies,<sup>212</sup> meaning that there could potentially be a great deal of variety and uncertainty as to how and when a prosecutor will seek a waiver. More importantly, the McCallum Memo fails to retreat from the Thompson Memo in any way.<sup>213</sup> Critics of these policies would like to see a return to the practices of the pre-Holder/Thompson Memoranda, or at the very least for government bodies to adopt uniform guidelines that would set forth limited circumstances when waivers of protected materials would be sought.<sup>214</sup>

But can these critics successfully pressure a return to the pre-Holder/Thompson practices? Recent events and changes to the Organizational Sentencing Guidelines indicate that pressure may work at the legislative level. Under § 8C2.5(g) of the Organizational Guidelines, entitled “Self-Reporting, Cooperation, and Acceptance of Responsibility,” an organization is capable of earning a reduction in its culpability score and fine range where it has “fully cooperated in the investigation.”<sup>215</sup> Prior to 2004, the Guidelines made no mention of waiver of the attorney-client privilege, but on May 1, 2004, the Sentencing Commission amended Application Note Twelve to § 8C2.5, adding the following sentence: “Waiver of attorney-client privilege and of work-product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”<sup>216</sup> In response, the ABA House of Delegates, as well as a coalition of business, legal, and public policy organizations, including the ACLU and U.S. Chamber of Commerce, expressed concern and opposition to the amendment through letters and testimony before the Sentencing Commission.<sup>217</sup> The Sentencing Commission responded by reconsidering the addition of the waiver language,<sup>218</sup> and the coalition of business, civil rights, and bar organizations scored a significant vic-

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212. McCallum Memo, *supra* note 211.

213. See Jeremy D. Frey, Commentary, *Privilege Still on Losing End in Corporate-Waiver Dispute*, *New U.S. Memo on Review Process Doesn't Go Far Enough*, 182 *NEW JERSEY L.J.* 731, Nov. 21, 2005.

214. Bruce A. Green & David C. Clifton, *Feeling the Chill*, 91 *A.B.A. J.* 61, 65 (Dec. 2005).

215. U.S.S.G., *supra* note 189, § 8C2.5.

216. *Id.* at application n.12; see also Buchanan, *supra* note 140, at 608 (explaining the addition of the waiver language).

217. Rhonda McMillion, *Matters of Privilege*, 92 *A.B.A. J.* 70, 70 (Feb. 2006); Elkan Abramowitz & Barry A. Bohrer, *Waiver of Corporate Attorney-Client and Work Product Protection*, *NEW YORK L.J.*, Nov. 1, 2005, at 3.

218. Anne Marie Squeo, *Agency Weighs Ending Leniency For Executive Cooperation Probes*, *WALL ST. J.*, Jan. 28, 2006, Section A.

tory in April 2006 when the Sentencing Commission unanimously voted to delete the waiver language.<sup>219</sup>

Despite this victory, it seems unlikely that the DOJ will reverse its stance on cooperation due simply to pressure from special interest groups.<sup>220</sup> However, the governmental policies may face additional challenges in the courts. For instance, in the recent federal prosecution of 16 former KPMG partners in New York, Judge Lewis A. Kaplan took the U.S. attorney to task for the DOJ's "cooperation" standard,<sup>221</sup> even holding those portions of the Thompson Memo which coerce corporations into not paying the legal fees of its employees as unconstitutional in violation of the Fifth and Sixth Amendments.<sup>222</sup> The constitutionality of what are essentially forced Fifth Amendment waivers is also highly questionable.<sup>223</sup> Ultimately, if court challenges eviscerate portions of the Thompson Memo, the DOJ and other governmental agencies may have no choice but to rethink their waiver approach.

## VII. CONCLUSION

The issue of whether selective waiver should be accepted can essentially be reduced to whether, and to what degree, society values the attorney-client privilege and work-product protection. The Supreme Court of Missouri aptly described the value of preserving these privileges:

As long as our society recognizes that advice as to matters relating to the law should be given by persons trained in the law[,] that is, by lawyers[,] anything that materially interferes with that relationship must be restricted or eliminated, and anything that fosters the success of that relationship must be retained and strengthened.<sup>224</sup>

Despite an increasing perception that selective waiver is minimally optional, selective waiver's intended purpose of encouraging waiver of the attorney-client privilege and work product protection materially interferes with the privilege or protection and should therefore be eliminated.

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219. Marcia Coyle, *Business Coalition Wins Big on Thorny Waiver Issue*, NAT'L L.J., Apr. 11, 2006, at 4.

220. Marcia Coyle, *Battle On Waivers Sees New Fronts Attorney-Client Privilege Is At Stake*, NAT'L L. J., May 15, 2006 (quoting Peter Lawson, the Chamber of Commerce's director of congressional and public affairs, as stating, "The truth is, with the way these things work, it's still a long shot that [DOJ] would on its own get to our position.").

221. *Corporate Injustice*, Review & Outlook, WALL ST. J., Apr. 6, 2006, at A14; Lynnley Browning, *Judges Press Companies That Cut Off Legal Fees*, N.Y. TIMES, Apr. 17, 2006, at Business Section.

222. *United States v. Stein*, 2006 WL 1735260, at \*18-19, 21-22 (S.D.N.Y. 2006).

223. See *supra* Part IV.B.1.

224. *Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 383 (Mo. 1978).



While corporations will surely feel no choice but to opt for selective waiver if a culture of waiver continues, the real battle should be to reverse the culture of waiver trend. The attorney-client privilege has existed for several centuries and its societal value has been recognized repeatedly.<sup>225</sup> While today's current climate of corporate malfeasance is troubling, the short-term gains that may be realized through a rule that encourages waiver are out-weighed by not only the societal gains of encouraging corporate compliance with the law through open and frank communications with counsel, but also by the constitutional and ethical implications such a waiver policy creates.

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225. Michael S. Greco, President American Bar Association, *U.S. Department of Justice Should Rethink Policy of Coercing Waiver of Attorney-Client Privilege*, <http://www.abanet.org/media/releases/opedattorneyclient.html>.