Saint Louis University Law Journal

Volume 52
Number 4 *Cooper v. Aaron: Little Rock and the Legacy of Brown (Summer 2008)*

Article 13

2008

Cooperation or Coercion?: Why Selective Waiver is Needed in Government Investigations

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COOPERATION OR COERCION?: WHY SELECTIVE WAIVER IS NEEDED IN GOVERNMENT INVESTIGATIONS

INTRODUCTION

In the wake of federal legislation and government crackdowns on white collar crime and securities laws violations, the legal environment in which attorney-client and work-product privileges are asserted is changing dramatically.[1] Internal investigations are commonplace in corporations today.[2] Corporate scandals from Enron to WorldCom to Tyco and others have prompted companies to call on the assistance of attorneys to conduct internal investigations of alleged improprieties.[3] In turn, prosecutors and regulators have great discretion in deciding whether to bring charges against corporations for wrongdoing,[4] and they can place tremendous pressure on corporations to cooperate with the government in order to receive favorable treatment.[5]

The government frequently requires companies to waive attorney-client and work-product privileges and to turn over the results of their internal investigations as a condition of leniency.[6] For example, the current guidelines from the U.S. Department of Justice (DOJ) regarding criminal charges against corporations "go out of their way to emphasize that a corporation's willingness

1. Richard M. Strassberg & Sarah E. Walters, *Is Selective Waiver of Privilege Viable?*, N.Y. L.J. (July 7, 2003); *see also* Robert S. Litt, *Unsealing the Lawyer's Lips: The Changing Contours of Attorney-Client Privilege in an Era of Corporate Fraud*, CRIM. LITIG. NEWSLETTER (A.B.A. Section of Litig.: Comm. on Criminal Litig., Chicago, Ill.), at 6.

2. Strassberg & Walters, *supra* note 1.

3. *Id*; *see* Zach Dostart, *Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine*, 33 PEPP. L. REV. 723, 731 (2006) (recognizing that most corporations will conduct internal investigations when faced with allegations of wrongdoing); *see also* Litt, *supra* note 1, at 6 ("The downfall of Enron, WorldCom and other companies, and the ensuing investigations, brought about a new focus on corporate governance and the role of the company's lawyer in the face of a possible fraud.").

4. Strassberg & Walters, *supra* note 1. Incentives in sentencing guidelines provide federal prosecutors with a blueprint for deciding when a company "should be indicted based in part on the quality of the corporation's cooperation with a government investigation." David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 154 (2000).

5. Strassberg & Walters, *supra* note 1; Litt, *supra* note 1, at 6; *see also* Zornow & Krakaur, *supra* note 4, at 147 ("[T]he client's rights of confidentiality . . . are giving way to the government's powerful demands for the swift disclosure of all evidence relevant to its investigations of corporate misconduct.").

6. Strassberg & Walters, *supra* note 1; Litt, *supra* note 1, at 6.

to waive both the attorney-client and work-product privileges with respect to internal investigations is an important factor that prosecutors will weigh in assessing whether a company has effectively cooperated and therefore should be afforded any leniency."[7] The Securities and Exchange Commission (SEC) also considers waiver of privileges in determining whether a corporation has cooperated.[8] In fact, the SEC goes even further than the DOJ in its policies. Not only is cooperation a condition of leniency in most cases, but corporations may also be penalized for a perceived lack of cooperation with SEC investigations.[9] This includes a corporation's refusal to waive its privileges.[10]

Thus, the decision of whether to waive privilege is both difficult and complicated.[11] Corporations have incentives to waive privilege to gain leniency, though revealing their wrongdoing may subject them to punishment.[12] Yet the consequences of waiver extend far beyond the limits of a government investigation.[13] Corporations have reason to fear that disclosure of privileged information may result in a "full-scale waiver" as to future civil litigants.[14]

> It is a fair bet that any civil lawsuits that follow a government investigation are sure to request the disclosure of any internal investigation, and if the privilege no longer applies, the company may find itself handing over to civil plaintiffs a virtual road map to assist them in their lawsuit.[15]

Because of this, corporations as well as government agencies, are calling for a doctrine of selective or limited waiver, which would allow companies to

7. Strassberg & Walters, *supra* note 1; *see* Memorandum from Deputy Att'y Gen. Larry D. Thompson to Heads of Dep't Components and U.S. Attorneys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo]; Richard Ben-Veniste & Lee H. Rubin, *DOJ Reaffirms and Expands Aggressive Corporate Cooperation Guidelines*, 18 LEGAL BACKGROUNDER No. 11, 1 (Apr. 4, 2003) (noting that the Thompson Memo provides guidance to prosecutors and defense attorneys concerning the guidelines that direct the Department when deciding whether to bring charges against a company).

8. Litt, *supra* note 1, at 6; *see* 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. 44,969 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm [hereinafter Seaboard Report] (listing several criteria that it considers in determining whether to reward self-reporting).

9. Michael H. Dore, *A Matter of Fairness: The Need for a New Look at Selective Waiver in SEC Investigations*, 89 MARQ. L. REV. 761, 761 (2006).

10. *Id.*

11. Strassberg & Walters, *supra* note 1; Litt, *supra* note 1, at 7.

12. Litt, *supra* note 1, at 7.

13. *See* Strassberg & Walters, *supra* note 1; Litt, *supra* note 1, at 7.

14. Litt, *supra* note 1, at 7.

15. Strassberg & Walters, *supra* note 1.

cooperate with the government without waiving privilege as to other parties.[16] In fact, corporations are entering into confidentiality agreements with government agencies which allow them to disclose privileged information to the government without waiving privilege as to any third parties who might later seek to discover such information.[17] The United States Courts of Appeal currently are split on whether corporations' disclosure of privileged information to the government waives privilege as to third-party civil litigants and whether confidentiality agreements are effective to maintain privilege as to these third parties.[18]

Part I of this Note will introduce the history of this circuit split, providing holdings and rationales from every circuit that has issued a ruling on this question. Part I will also address the law concerning the attorney-client and work-product privileges and waivers of both privileges generally. Part II critiques the various rulings of the courts and analyzes the policy rationale for allowing a selective waiver in government investigations as well as the future of such a doctrine. This Note concludes that confidentiality agreements allowing a limited waiver for disclosures to government agencies should be upheld for reasons of fairness and public policy concerns.

I. LEGAL BACKGROUND OF PRIVILEGES AND CIRCUIT SPLIT ON SELECTIVE WAIVER

A. Attorney-Client Privilege

Attorney-client privilege is the oldest common law privilege for confidential information.[19] "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[20] In the interests of justice, the privilege is necessary because attorneys must be able to assist their clients "free from the consequences or the apprehension of disclosure."[21]

16. *See id.*

17. Nolan Mitchell, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power Over State Courts*, 86 B.U. L. REV. 691, 697 (2006).

18. Strassberg & Walters, *supra* note 1. As a result of the circuit split concerning confidentiality agreements, corporations face a great deal of uncertainty about whether their confidentiality agreements will be invalidated. Dore, *supra* note 9, at 762; Mitchell, *supra* note 17, at 697–98.

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

20. *Id.*

21. Hunt v. Blackburn, 128 U.S. 464, 470 (1888); *see also* MCCORMICK ON EVIDENCE § 87 (Edward W. Cleary, ed., 2d ed. 1972) ("The proposition is that the detriment to justice from a power to shut off inquiry to pertinent facts in court, will be outweighed by the benefits to justice (not to the client) from a franker disclosure in the lawyer's office.").

Because the privilege effectively withholds material information from the fact-finder, it is applicable only when necessary to accomplish its purpose.[22] Attorney-client privilege is construed narrowly, and "protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege."[23] Confidentiality is the key factor of the privilege, therefore if a party voluntarily discloses otherwise privileged information to a third-party, he loses the protection of attorney-client privilege.[24] It has long been recognized that voluntary disclosure to a third party is inconsistent with the privilege.[25] "If clients themselves divulge such information to third parties, chances are that they would also have divulged it to their attorneys, even without the protection of the privilege. Thus, once a client has revealed privileged information to a third party, the basic justification for the privilege no longer applies . . . ."[26]

1. Selective Waiver Approved

The Eighth Circuit is the only circuit that has adopted selective waiver for attorney-client privilege.[27] In fact, it was the Eighth Circuit that developed the notion of selective waiver in *Diversified Industries, Inc. v. Meredith* in 1977. [28] In that case, when defending a civil action, Diversified claimed attorney-client privilege for a memorandum and report prepared by its counsel that was previously produced to the SEC in response to a subpoena by the agency.[29] The court addressed the issue in a single paragraph, concluding that only a limited waiver of privilege had occurred.[30] It declared that "[t]o 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."[31]

22. Fisher v. United States, 425 U.S. 391, 403 (1976).

23. *Id.*

24. *In re* Qwest Commc'ns Int'l, 450 F.3d 1179, 1185 (10th Cir. 2006).

25. United States v. Bernard, 877 F.2d 1463, 1465 (10th Cir. 1989); United States v. AT&T Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).

26. Comment, *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation*, 130 U. PA. L. REV. 1198, 1207 (1982). However, courts have allowed disclosure to third parties where such disclosure still serves the underlying purpose of the doctrine. *See* Hunydee v. United States, 355 F.2d 183, 184–85 (9th Cir. 1965) (holding that clients may disclose information to co-defendants or co-litigants).

27. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977).

28. *Id.*

29. *Id.* at 599.

30. *Id.* at 611.

31. *Id.*

2. No Selective Waiver

The D.C. Circuit was the first circuit to consider selective waiver after *Diversified*. In *Permian Corporation v. United States*,[32] the Department of Energy requested documents from the SEC which the SEC had previously received from the corporation.[33] The company had voluntarily turned over the documents to the SEC in connection with an investigation involving possible illegal bribes to foreign officials and tax fraud.[34] Considering the purpose of the attorney-client privilege, the court found the doctrine of selective waiver to be "wholly unpersuasive."[35] The court decided that the availability of a limited waiver would not serve the interests underlying attorney-client privilege.[36] It determined that although "[v]oluntary cooperation with government investigations may be a laudable activity," it is hard to comprehend how this improves the attorney-client privilege.[37] It concluded that "[i]f the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a 'friendly' agency."[38]

The court also held that "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit."[39] It determined that attorney-client privilege should only be available to a client who wants to maintain genuine confidentiality.[40] It concluded that the corporation destroyed the confidentiality of its attorney-client communications when it disclosed them to the SEC.[41] The First, Second, Third, and Fourth Circuits have also rejected selective waiver for attorney-client privilege, using reasoning similar to that in *Permian*.[42]

32. 665 F.2d 1214 (D.C. Cir. 1981).

33. *Id.* at 1216–17.

34. *Id.* at 1216.

35. *Id.* at 1220.

36. *Id.*

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

38. *Id*.

39. *Id*.

40. *Id.* at 1222.

41. *Id.* at 1219; *see also In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (reiterating the Circuit's position and holding that the privilege should only be available for a litigant who wants to maintain genuine confidentiality).

42. *See* Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1425 (3d Cir. 1991) (holding that selective waiver does not further the interest of attorney-client privilege; it merely promotes voluntary disclosure to the government, which extends the privilege beyond its intended purpose); Martin Marietta Corp. v. Pollard, 856 F.2d 619, 623 (4th Cir. 1988) (rejecting a limited waiver of attorney-client privilege where a corporation had previously disclosed documents to the government in an effort to settle a criminal investigation against it); John Doe

In 2002, the Sixth Circuit issued a comprehensive opinion on the issue in *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*.[43] In that case, civil plaintiffs sought documents that the corporation previously provided to the DOJ and other government agencies.[44] The court rejected the doctrine of selective waiver in any form.[45] It held that the approach adopted in *Diversified* had little, if any, connection "to fostering frank communication between a client and his . . . attorney."[46] The court concluded that all forms of selective waiver, even those which stem from confidentiality agreements, alter the attorney-client privilege into "merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage."[47] The court admitted that a selective waiver rule would further the search for truth, promote substantial investigative efficiencies, encourage settlements, and potentially increase corporate self-policing.[48] Thus, it recognized the appeal and justification for permitting cooperation with the government, but determined that the purpose of attorney-client privilege should not be thwarted by imposition of selective waiver.[49]

In a vigorous dissent, Judge Boggs argued that because the harms of selective disclosure are not clear, the benefits to the government of sharing information should prevail.[50] Judge Boggs concluded that the court's choice is not a decision whether to release privileged information to third party civil litigants which was already disclosed to the government; rather the choice is whether to create incentives that permit voluntary disclosures to the government at all.[51] He noted that "[i]n the run of cases, either the government

Corp. v. United States, 675 F.2d 482, 489 (2d Cir. 1982) (rejecting a "pick and choose" theory of attorney-client privilege and expressly adopting the reasoning in *Permian*, while noting that the case before it was somewhat stronger because it did not involve a confidentiality agreement with the corporation and a government agency); *see also* United States v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997). The First Circuit commented:

> Anyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage. It would be perfectly possible to carve out some of those disclosures and say that, although the disclosure itself is not necessary to foster attorney-client communications, neither does it forfeit the privilege. With rare exceptions, courts have been unwilling to start down this path—which has no logical terminus—and we join in this reluctance.

Id.

43. 293 F.3d 289 (6th Cir. 2002).
44. *Id.* at 292–93.
45. *Id.* at 302.
46. *Id.*
47. *Id.* (quoting *In re* Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993).
48. *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 303.
49. *Id.*
50. *Id.* at 311.
51. *Id.* at 312.

gets the disclosure made palatable because of the exception, or neither the government nor any private party becomes privy to the privileged material."[52] Judge Boggs asserted that there is great importance in allowing the government increased access to privileged information that it otherwise would not be able to secure.[53] Thus, allowing a limited waiver to government agencies would advance public interest by "bringing violations of the law to light."[54]

B. Work-Product Privilege[55]

The purpose underlying the work-product doctrine is notably different from that of attorney-client privilege.[56] Whereas the goal of attorney-client privilege is to protect the confidentiality of communications between an attorney and a client, the work-product doctrine is designed to promote the adversarial system by shielding information prepared by attorneys in anticipation of litigation.[57] The United States Supreme Court created this doctrine in *Hickman v. Taylor*, determining that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."[58] The court reiterated that it is important for attorneys to act on behalf of their clients without worrying that their adversaries will discover their tactics.[59] As explained by one commentator:

52. *Id.*

53. *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 311.

54. *Id.* at 312–13.

55. This is not a true privilege because opponents can receive access to the information if the requirements of the rule are met. *See* FED. R. CIV. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947).

56. Dostart, *supra* note 3, at 730 ("Although both the attorney-client privilege and the work product doctrine are derived from common law, they have significant differences.").

57. Dore, *supra* note 9, at 764; Mitchell, *supra* note 17, at 699–700. The doctrine was later codified in the Federal Rules of Civil Procedure, which state that a party may discover materials

> prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only 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.

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

58. 329 U.S. at 510. The *Hickman* Court further explained that the work product doctrine permits an attorney to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 511.

59. *Id.* at 510–11; *see* Zornow & Krakaur, *supra* note 4, at 150 ("[W]ork product doctrine is based on 'the public policy underlying the orderly prosecution and defense of legal claims'—the notion that, in an adversary system, an attorney should not be obliged to share her work with her client's adversary.") (quoting *Hickman*, 329 U.S. at 510).

> The natural jealousy of the lawyer for the privacy of his file, and the courts' desire to protect the effectiveness of the lawyer's work as the manager of litigation, have found expression, not only as we have seen in the evidential privilege for confidential lawyer-client communications, but in rules and practices about the various forms of pretrial discovery.[60]

Because the purpose of this privilege differs from attorney-client privilege, the waiver rules differ as well.[61] The work-product doctrine is designed to protect the adversarial system and is not concerned with a client's ability to receive confidential legal advice.[62] Thus, a party does not automatically lose the protection of the privilege by making a disclosure to a third- party.[63] If, however, the disclosure gives an adversary access to the information, most courts hold that the protection of the privilege is waived.[64]

1. Selective Waiver Approved

The Fourth Circuit is the only circuit to approve selective waiver for the work-product privilege.[65] However, it has limited the use of selective waiver to cases involving only opinion work product.[66] The court held that the waiver was comprehensive when the company made testimonial use of non-opinion work product by disclosing it to the government.[67] The court extended selective waiver to opinion work product for two reasons.[68] First, the court concluded that opinion work product has received great protection by courts.[69] It noted that "the plain language of [FED. R. CIV. P.] 26(b)(3) suggests especial protection for opinion work product[.]"[70] Second, the Court determined that in a trial, there is little risk that a party "will attempt to use a pure mental impression or legal theory as a sword and as a shield . . . so as to distort the factfinding process."[71] Therefore, the Fourth Circuit vacated the district court's ruling concerning work-product protection.[72]

60. *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 313 (quoting MCCORMICK ON EVIDENCE, § 96 (Edward W. Cleary, ed., 2d ed. 1972)).

61. Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1428 (3d Cir. 1991).

62. Mitchell, *supra* note 17, at 700.

63. *Westinghouse*, 951 F.2d at 1428.

64. *Id.*; *see also* 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024 (1994).

65. Martin Marietta Corp. v. Pollard, 856 F.2d 619, 626–27 (4th Cir. 1988).

66. *Id.* at 626.

67. *Id.* at 625.

68. *Id.* at 626.

69. *Id.*

70. *Martin Marietta Corp*, 856 F.2d at 626.

71. *Id.*

72. *Id.*

2. No Selective Waiver

Ironically, the circuit that created the concept of selective waiver and applied it to attorney-client privilege, has rejected the doctrine in the work-product arena.[73] In *Chrysler Motors*, a company produced a computer tape to its adversaries in civil litigation during settlement negotiations under a confidentiality agreement.[74] The U.S. Attorney later sought production of these tapes, and the company refused to produce them.[75] The Eighth Circuit held that "Chrysler waived any work-product protection by voluntarily disclosing the computer tape to its adversaries . . . ."[76] It also held that the company's confidentiality agreement was irrelevant, because the determinative factor was that the materials were not kept confidential.[77]

Focusing on the purpose of privilege, the Third Circuit ruled that work-product privilege may be retained when disclosure furthers the interests underlying the doctrine.[78] However, the court noted:

> [w]hen a party discloses protected materials to a government agency investigating allegations against it, it uses those materials to forestall prosecution (if the charges are unfounded) or to obtain lenient treatment (in the case of well-founded allegations). These objectives, however rational, are foreign to the objectives underlying the work product doctrine.[79]

The court held that attorneys are free to prepare their cases without fearing disclosure to their opponents as long as they and their clients refrain from disclosing privileged materials themselves.[80] Likewise, the Sixth Circuit held that most of the rationale for disallowing selective waiver in the attorney-client contexts extends to work product as well.[81] Work product allows an attorney to prepare his case in confidence.[82] Thus, the goal underlying this doctrine "has little to do with talking to the Government."[83]

Finally, as noted above, the Fourth Circuit refused to apply selective waiver to non-opinion work product, even though it did adopt selective waiver for opinion work product.[84] The First Circuit issued the same ruling as the

73. Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 846 (8th Cir. 1988). The *Chrysler* court did not discuss *Diversified* in reaching its decision to deny a selective waiver.

74. *Id.* at 845.

75. *Id.*

76. *Id.* at 846.

77. *Id.*

78. Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1429 (3d Cir. 1991).

79. *Id.*

80. *Id.*

81. *In re* Columbia/HCA Healthcare, 293 F.3d 289, 306 (6th Cir. 2002).

82. *Id.*

83. *Id.*

84. Martin Marietta Corp. v. Pollard, 856 F.2d 619, 623 (4th Cir. 1988).

Fourth regarding selective waiver and opinion work product, holding that "it would take better reason than we have to depart from the prevailing rule that disclosure to an adversary, real or potential, forfeits work product protection."[85]

3. Case-by-Case Approach to Selective Waiver

In *In re Sealed Case*, the D.C. Circuit held that documents that the company had previously produced to the SEC were not protected work product.[86] There, the record did not establish that the company entered into a confidentiality agreement with the SEC.[87] The court determined that any governmental agency has the power to expressly agree to any disclosure limitations to other agencies, as long as it does not violate their duties under the law.[88] However, it held that courts should not imply an agreement where the parties did not expressly make such an agreement.[89]

Applying *In re Sealed Case*, the D.C. Circuit rejected another claim of selective waiver for work product in *In re Subpoenas Duces Tecum*.[90] However, the court did not reject the selective waiver doctrine under all circumstances.[91] It limited its rejection to the circumstances of that case.[92] Its decision was based on three factors: (1) the proposed use of work-product protection was not consistent with the purpose of the doctrine; (2) the appellants did not have a rational basis for believing that the SEC would keep the disclosed documents confidential; and (3) applying waiver "would not trench on any policy elements now inherent in this [protection]."[93] The court noted that the company chose to participate in the SEC's voluntary disclosure program.[94] It concluded that this decision was obviously motivated by self-interest.[95] The appellants wanted to claim work-product protection for the same disclosures against different adversaries in suits based on the very same matters disclosed to the SEC.[96] The court held that "[i]t would be inconsistent and unfair to allow appellants to select according to their own self-interest to which adversaries they will allow access to the materials."[97] The court

85. United States v. Mass. Inst. Tech., 129 F.3d 681, 687 (1st Cir. 1997).
86. 676 F.2d 793, 824 (D.C. Cir. 1982).
87. *Id.* at 820.
88. *Id.* at 824.
89. *Id.*
90. 738 F.2d 1367, 1371–72 (D.C. Cir. 1984).
91. *Id.* at 1372.
92. *Id.*
93. *Id.*
94. *Id.*
95. *In re Subpoenas*, 738 F.2d at 1372.
96. *Id.*
97. *Id.*

reiterated that the company failed to ensure by agreement that the SEC would not disclose the materials.[98]

Likewise, in *In re Steinhardt Partners, L.P.*, the Second Circuit denied mandamus relief to defendants alleging work-product protection for a memorandum previously disclosed to the SEC.[99] However, in denying the petition, the court refused "to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection."[100] The court held that the issue should be decided on a case-by-case basis.[101] It noted that a per se rule "would fail to anticipate situations . . . in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials."[102]

C. Other Notable Cases

In one of the most illustrative state court opinions on the issue, the Delaware Court of Chancery upheld selective waiver for attorney-client privileged communication.[103] In *Saito v. McKesson HBOC, Inc.*, a shareholder requested documents that McKesson previously disclosed to the SEC pursuant to a confidentiality agreement.[104] The court concluded that when companies disclose privileged information after securing a confidentiality agreement, they gain a heightened expectation of privacy.[105] The court expressly responded to the Sixth Circuit's fairness argument by asserting that third-party litigants are not disadvantaged with a waiver rule.[106] It asserted that civil litigants are in no worse position than had disclosure never been made.[107] The court also noted that a selective waiver rule would encourage corporate compliance and benefit law enforcement.[108]

In a subsequent and related case, the District Court for the Northern District of California followed the Delaware Court ruling and upheld selective waiver for work product in *In re McKesson HBOC, Inc.*[109] The court relied substantially on Judge Boggs's dissent in *In re Columbia/HCA* in reaching its decision.[110] In issuing its ruling, the court emphasized the distinction between

98. *Id.* at 1375.
99. 9 F.3d 230, 232 (2d Cir. 1993).
100. *Id.* at 236.
101. *Id.*
102. *Id.*
103. Saito v. McKesson HBOC, Inc., No. 18553, 2002 WL 31657622, at *11 (Del. Ch. Nov. 13, 2002), *aff'd*, No. 18554, 2005 WL 583742 (Del. Mar. 8, 2005).
104. *Id.* at *1.
105. *Id.* at *6.
106. *Id.* at *9–10.
107. *Id.*
108. *Saito*, 2002 WL 31657622, at *8.
109. No. 99-CV-20743, 2005 WL 934331, at *10 (N.D. Cal. Mar. 31, 2005).
110. *Id.* at *9.

disclosure to private parties and disclosure to a government agency pursuant to a confidentiality agreement.[111] It concluded that in the former case a waiver would clearly result, while the privilege should be upheld in the latter case.[112]

D. Tenth Circuit Issues Overall Refusal of Selective Waiver

In the most recent selective waiver case, the Tenth Circuit issued a comprehensive opinion rejecting selective waiver under all circumstances.[113] In a consolidated securities class action against Qwest, the lead plaintiffs requested pretrial production of documents.[114] Qwest claimed that the documents were protected by the attorney-client and work-product privileges.[115] These documents were previously produced to the SEC and DOJ pursuant to subpoena and confidentiality agreements between Qwest and the agencies during an investigation of the corporation's business practices.[116] The agreements provided that Qwest did not intend to waive attorney-client privilege or work-product privilege as to the documents, and the SEC and DOJ agreed not to disclose the documents to any third party unless the agencies determined that disclosure was required by law and "would be in furtherance of the [agencies'] discharge of its duties and responsibilities."[117] The court held that the confidentiality agreements do not support an adoption of selective waiver.[118] The court reasoned that the agreements gave the agencies broad discretion to use the disclosed documents as they saw fit.[119]

Qwest urged the court to adopt a "selective waiver," which would allow production of the privileged documents to the DOJ and SEC without waiving the privilege as to third party civil litigants.[120] Considering the purposes behind the attorney-client and the work-product doctrine, the court refused to adopt a selective waiver doctrine as an exception to the general waiver rules.[121] The court also concluded that "[t]he record [did] 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."[122] The court noted that what Qwest was

111. *Id.*

112. *Id.* The Court did not uphold the attorney-client privilege in this case because McKesson agreed to disclose the information before any communications were even made to the attorneys. *Id.* at *3.

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

114. *Id.* at 1182.

115. *Id.*

116. *Id.* at 1181.

117. *Id.* (citing Pet'r Br., Ex. B at 1).

118. *In re Qwest*, 450 F.3d at 1194.

119. *Id.*

120. *Id.* at 1181.

121. *Id.* at 1192.

122. *Id.*

requesting was really a whole new privilege: a "government-investigation privilege."[123] The court was unwilling to create this new privilege.[124]

The court did not accept Qwest's argument that selective waiver is necessary to ensure cooperation with law enforcement.[125] It determined that "companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine," noting that Qwest turned over documents in the face of almost unanimous rejection of the selective waiver by other circuits.[126] Also, the court noted that the agencies voiced no support for Qwest's position, pointing to the fact that the DOJ wrote a reply brief at the court's request and took no position on the issue of whether a selective waiver should be found.[127]

The court reasoned that selective waiver does not promote the goals of the attorney-client and work-product privileges.[128] Selective waiver does not promote exchange between the attorney and client, but it would have the opposite effect of inhibiting communication.[129] The court determined that officers and employees would be guarded in the conversations with attorneys if they knew that employers could disclose privileged information to the government without risking further waiver of attorney-client privilege.[130] The court also noted that selective waiver does little to further the purpose of the work-product doctrine, which is to enable counsel to prepare a case in privacy.[131] It found that selective waiver may encourage attorneys to prepare cases with any eye towards pleasing the government.[132]

The court did not accept Qwest's argument that disallowing selective waiver would be unfair to them but not to the civil plaintiffs.[133] It decided that allowing Qwest to choose which of its adversaries would be privy to privileged information is "far from a universally accepted perspective of fairness."[134] It noted that Qwest realized an obvious benefit from disclosing the materials to the government, "but did so while weighing the risk of waiver."[135]

123. *In re Qwest*, 450 F.3d at 1192.

124. *Id.*; *see also* Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1426 (3d Cir. 1991) (also ruling that a new privilege was not necessary to encourage cooperation with the government and noting that Westinghouse chose to cooperate despite the absence of an established selective waiver privilege).

125. *In re Qwest*, 450 F.3d. at 1193.

126. *Id.*

127. *Id.*

128. *Id.* at 1195.

129. *Id.*

130. *In re Qwest*, 450 F.3d at 1195.

131. *Id.*

132. *Id.*

133. *Id.* at 1195–96.

134. *Id.* at 1196.

135. *In re Qwest*, 450 F.3d at 1196.

III. SELECTIVE WAIVER SHOULD BE APPROVED

Although courts have distinguished between the purposes of attorney-client privilege and work-product privilege, their reasoning for rejecting selective waiver for both privileges has been relatively similar.[136] The weight of authority is clearly against selective waiver, and the courts' decisions have been predominately based on two factors: purpose of the privileges and fairness.[137] This section will analyze why the courts have reached the wrong conclusion when addressing these factors and will argue that a selective waiver should be adopted in government investigations when a confidentiality agreement has been executed.

A. Opposing Courts Reach Wrong Conclusion on Goals of Privileges

Courts rejecting selective waiver have come to the uniform conclusion that the doctrine does not support the purposes of the attorney-client and work-product privileges.[138] However, these courts fail to recognize the exact impact of selective waivers as well as the public policy arguments which override their concerns.

As courts have reiterated, the purpose of the attorney-client privilege is to encourage "full and frank discussion between attorneys and their clients."[139] Courts have been firm in ruling that the selective waiver doctrine does not advance this purpose, and the Tenth Circuit took it one step further by determining that selective waiver actually inhibits the goal of the attorney-client privilege.[140] The Tenth Circuit concluded that employees would be discouraged from talking to corporate attorneys if they knew that the attorneys could disclose the contents of their conversations to the government without risking further disclosure to other parties.[141] This argument advanced by the Tenth Circuit as well as other opponents of the doctrine is illogical and fails to consider the full scope of selective waiver.

Courts opposing the doctrine have looked at selective waiver only as a tool of manipulation for companies to employ whenever it benefits them. There is no doubt that companies do use selective waiver to their advantage. However, courts that oppose selective waiver refuse to recognize that the nature of the doctrine itself actually encourages full and frank discussion between corporate employees and attorneys. Given that corporate clients have a great incentive to

136. *See supra* text accompanying notes 19–135.

137. *See id.*

138. *See id. But see In re* Columbia/HCA Healthcare, 293 F.3d 289, 308 (6th Cir. 2002) (Boggs, J., dissenting) ("It is not clear why an exception to the *third-party waiver rule* need be moored to the justifications of the *attorney-client privilege*.") (emphasis in original).

139. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); *see supra* text accompanying note 21.

140. *In re Qwest*, 450 F.3d at 1195.

141. *Id.*

cooperate with government investigations to ensure leniency for the corporation, themselves, or both, selective waiver would encourage frank discussion between corporate attorneys and clients if clients were assured that their communications could not be disclosed to third parties who could later sue them. Therefore, it is highly unlikely that employees would ever be discouraged from talking to attorneys when it would clearly be to their advantage to do so.

Although in vehement opposition with most court rulings on the issue, the Eighth Circuit, the Delaware Court of Chancery, and the Northern District of California were correct in determining that failure to adopt selective waiver actually "hindered the corporate attorney's role as advisor."[142] Specifically, the Delaware court concluded that "[w]hen courts amplify the risk of disclosure to include future private plaintiffs, the scales begin to tip further in favor of corporate noncompliance with investigative agencies."[143] The courts found that the goal of the privilege was furthered when companies were assured that information disclosed to the government will not in turn be disclosed to civil litigants.[144]

Additionally, courts ruling against selective waiver have concluded that the doctrine does not further attorney-client privilege, but creates an exception for communications between the government and corporations.[145] These courts have come to the wrong conclusion. Selective waiver does not promote full and frank communication between the client and the government; it merely allows privileged communications between clients and *attorneys* to be disclosed to the government.[146]

Moreover, selective waiver can also promote the goal of the work-product privilege. As noted above, the purpose of this privilege is to ensure that attorneys are allowed to prepare their cases in privacy, free from the intrusion of their adversaries.[147] In explaining the goal of the doctrine, courts have articulated that attorneys should not be privy to the work of an adversary.[148]

142. Tiffany Seeman, *Safeguarding the Attorney-Client Privilege in the Face of Federal Securities Regulations*, 4 DEPAUL BUS. & COM. L.J. 309, 335–36 (2006).

143. Saito v. McKesson HBOC, Inc., No. 18553, 2002 WL 31657622, at *8 (Del. Ch. Nov. 13, 2002), *aff'd*, No. 18554, 2005 WL 583742 (Del. Mar. 8, 2005).

144. Seeman, *supra* note 142, at 336.

145. *Id*. at 338; *see, e.g.*, *In re* Columbia/HCA Healthcare, 293 F.3d 289, 302 (6th Cir. 2002) (asserting that the privilege was not designed to protect communications between the client and the government).

146. Seeman, *supra* note 142, at 338. This same logic can be applied to the work product doctrine as well. Selective waiver does not encourage companies to prepare their cases for the benefit of the government, but it merely allows them to disclose the information which they have prepared in anticipation of litigation to the government.

147. *See supra* notes 56–64 and accompanying text.

148. *See id.*

Without selective waiver, this is exactly what will happen. If courts allow work-product privileged information to be turned over to third-party civil litigants, these litigants would be provided with a blueprint for litigating against the disclosing corporations.

Furthermore, while maintaining and promoting the goals of the substantive privileges is laudable, courts have created exceptions for other legal doctrines which did not support the goals of those doctrines, particularly when there were public policy concerns involved. For example, in the contracts arena, courts have created an exception to the general rule for advertisements.[149] Normally, advertisements are not offers but are mere invitations to negotiate an offer, *unless* there is a public policy reason to bind the advertiser.[150] This exception does not support the purpose of the substantive law regarding advertisements, but exists solely because of issues of fairness and public policy concerns. In the field of torts, there is no duty for an actor to rescue another who has not been placed in harm by that actor's conduct, even if the actor should realize that his actions may be necessary to save another.[151] However, courts will impose an affirmative duty to act based solely on the relationship between the actor and the individual in danger. For example, a parent may have a duty to save a child and a husband may have a duty to save his wife.[152] Like the contracts example, the exception does not promote the purpose of the substantive privilege concerning a duty to act, but it exists solely for reasons of public policy.

Additionally, within the selective waiver arena, several courts have adopted selective waiver for public policy reasons. As noted above, the Fourth Circuit has adopted selective waiver for opinion work product.[153] The Second Circuit and the D.C. Circuit acknowledged that approval of selective waiver may be possible where the company has entered into a confidentiality agreement with the government, such that the companies have a reasonable expectation that their communications will be kept confidential.[154] Finally, the Eighth Circuit, the Delaware Court of Chancery, and the Northern District of California have expressly adopted selective waiver for attorney-client privilege.[155] Therefore, it would not be unprecedented or unreasonable for

149. *See, e.g.*, Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116 (S.D.N.Y. 1999); Izadi v. Machado Ford, Inc., 550 So. 2d 1135, 1140 (Fla. Dist. Ct. App. 1989).

150. *See e.g.*, *Leonard*, 88 F. Supp. 2d at 122–23; *Izadi*, 550 So. 2d at 1140; RESTATEMENT (SECOND) OF CONTRACTS § 26 (1979).

151. RESTATEMENT (SECOND) OF TORTS § 314 (1963).

152. RESTATEMENT (SECOND) OF TORTS § 314 cmt. A (1963).

153. Martin Marietta Corp. v. Pollard, 856 F.2d 619, 626 (4th Cir. 1988).

154. *In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993); *In re* Subpoenas Duces Tecum, 738 F.2d 1376, 1371–72 (D.C. Cir. 1984).

155. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978); *In re* McKesson HBOC, Inc., No. 99-CV-20743, 2005 WL 934331, at *9–10 (N.D. Cal. Mar. 31, 2005); Saito v.

courts to approve an exception that would not promote the goal of the substantive rule in this case.

B. Fairness Weighs in Favor of Corporations

As noted earlier, due to the changing legal landscape concerning corporate corruption, companies face ever increasing pressures to waive privilege and cooperate with government investigations. One might argue that the decision to waive privilege and disclose information to the government is simply the corporation's choice, and that the companies should live with the consequences of their self-serving choice to cooperate with investigations against them.[156] "But for men and women facing the threat of imprisonment, the effective end of their professional careers and financial well-being, and the weight of lining up against the United States Government, it is not much of a choice. In many ways, cooperation must feel like the only option."[157] Unfortunately for the corporations, the majority of courts have not been sympathetic to their plight. Courts rejecting selective waiver have held that corporations cannot selectively waive privilege as to the government, while maintaining the privilege against civil litigants.[158] The courts have asserted that corporations should not be allowed to manipulate the privileges and "pick and choose" which adversaries they are allowed to waive privilege to.[159] However, upon closer inspection of the SEC and DOJ policies, it appears that the true manipulators are the government agencies. Moreover, the tactics that they are employing are far more unfair than selective waiver.

Many have noted that the SEC considers "cooperation" as a major factor it considers when investigating corporations for potential securities violations.[160] An essential part of the cooperation includes whether the particular corporation has waived privilege as to the agency.[161] "At the same time, the SEC looks very unfavorably on a perceived lack of cooperation, threatening targets of investigations with penalties and more serious charges."[162]

On October 23, 2001, the SEC released what is now known as the "Seaboard Report."[163] The report expressed the SEC's policy to award

McKesson HBOC, Inc., No. 18553, 2002 WL 31657622, at *8 (Del. Ch. Nov. 13, 2002), *aff'd*, No. 18554, 2005 WL 583742 (Del. Mar. 8, 2005).

156. Dore, *supra* note 9, at 783.

157. *Id.* at 783–84; *see* Zornow & Krakaur, *supra* note 4, at 156 ("The possible sanctions against the corporation if it is deemed to have failed to cooperate 'thoroughly' often appear too great to justify a battle with prosecutors over privileges.").

158. *See supra* note 42 and accompanying text.

159. *See id.*

160. Dore, *supra* note 9, at 761; Mitchell, *supra* note 17, at 692.

161. Dore, *supra* note 9, at 761; Mitchell, *supra* note 17, at 692.

162. Dore, *supra* note 9, at 761.

163. Seaboard Report, *supra* note 8.

leniency to corporations that assisted in their investigations.[164] It listed several factors as indicators of cooperation; among them is whether the corporation voluntarily disclosed otherwise privileged information.[165] Unlike previous policies issued by the SEC, this report made clear that a perceived lack of cooperation could result in severe penalties against a company.[166] The report also explained why the SEC did not bring charges against the Seaboard Corporation for apparent misconduct.[167] The SEC did prosecute one of the corporate officials, but took no action against the corporation itself.[168] The SEC articulated that Seaboard's cooperation, particularly their decision to waive attorney-client and work-product privileges, was a factor in not prosecuting the company.[169] Therefore, due to the great advantage that can result from waiving privilege and the significant consequences that may arise from lack of participation, it is not hard to understand why cooperation by companies may not be truly "voluntary."

The DOJ has employed similar tactics. In June of 1999, Deputy Attorney General Eric Holder, released a memorandum entitled "Bringing Criminal Charges Against Corporations," to the U.S. Attorneys which listed the relevant factors that the Department should look to when determining whether to bring criminal charges against a corporation.[170] Among the factors listed was a "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."[171] The Holder Memorandum explained that a corporation's waiver of privilege referred to its internal investigations and to communications between the officers, directors, and other employees of the company.[172] The DOJ articulated that these waivers are "critical in enabling the government to

164. *Id.*

165. *Id.*

166. Dore, *supra* note 9, at 769–70.

167. Seaboard Report, *supra* note 8.

168. *Id*.

169. *Id*. Furthermore, in a footnote,

> [t]he Commission then professed to "recognize that these privileges, protections and exemptions serve important social interests," and thus "the Commission does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff."

Dore, *supra* note 9, at 769 (quoting Seaboard Report, *supra* note 8).

170. Memorandum from Deputy Attorney General Eric Holder to All Component Heads and United States Attorneys, Bringing Charges Against Corporations (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html [hereinafter Holder Memo]; *see also* Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 935 (2006).

171. Brown, *supra* note 170, at 935–36 (quoting Holder Memo, *supra* note 170).

172. Holder Memo, *supra* note 170.

evaluate the completeness of a corporation's voluntary disclosure and cooperation."[173] In January 2003, Deputy Attorney General Larry Thompson issued a revised version of the Holder Memorandum, entitled "Principles of Federal Prosecution of Business Organizations."[174] The criteria concerning the waiver of privileges remained in the newly revised Thompson Memorandum.[175]

In a recent interview, the United States Attorney for the Southern District of New York, James Comey, emphasized that in determining the quality of a corporation's cooperation, the government would consider whether the corporation disclosed information resulting from its internal investigations and whether it waived privilege.[176] When asked about the Department's request to waive privilege, Comey replied that "[s]ometimes, in order to fully cooperate and disclose all facts, a corporation will have to make some waiver because it has gathered the facts through privileged interviews and the protected work product of counsel."[177] Although Comey asserts that the intrusion is minimal, he admits that waiver may be necessary if the company wants to earn leniency through cooperation.[178]

The policies of these agencies are essential to this issue because fairness is at the heart of the courts' arguments.[179] The opponents of selective waiver have determined that it is the corporations that are being manipulative by picking and choosing to which adversaries they waive privilege.[180] However, the policies of the agencies tell a different story. In what has been called the "compelled-voluntary waiver paradox,"[181] "[t]he government's policy of

173. *Id.* The DOJ goes on to assert that "[t]he Department does not, however, consider waiver of a corporation's privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation's cooperation." *Id.*

174. Thompson Memo, *supra* note 7.

175. *Id.* There is one notable difference between the memoranda. The Thompson Memo's language regarding cooperation effectively increases the significance given to the waiver of attorney-client and work-product protections. Brown, *supra* note 170, at 936–37; Mitchell, *supra* note 17, at 695 (noting that the Thompson Memo places a "greater emphasis on waiver as a condition of cooperation").

176. Shirah Neiman, *Corporate Fraud Issues II: Interview with United States Attorney James B. Comey Concerning the Department of Justice's Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney-Client Privilege and Work Product Protection*, 1456 PLI/CORP. L. & PRAC. 1089, 1093 (2004).

177. *Id.*

178. *Id.*

179. Dore, *supra* note 9, at 784.

180. *See supra* Part III.A.

181. Brown, *supra* note 170, at 897, 899–900.

pressuring companies to waive their attorney-client and work-product protections is the *real* manipulation of the privilege."[182]

"While both the SEC and DOJ insist that waiver of privilege is not required for cooperation, corporate attorneys are aware of the well-known incentives to cooperate with a government investigation and fear that the corporation will be treated harshly if their cooperation is deemed inadequate."[183] For example, with the SEC, not only does a corporation lose the advantages of cooperation if they refuse to waive privilege, but even a "perceived lack of cooperation" could lead to millions of dollars in losses.[184] Although the agency has not penalized a corporation solely for refusal to waive privilege, the severity of its policy essentially forces companies to waive privilege.[185] Courts have concluded that companies should not use privilege for any "tactical employment," yet the SEC uses the same tactical approach "when it forces corporations to choose between the Commission's wrath and wholesale disclosure to suing shareholders."[186]

The corporations are certainly feeling the pressure. In a recent survey of inside and outside corporate counsel almost seventy-five percent of both categories expressed concern that there was a culture of waiver in which government agencies that think it is proper and reasonable to expect companies under investigation to broadly waive their privileges.[187] About fifty-two percent of in-house counsel and fifty-nine percent of outside counsel believed that there was a discernible increase in requests for waivers from the

182. Dore, *supra* note 9, at 786 (emphasis added).

183. Seeman, *supra* note 142, at 325; *see* Mitchell, *supra* note 17, at 696–97 (recognizing that although the DOJ memoranda maintain that waiver is not an "absolute requirement" for cooperation, in practice the DOJ "has made clear that waiver is an important (and at times, in fact, required) condition to be fulfilled." Similarly, documents from the SEC indicate that waiver may be a necessary factor of "cooperation" with agency investigation in certain cases. "Even where federal investigators fail to deliver formal waiver requests, corporations and their attorneys are well aware that an assertion of attorney-client privilege or work product protection may produce significant liabilities."). As the National Association of Criminal Defense Lawyers has articulated the "not required" aspect is hard to reconcile considering that government views a refusal to waive privilege as an attempt to hide the truth. Robert A. Del Giorno, *Corporate Counsel As Government's Agent: The Holder Memorandum and Sarbanes-Oxley Section 307*, THE CHAMPION: NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, August, 2003, at 23, *available at* http://www.nacdl.org/ public.nsf/698c98dd101a846085256eb400500c01.

184. Dore, *supra* note 9, at 761.

185. *See id*.

186. *Id*. at 762–63. This same argument would apply to the DOJ as well since their policies are parallel.

187. ASS'N OF CORP. COUNS., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT: SURVEY RESULTS 3 (2006), *available at* http://www.acc.com/Surveys/ attyclient2pdf [hereinafter ACC SURVEY]. Only one percent of inside counsel and two and a half percent of outside counsel expressed disagreement with that opinion. *Id*. The survey sample included over 1,200 respondents. *Id*. at 2.

government as a condition of cooperation.[188] The National Association of Criminal Defense Lawyers has emphasized that "[t]he statements on cooperation are viewed as going quite far toward effectively forcing a corporation to waive the privileged protections in the hopes of receiving favorable charging treatment."[189] Outside counsel indicated the DOJ memoranda were cited most often when a reason for waiver requests was given by the government.[190] As a result of these government investigations, fifteen percent of companies that were investigated in the last five years mentioned that related third-party lawsuits followed.[191] These results clearly indicate that there is a significant amount of coercion as a consequence of government policies regarding waiver. As one survey respondent explained: "Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit."[192] Therefore, if the courts want to look at fairness when considering selective waiver, they should also consider the unfair procedures instituted by the government to pressure companies into waving privilege.

Moreover, contrary to what courts have indicated, there is no unfairness to civil litigants if selective waiver is allowed.[193] As Judge Boggs correctly pointed out in his dissent, "[i]t is important to identify the silent premise of the court's argument: private parties would disclose privileged material to the government regardless of the existence of an exception."[194] Under normal circumstances, the corporations would never be required to release the information, and the civil litigant is in the same position that he would have been had there been no disclosure at all.[195] In other words, the court fails to consider that the information would still be privileged if it were not released to the government. "In the run of cases, either the government gets the disclosure made palatable because of the exception, or neither the government nor any private party becomes privy to the privileged material."[196]

188. *Id.* at 3. "Consistent with that finding, roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers." *Id.*

189. Del Giorno, *supra* note 183, at 23.

190. ACC SURVEY, *supra* note 187, at 4.

191. *Id.* Such lawsuits included private antitrust actions and derivative securities lawsuits. *Id.*

192. *Id.* at 5. Another respondent put it more bluntly by stating that in his experience the "government agencies routinely 'blackmail' companies with threats of indictment, fines, etc., in order to get them to waive privilege and take other actions . . . ." *Id.* at 11.

193. *See supra* note 50 and accompanying text.

194. *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 312 (6th Cir. 2002) (Boggs, J., dissenting).

195. *Id.*; Seeman, *supra* note 142, at 338. Additionally, "the underlying facts of the privileged communication may be available through other sources which are not privileged . . . ." *Id.*

196. *In re Columbia*, 293 F.3d at 312 (Boggs, J., dissenting).

Furthermore, with the fairness issue, no court has recognized the most significant unfairness in this whole situation, that is, allowing government agencies to enter into confidentiality agreements with corporations, only for the courts to hold them invalid. Courts have pointed to the fact that corporations have disclosed information to the government in the face of virtually unanimous rejection of selective waiver;[197] however, courts have failed to emphasize that corporations have disclosed information only pursuant to a promise by the government that their information would not be disclosed. There is an inherent injustice in allowing one branch of government to enter into an agreement with a party that is later invalidated by another branch, particularly when all the repercussions of a court's decision will fall only on the corporation. While the courts have chastised the companies for entering into agreements when such agreements have been invalidated by *other* jurisdictions, no court has ever discussed the government's responsibility in entering into these agreements. Courts have expressed concern over corporations manipulating the privileges, but—especially in the case of confidentiality agreements—it appears that the true manipulation is coming from the government.[198] Thus, selective waiver is necessary to ensure fairness.[199]

C. Public Policy Supports Approval of Selective Waiver

In addition to the fairness concerns listed above, there are formidable policy reasons as to why selective waiver should be adopted. Even some of the courts which have rejected selective waiver have admitted that it does encourage corporations to cooperate with the government.[200] Other courts have denied this proposition.[201] However, there is more logic on the side of the former argument, and the policy arguments in favor of selective waiver far outweigh its potential disadvantages.

As Judge Boggs correctly advocated in his dissent in *In re Columbia*, rejecting selective waiver "unnecessarily raises the cost of cooperating with a government investigation."[202] In explaining why selective waiver would increase cooperation with investigations, Judge Boggs introduced what he described as an "uncontroversial behavioral prediction": If faced with a complete waiver of privilege covering the entire subject matter of the

197. *See, e.g.*, *In re* Qwest Communications Int'l, 450 F.3d 1179, 1193 (10th Cir. 2006).

198. *See* Dore, *supra* note 9, at 785 ("The true control, and thus the true tactical employment, is being effected by the government, not the respective companies it chooses to investigate.").

199. *See id.* at 786 (arguing that not allowing selective waiver "is an unfair exploitation of power by the federal government that has adverse effects on both the attorney-client privilege and work-product doctrine.").

200. *See, e.g.*, *In re Columbia*, 293 F.3d at 303.

201. *See, e.g.*, *In re Qwest*, 450 F.3d at 1192.

202. 293 F.3d at 307 (Boggs, J., dissenting).

disclosure as to all parties, the client would be more hesitant to disclose privileged information than it would be if there was no possibility of waiver.[203] This proposition is more logical than any reasoning given by courts that have rejected the doctrine. Corporations under investigation have much to lose, especially if faced with the possibility of a third-party suit in addition to the consequences suffered as a result of the government investigation. Thus, it makes sense that they would be more willing to disclose information if they could receive favorable treatment from the government without handing a third-party civil litigant a virtual roadmap for any subsequent lawsuit. Selective waiver creates more of a motivation for companies to be truthful with the information they disclose as well. "This may be best explained in the sense that the current 'complete waiver' waives all privileged information to a third party once the information is disclosed, leaving corporations with little incentive to be completely honest when disclosing possibly incriminating evidence."[204]

The policy considerations behind the doctrine are important to analyze because the interpretation of privileges and the determination of circumstances under which they can be waived are bestowed to the "reason and experience" of the federal courts.[205] Thus, in applying this rule, the courts have to consider any potential consequences and public policy concerns.[206] "These questions of 'policy,' like the deleterious impact of a waiver rule on government investigations, are at the heart of the privilege inquiry."[207] It should be noted that unless the government obtains a waiver for privileged information of a particular company, it may have no other way to obtain such information without great expense.[208] Therefore, allowing a doctrine which would encourage voluntary waivers from companies increases the efficiency of government investigations.[209]

Generally, it is true that clients should not be allowed to waive privilege as to one adversary while maintaining it for another, but the policy behind selective waiver overrides this concern.[210] Without selective waiver, material

203. *Id.* at 309–10.

204. Dostart, *supra* note 3, at 741.

205. *In re Columbia*, 293 F.3d at 310 (Boggs, J., dissenting) (citing FED. R. EVID. 501).

206. *Id.*

207. *Id.*; *see generally* Jaffee v. Redmond, 518 U.S. 1 (1996) (extensively analyzing policy considerations in devising a psychotherapist-patient privilege under federal law).

208. *In re Columbia*, 293 F.3d at 311 (Boggs, J., dissenting).

209. *Id.*; Brown, *supra* note 170, at 936 ("Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.") (citing Holder Memo, *supra* note 170); Dostart, *supra* note 3, at 731–32.

210. Dostart, *supra* note 3, at 739–40.

that could be disclosed would remain in the dark.[211] So, the question at the heart of this issue is whether the benefits obtained from prohibiting selective waiver outweigh the benefits of the increased information that the government would receive if the exception is allowed.[212] Judge Boggs is correct in arguing that "[a]s the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail."[213]

In support of its argument that selective waiver is not needed to encourage companies to cooperate with the government, the Tenth Circuit relied on the fact that Qwest disclosed documents to the government in the face of nearly unanimous rejection of the doctrine by other circuit courts.[214] However, as Judge Boggs pointed out, the case against selective waiver is not as overwhelming as courts have suggested.[215] Particularly, where disclosure has been accompanied by confidentiality agreements (as was the case in *Qwest*), several courts have shown a willingness to adopt selective waiver.[216] Given this, and considering that no Tenth Circuit case had ever addressed the issue, this assertion by the *Qwest* Court is not convincing.

Moreover, the government agencies themselves have voiced support for selective waiver as well. This is notable because in *Qwest* the court pointed out that the DOJ wrote a brief at the court's request but took no position on the issue.[217] In a January 2007 interview, Deputy United States Attorney General Paul McNulty voiced support for the doctrine.[218] He noted that the danger of exposing companies to third-party civil lawsuits "is a significant concern," and he reported that the DOJ was "supportive of the effort to create a limited waiver and to amend federal rules to allow it to occur."[219]

211. *In re Columbia*, 293 F.3d at 312 (Boggs, J., dissenting). "The exception aids the government in bringing violations of the law to light." *Id.*

212. *Id.* at 311; *see* Dostart, *supra* note 3, at 739–40.

213. *In re Columbia*, 293 F.3d at 311 (Boggs, J., dissenting); *see* Dostart, *supra* note 3, at 740 (arguing that "a decision should not be made against the selective waiver without considering the benefits, especially when the benefits of allowing the selective waiver have readily identifiable strengths").

214. *In re* Qwest Communications Int'l, 450 F.3d 1179, 1193 (10th Cir. 2006).

215. *In re Columbia*, 293 F.3d at 307 (Boggs, J., dissenting); *see also* Kathryn Keneally & Kenneth M. Breen, *White Collar Crime: New Life for Selective Waiver*, THE CHAMPION: NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Jan.–Feb. 2006, at 42 (commenting that recent court decisions have given new hope for selective waiver).

216. Keneally & Breen, *supra* note 215, at 42; *see also In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2nd Cir. 1993); *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1369 (D.C. Cir. 1984); *In re* Sealed Case, 676 F.2d 793, 825 (D.C. Cir. 1982).

217. *In re Qwest*, 450 F.3d at 1193.

218. Pamela A. MacLean, *No Comfort from DOJ Waiver Rule: "McNulty Memo" on Attorney-Client Privilege Blasted by Critics*, 29 NAT'L L.J. No. 20, Jan. 22, 2007, at 8.

219. *Id.*

Furthermore, the SEC has asserted that waiver of privilege greatly enhances investigative efforts.[220] In an amicus brief filed with the Ninth Circuit, the SEC argued that confidentiality agreements should preserve privilege against third-party civil litigants.[221] Relying significantly on Judge Boggs's dissent in *In re Columbia*, the SEC argued that "[a]llowing parties to produce work product to the Commission without waiving work-product protection serves the public interest because it significantly enhances the Commission's ability to conduct expeditious investigations and obtain prompt relief . . . ."[222]

D. Future of Selective Waiver

Given the importance of the issue as well as the changing landscape in regards to corporate corruption, selective waiver is an issue that is likely to come before even more circuits. The recent wave of court decisions rejecting selective waiver suggest that it is unlikely that these remaining circuits will wholeheartedly accept the doctrine. However, there is some evidence to suggest that courts may be willing to adopt some form of selective waiver where a confidentiality agreement was executed between the companies and the government.[223]

The best hope for corporations will most likely come from the legislature. Recent legislation proposed by Congress strongly supports corporations. Congress is calling for a new Federal Rule of Evidence which would resolve the circuit split in favor of the companies.[224] Proposed Federal Rule of Evidence 502 would allow selective waiver, such that disclosure to a federal agency would not affect waiver to third parties when the corporation has executed a confidentiality agreement with the government.[225] In addition, on December 7, 2006, Senator Arlen Specter introduced the "Attorney-Client Privilege Protection Act of 2006."[226] The proposed law would trump the DOJ memoranda and make it illegal for any governmental agency to use waiver of privilege to determine the level of cooperation for companies under investigation.[227] Senator Specter took the lead in this area because the DOJ

220. Dostart, *supra* note 3, at 740–41 & n. 126.

221. Brief for the Securities and Exchange Commission as Amicus Curiae Supporting Appellants at 24, United States v. Bergonzi, 403 F.3d 1048, (9th Cir. 2005) (No. 03-10511).

222. *Id.* at 23–24.

223. *See supra* note 216 and accompanying text.

224. Geogory P. Joseph, *Privilege Waiver Rule I*, 28 NAT'L L.J. No. 35, May 8, 2006, at 15.

225. *Id.*

226. Attorney-Client Privilege Protection Act of 2007, S.318, 110th Cong. (2007) (introduced in the Senate on Jan. 4, 2007); *see* Press Release, Assoc. of Corporate Counsel, Senator Specter Takes Aim at DOJ's "Thompson Memorandum" (Dec. 7, 2006), *available at* http://www.acc.com/about/press/item.php?key=20061207_6468 [hereinafter Press Release].

227. Press Release, *supra* note 226. The Association for Corporate Counsel has spoken in support of this bill, declaring that "[they] commend Senator Specter for recognizing that the

was not forthcoming with reforms of its own.[228] Due to the drastic consequences that this Act would have for government investigations, there may be a greater call for selective waiver as a middle ground when there is a confidentiality agreement; allowing companies to voluntarily aid in government investigations without suffering severe repercussions as to later civil suits.

CONCLUSION

As corporate scandals continue to arise, there will be an ever-increasing call for corporations to cooperate with the government. In most cases, this will require that corporations disclose otherwise privileged information. The choice that companies must make carries grave consequences. Corporations have a strong incentive to cooperate with the government, but the cost of that cooperation is increasing as courts continue to give third-party civil litigants access to disclosed information. Selective waiver should be allowed when a corporation has entered into a confidentiality agreement with the government because the doctrine does promote the goals of the attorney-client and work-product privileges, and the public policy benefits resulting from selective waiver greatly outweigh any potential disadvantages. Government policies concerning waiver essentially force corporations to disclose their privileged information. Court rulings further exacerbate the problem by invalidating promises made by the government to ensure that corporations will not have to turn over their information to third parties. Therefore, allowing a selective waiver when a government agency has entered into a confidentiality agreement with a corporation is the only way to ensure that what appears to be cooperation is not really coercion.

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Department of Justice has gone too far in the tactics it employs during the prosecutorial process." *Id.*

228. *Id*. While the Association of Corporate Counsel has voiced support for Senator Specter's bill, they have not endorsed Proposed Federal Rule 502. Press Release, Assoc. of Corporate Counsel, "Selective Waivers" Offer Wrong Protection to Corporations, *available at* http://www.acc.com/about/press/item.php?key=20070130_21487. It describes the bill as "a wolf in sheep's clothing" and purports that it will facilitate prosecutorial demands for waiver. *Id.*

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