

## The Future of Selective Waiver of Attorney-Client Privilege and Work-Product Protection After *Qwest* [*In re Qwest Commc'ns Int'l Inc. Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006)]

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*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.*<sup>1</sup>

### I. INTRODUCTION

The status of attorney-client privilege and attorney work-product doctrine has become an issue of concern among members of the corporate defense bar in the wake of recent blockbuster corporate scandals.<sup>2</sup> As Congress passed measures such as the Sarbanes-Oxley Act (SOX)<sup>3</sup> to ensure independent accounting and executive accountability, the Department of Justice (DOJ) and various regulatory agencies developed aggressive investigative tactics to clean up corporate America.

Communications between corporate clients and counsel often contain information relevant to government investigations, but such communications are generally protected from discovery.<sup>4</sup> Prosecutors and securities investigators wanting to gain access to protected information frequently request that a party under investigation voluntarily surrender protected documents.<sup>5</sup> Corporate targets often comply with these requests to maintain a positive public image and preserve the company's market value. Underlying this cooperative environment, however, is a tendency by prosecutors to link determinations of a corporation's level of "cooperation" to voluntary waivers of privilege. The level of coop-

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1. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

2. See generally William R. McLucas et al., *The Changing Face of White-Collar Crime: The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621 (2006) (discussing waiver of attorney-client privilege and attorney work-product doctrine).

3. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 [hereinafter SOX] (codified as amended in scattered sections of 15 U.S.C.).

4. FED. R. EVID. 501; FED. R. CIV. P. 26(b)(3).

5. See Survey, *The Decline of Attorney-Client Privilege in the Corporate Context*, at 3-4, available at <http://www.acca.com/Surveys/attyclient2.pdf> (last visited Feb. 2, 2007).

eration displayed by a target plays a role both in the prosecutor's decision to indict the corporation, as well as her receptiveness to any possible plea agreement.<sup>6</sup>

A memorandum prepared by Deputy Attorney General Eric Holder in 1999 (Holder Memo) explained that a corporation's voluntary waiver of attorney-client privilege and attorney work-product might be considered when determining whether to indict a target corporation.<sup>7</sup> A 2003 memo by Deputy Attorney General Larry Thompson (Thompson Memo) placed an emphasis on "authentic" cooperation by a target,<sup>8</sup> sometimes making voluntary waiver dispositive in a prosecutor's determination. In December 2006, the DOJ released a revised policy (McNulty Memo) regarding corporate investigations in an effort to address some of the concerns that the defense bar has raised with the Thompson Memo.<sup>9</sup> The McNulty Memo retains many of the objectives and procedures of the Thompson Memo.<sup>10</sup>

The aggressive pursuit of privileged information by prosecutors and securities investigators, coupled with the unsettled law regarding waiver of privilege, place corporate counsel and their clients in difficult situations. A corporate client may be reluctant to communicate openly with its attorney if that information may be disclosed to government investigators in the future. In jurisdictions that do not recognize selective waiver, there is an added risk that production of privileged documents to government investigators may waive privileges against third parties.<sup>11</sup> This risk is a further disincentive for a client to discuss sensitive material with its attorney.

Attorney-client privilege and attorney work-product protection are generally deemed waived when protected materials are disclosed to anyone.<sup>12</sup> The doctrine of selective waiver, developed in the common law, preserves attorney-client and attorney work-product protections against third parties on privileged materials previously disclosed, generally to a government agency.<sup>13</sup> Selective waiver preserves candid communication between the attorney and corporate client and ensures fair treatment to corporations targeted by government investigators. In some instances where selective waiver was recognized, the existence of

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6. See Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components, United States Attorneys, at 6 (Jan. 20, 2003) [hereinafter Thompson Memo].

7. See Memorandum from Eric J. Holder, Deputy Attorney General, to All Component Heads and United States Attorneys, at para. 10 (June 16, 1999) [hereinafter Holder Memo].

8. Thompson Memo, *supra* note 6, at para. 3.

9. See Press Release, United States Department of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud (Dec. 12, 2006), available at [http://www.usdoj.gov/opa/pr/2006/December/06\\_odag\\_828.html](http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html).

10. *Id.*

11. See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 311 (6th Cir. 2002) (Boggs, J., dissenting).

12. *In re Grand Jury Proceedings* October 12, 1995, 78 F.3d 251, 254 (6th Cir. 1996).

13. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc).

confidentiality agreements between investigators and targets influenced the court's decision.<sup>14</sup>

In *In re Qwest Communications International, Inc. Securities Litigation*,<sup>15</sup> the United States Court of Appeals for the Tenth Circuit declined to recognize the selective waiver of attorney-client privilege. In so holding, the court followed outdated precedent and failed to recognize the changing environment surrounding selective waiver in the context of modern regulatory investigation. The rules of corporate investigation have changed since Enron and WorldCom, and the court's application of attorney-client privilege must reflect that change. The court's holding in *Qwest* only adds to the uncertainty surrounding the state of the attorney-client privilege and attorney work-product protection.

## II. CASE DESCRIPTION

Qwest Communications started business in 1988 as a wholly owned subsidiary of the Anschutz Company.<sup>16</sup> Qwest developed a digital microwave infrastructure throughout the southwestern United States that it intended to use to provide telecommunications services to consumers.<sup>17</sup> In 1995, Qwest Communications was acquired by Southern Pacific Telecommunications Company, which owned a broadband communications network throughout the region and provided phone services to commercial clients.<sup>18</sup> Rechristened "Qwest" after the merger, the company created a global fiber-optic communications infrastructure for its future use. Qwest financed some of the network's construction by selling fiber-optic lines to other providers.<sup>19</sup> Qwest used the network to provide long distance and local services to customers, primarily in the Rocky Mountain states.<sup>20</sup> After a successful period as a privately held company, Qwest made its initial public offering in June 1997.<sup>21</sup> As Qwest's network grew, so did its appetite for competitors; most notable among the acquisitions made by Qwest was its purchase of telecommunications provider US West in June 1999.<sup>22</sup> Soon after the merger,

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14. See, e.g., *Teacher's Ins. & Annuity Ass'n of Am. v. Shamrock Broad. Co.*, 521 F. Supp. 638, 646 (S.D.N.Y. 1981).

15. 450 F.3d 1179 (10th Cir. 2006), *cert. denied sub nom. Qwest Commc'ns Int'l Inc. v. New Eng. Health Care Employees Pension Fund*, 127 S. Ct. 584 (2006).

16. *Qwest Communications International Inc.*, STANDARD & POOR'S CORPORATE DESCRIPTIONS PLUS NEWS, July 15, 2006, at \*1, *available at* LEXIS, News & Business [hereinafter STANDARD & POOR'S].

17. *Id.* at \*2-3.

18. *Qwest Communications International Inc.*, HOOVER'S COMPANY RECORDS, Jan. 9, 2006, at \*6, *available at* LEXIS, News & Business [hereinafter HOOVER'S]. Like Qwest, Southern Pacific Telecommunications Co. was a wholly owned subsidiary of the Anschutz Company.

19. *Id.*

20. STANDARD & POOR'S, *supra* note 16, at \*2.

21. *Id.* at \*1.

22. Complaint at para. 24, Sec. & Exch. Comm'n. v. Qwest Commc'ns Int'l Inc., No. 04-Z-2179

Qwest's stock rose from thirty-four dollars per share at the time of the merger to over fifty dollars per share.<sup>23</sup>

Unfortunately, the demand that drove the stock higher was fed by a reliance on unrealistic corporate earnings projections, which, according to a complaint by the SEC, grossly overstated the income Qwest received from the sale of portions of its network to other providers.<sup>24</sup> The company's troubles were revealed to the public in August 2002 when Qwest announced that it would have to restate revenue for the preceding quarter.<sup>25</sup> Within days, the stock dropped to \$1.11 per share.<sup>26</sup>

### A. Early Investigation

Qwest's business practices became the target of investigations by the Securities and Exchange Commission (SEC) and the DOJ in early 2002.<sup>27</sup> In the course of these investigations, both agencies requested that Qwest surrender "documents protected by the attorney-client privilege and the work-product doctrine."<sup>28</sup> Although the agencies procured subpoenas to compel production, Qwest voluntarily provided authorities more than 220,000 pages of protected documents, but withheld 390,000 pages of privileged material.<sup>29</sup> As a condition to the documents' surrender, the agencies executed confidentiality agreements with Qwest, which provided that "Qwest did not intend to waive the attorney-client privilege or work-product protection."<sup>30</sup> The SEC promised to preserve the documents' confidentiality unless disclosures were "required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities."<sup>31</sup> The agreement with the DOJ provided for similar restrictions, but allowed disclosure to other governmental agencies for use in their investigations.<sup>32</sup>

The SEC investigation resulted in multiple fraud charges against Qwest.<sup>33</sup> On October 21, 2004, Qwest entered into a consent judgment in which it, while admitting no guilt, was enjoined from continued violation of securities laws and agreed to pay a civil penalty to its shareholders.<sup>34</sup>

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(D. Colo. 2004), available at <http://www.sec.gov/litigation/complaints/comp18936.pdf>.

23. *Id.* para. 23.

24. *Id.* para. 24.

25. *Id.* para. 6.

26. *Id.*

27. *In re Qwest Commc'ns Int'l Inc. Sec. Litig.*, 450 F.3d 1179, 1181 (10th Cir. 2006).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1181-82.

33. Press Release, U.S. Securities and Exchange Commission, SEC Charges Qwest Communications International Inc. with Multi-Faceted Accounting and Financial Reporting Fraud (Oct. 21, 2004), available at <http://sec.gov/news/press/2004-148.htm>.

34. *Id.*

### B. District Court Proceedings: The Securities Case

As Qwest's stock price reached its nadir and allegations of fraud grew in volume and intensity, the company began to liquidate assets.<sup>35</sup> The largest single liquidation was the proposed sale of Qwest's subsidiary phone directory service QwestDex.<sup>36</sup> The sale was scheduled to close on November 8, 2002, but on November 4, 2002, a group of Qwest shareholders filed a petition in the United States District Court for the District of Colorado to enjoin the sale.<sup>37</sup> The district court denied the shareholders' request for a restraining order on November 7, 2002,<sup>38</sup> and the sale went on as planned.

Since that first petition, Qwest and its corporate officers have been named defendants in numerous related lawsuits.<sup>39</sup> Twelve of these civil cases were consolidated in what is now commonly referred to as "the Securities Case," which is the subject of this comment.<sup>40</sup>

Throughout discovery in the Securities Case, Qwest released millions of pages of material to the plaintiffs, but maintained attorney-client and work-product protections over the documents it had surrendered to the SEC and the DOJ.<sup>41</sup> On May 31, 2005, a federal magistrate judge granted a motion by the plaintiffs to compel production of those documents.<sup>42</sup> Despite Qwest's objection, that order was upheld by a district judge on August 15, 2005.<sup>43</sup> Qwest again objected, and upon reconsidering the motion, the court ruled in favor of production but allowed Qwest to redact opinion work-product.<sup>44</sup>

Dissatisfied with this ruling, Qwest filed a petition for writ of mandamus seeking the reversal of the district court's production order with the United States Court of Appeals for the Tenth Circuit.<sup>45</sup> After briefing by the parties and oral argument, the circuit court denied Qwest mandamus relief.<sup>46</sup>

## III. BACKGROUND

### A. Attorney-Client Privilege

The doctrine of "attorney-client privilege is the oldest of the privi-

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35. HOOVER'S, *supra* note 18, at \*7.

36. *Id.*

37. *In re Qwest Commc'ns Int'l Inc. Sec. Litig.*, 231 F. Supp. 2d 1066, 1067 (D. Colo. 2002).

38. *Id.* at 1071.

39. *In re Qwest Commc'ns Int'l Inc. Sec. Litig.*, 450 F.3d 1179, 1182 (10th Cir. 2006).

40. *Id.*; see *In re Qwest Commc'ns Int'l Inc. Sec. Litig.*, 2006 U.S. Dist. LEXIS 7678 (D. Colo. 2006).

41. *In re Qwest*, 450 F.3d at 1182.

42. *In re Qwest Commc'ns Int'l Inc. Sec. Litig.*, 2006 U.S. Dist. LEXIS 7678, \*7 (D. Colo. 2006).

43. *Id.*

44. *Id.* at \*11.

45. *In re Qwest*, 450 F.3d at 1182.

46. *Id.* at 1201.

leges . . . known to the common law.”<sup>47</sup> As one of the common law privileges, attorney-client privilege is implicitly recognized by Federal Rule of Evidence 501.<sup>48</sup> The privilege applies to communications made only in the context of the attorney-client relationship.<sup>49</sup> The privilege is bidirectional; it protects both the attorney’s professional advice, as well as information provided by the client.<sup>50</sup> Attorney-client privilege promotes “law and administration of justice” by “encourag[ing] full and frank communication between attorneys and their clients.”<sup>51</sup>

Open communication is valued because it serves the interest of effective lawyering. For example, “if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.”<sup>52</sup> When the client discloses potentially damaging information to his lawyer, the lawyer is better equipped to advise the client of potential courses of action.<sup>53</sup> In the event of litigation, open communication will allow the attorney to properly advise the client about possible claims or defenses.<sup>54</sup> Because this privilege is intended to foster open communication in an attorney-client relationship, it is generally deemed waived if privileged material is voluntarily disclosed to a third party.<sup>55</sup>

### B. Attorney Work-Product Doctrine

The attorney work-product doctrine originated in *Hickman v. Taylor*,<sup>56</sup> and is now codified in Federal Rule of Civil Procedure 26(b)(3).<sup>57</sup>

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

48. FED. R. EVID. 501. Rule 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

*Id.*

49. 1-501 Federal Evidence § 501.5 (MB) (2004).

50. *Upjohn Co.*, 449 U.S. at 390.

51. *Id.* at 389.

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

53. *See United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 684 (1st Cir. 1997).

54. *See id.*

55. *See, e.g., In re Grand Jury Proceedings* October 12, 1995, 78 F.3d 251, 254 (6th Cir. 1996).

56. 329 U.S. 495, 512 (1947).

57. *Id.* Rule 26(b)(3) states in part:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and 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 un-

This doctrine prohibits discovery of any material prepared by an attorney in preparation for trial.<sup>58</sup> Work-product protection is a qualified privilege and does not offer the absolute protection of attorney-client privilege.<sup>59</sup> Under the work-product doctrine, protected items may be discoverable if the party seeking discovery can demonstrate that the information is substantially necessary for the preparation of his case.<sup>60</sup> Attorney work-product is classified based upon the content of the work. “Opinion” work-product includes any preparatory material that reveals the opinions, judgments, and thought processes of counsel.<sup>61</sup> “Fact” work-product includes factual observations and notes made during the course of discovery and in preparation for trial.<sup>62</sup>

In some instances, courts have construed work-product doctrine to offer broader protection than attorney-client privilege because protection of attorney work-product advances the adversarial aspects of the American justice system.<sup>63</sup> As a result, disclosure of protected work-product information does not automatically waive the protection.<sup>64</sup> As long as that disclosure is not “inconsistent with the maintenance of secrecy from the disclosing party’s adversary,” protection will be preserved.<sup>65</sup>

### C. Selective Waiver of Attorney-Client and Work-Product Protections

Although attorney-client privilege and work-product protection are generally deemed waived when otherwise protected materials are disclosed to third parties, a minority of federal jurisdictions have adopted “selective” or “limited” waiver.<sup>66</sup> Selective waiver allows for the preservation of privilege against third parties when protected documents have been disclosed to another party.<sup>67</sup> The jurisprudence of selective waiver is confusing because the multifaceted doctrine implicates several com-

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able without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

58. *See id.*

59. *United States v. Nobles*, 422 U.S. 225, 239 (1975).

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

61. *See Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

62. *See In re Martin Marietta Corp. v. Pollard*, 856 F.2d 619, 622, 626 (4th Cir. 1988). The distinction between the two types of work-product is not always clear. For example, courts have found interview notes to be fact work-product. *See, e.g., id.* The Supreme Court recognized in *Upjohn Co.*, however, that “[f]orcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes.” *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981).

63. *In re Martin Marietta Corp.*, 856 F.2d at 624 (citing *United States v. Nobles*, 422 U.S. 225, 238 (1975)).

64. *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).

65. *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

66. *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc).

67. *See id.*

mon law privileges. Furthermore, the issue has primarily arisen in complex corporate litigation; cases involving multiple companies, subsidiaries, civil plaintiffs, and government agencies are a standard affair. As a result, the narrative of selective waiver can easily become a tangled mess. The following survey of circuit court opinions on selective waiver will try to avoid that morass. The issue is discussed according to its chronological development, but an effort will be made to explore the divergent trends in each form of selective waiver.

1. The Origin of Selective Waiver: *Diversified Industries, Inc. v. Meredith*

Selective waiver was first recognized by the United States Court of Appeals for the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*.<sup>68</sup> In 1975, Diversified conducted an internal investigation to examine allegations that company employees bribed customers.<sup>69</sup> The results of that investigation were revealed in a memorandum and report prepared by outside counsel representing Diversified.<sup>70</sup> The SEC subsequently launched an investigation into Diversified's business practices and, pursuant to a subpoena, obtained the attorney's report as well as the minutes of certain Board of Directors meetings in which that report was discussed.<sup>71</sup> One company brought a civil suit and sought the documents Diversified previously disclosed to the SEC.<sup>72</sup> District court judge James Meredith ordered production, and Diversified sought mandamus relief in the circuit court.<sup>73</sup> The Eighth Circuit initially denied the petition based on its finding that the materials were not protected by attorney-client privilege or work-product protection.<sup>74</sup> Pursuant to a petition by Diversified, the Eighth Circuit agreed to rehear the matter en banc.<sup>75</sup> Upon rehearing, the court reversed itself and held that the documents were protected.<sup>76</sup> On the issue of waiver, the court stated that: "[a]s Diversified disclosed these documents in a separate and non-public SEC investigation, we conclude that only a *limited waiver* of the privilege occurred."<sup>77</sup> As a result, the court found that the privilege on the reports and minutes had been preserved.<sup>78</sup>

The Eighth Circuit's decision in *Diversified* created a split among

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68. 572 F.2d 596 (8th Cir. 1977).

69. *Id.* at 600.

70. *Id.* at 600-01.

71. *See id.* at 600.

72. *Id.*

73. *Id.* at 598-99.

74. *Id.* at 604.

75. *Id.* at 607.

76. *Id.* at 611.

77. *Id.* (emphasis added).

78. *Id.*

the circuit courts, and the Eighth Circuit remains the sole circuit that recognizes selective waiver of attorney-client privilege and attorney work-product. Of the circuits that have considered the issue, some have foreclosed the doctrine of selective waiver entirely, while others have supported it in certain circumstances or have left the door open to future recognition.<sup>79</sup>

## 2. The Decline of Selective Waiver in the Circuit Courts

The Court of Appeals for the District of Columbia was the first to address the issue of selective waiver after *Diversified*. In *Permian Corp. v. United States*,<sup>80</sup> the court considered the status of documents that were voluntarily disclosed to the SEC by Permian's parent company, Occidental Petroleum, during a prior investigation of Occidental.<sup>81</sup> The United States Department of Energy sought these documents as part of a separate investigation into Permian's pricing policies.<sup>82</sup> The court noted the existence of a confidentiality agreement between Occidental and the SEC regarding materials to be protected under both attorney-client privilege and work-product doctrine, but found that attorney-client privilege had been waived.<sup>83</sup> The court reasoned that selective waiver did not serve the original purposes of attorney-client privilege and would be a policy that allowed clients to "pick and choose among [their] opponents."<sup>84</sup> The court urged a narrow construction of attorney-client privilege to prevent the privilege's use as a tactical tool, stating that "attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality."<sup>85</sup> The court viewed work-product protection more broadly, and it upheld the district court's ruling that work-product protection was preserved on letters produced to the SEC in the course an investigation.<sup>86</sup>

The United States Court of Appeals for the Second Circuit rejected selective waiver of attorney-client privilege in *In re John Doe Corp.*<sup>87</sup> In that case, a grand jury demanded materials that were the product of an internal investigation by the anonymous company, many of which were disclosed to various parties involved in the investigation, including out-

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79. See *In re Columbia Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294-95 (6th Cir. 2002).

80. 665 F.2d 1214 (D.C. Cir. 1981).

81. *Id.* at 1216.

82. *Id.* at 1217.

83. *Id.* at 1216, 1222.

84. *Id.* at 1220-21.

85. *Id.* at 1222.

86. *Id.* at 1218-19. The court applied a clearly erroneous standard of review to the district court's decision that work-product protection was preserved. *Id.* at 1222.

87. 675 F.2d 482 (2d Cir. 1984).

side counsel and accountants.<sup>88</sup> The court held that the privilege was waived because such disclosures were evidence of the corporation's intent to use the information outside of the attorney-client relationship.<sup>89</sup>

The United States Court of Appeals for the Fourth Circuit rejected selective waiver of attorney-client privilege in *Martin Marietta Corp. v. Pollard*,<sup>90</sup> where a former Martin Marietta employee, then under indictment for fraud, sought the production of protected documents for use in his defense.<sup>91</sup> The employee sought these documents to show that he was merely a scapegoat for an alleged conspiracy by Martin Marietta to defraud the Department of Defense.<sup>92</sup> Several of the documents were previously disclosed by Martin Marietta to the Department of Defense, the DOJ or both.<sup>93</sup>

While rejecting selective waiver of attorney-client privilege in *Martin Marietta*, the Fourth Circuit recognized selected waiver of opinion work-product.<sup>94</sup> In distinguishing the two types of protection, the court reasoned that the danger that litigants may use pure mental impressions as a weapon "to distort the factfinding process" was outweighed by the value to the adversarial process of protecting such impressions.<sup>95</sup> The court, however, refused to extend such protection to fact work-product such as interview notes and audit results.<sup>96</sup>

The United States Court of Appeals for the Eighth Circuit rejected selective waiver of attorney fact work-product protection in *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*.<sup>97</sup> In *Chrysler*, the government sought a computer tape previously disclosed by Chrysler to plaintiffs' counsel in a class action.<sup>98</sup> The court compelled production of the tape to the U.S. Attorney, holding that the initial disclosure waived protection and that the government demonstrated a substantial need for the evidence.<sup>99</sup>

The United States Court of Appeals for the Third Circuit addressed the issue in *Westinghouse Electric Corp. v. Republic of the Philippines*,<sup>100</sup> a case that involved allegations that Westinghouse Electric bribed Filipino officials to obtain a contract to construct a power plant in the Philippines.<sup>101</sup> Westinghouse had previously performed internal

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88. *In re John Doe Corp.*, 675 F.2d at 484-85.

89. *Id.* at 488.

90. 856 F.2d 619 (4th Cir. 1988).

91. *Id.* at 620.

92. *Id.* at 622.

93. *In re Martin Marietta Corp. v. Pollard*, 856 F.2d 619, 621 (4th Cir. 1988).

94. *Id.* at 626.

95. *Id.*

96. *Id.*

97. 860 F.2d 844, 846 (8th Cir. 1988).

98. *Id.* at 845.

99. *Id.* at 847.

100. 951 F.2d 1414 (3d Cir. 1991).

101. *Id.* at 1417.

audits, and had produced information gleaned from those investigations to the SEC and DOJ.<sup>102</sup> In denying Westinghouse's request for a writ of mandamus, the Third Circuit followed the reasoning of the D.C. Circuit in *Permian* and held that selective waiver amounted to a new privilege that did not promote the original purpose of the attorney-client privilege.<sup>103</sup> The court also held that attorney work-product protection was waived by the voluntary disclosure.<sup>104</sup>

The most recent case preceding *Qwest* is *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*.<sup>105</sup> In *Columbia*, the United States Court of Appeals for the Sixth Circuit recognized the "considerable appeal, and justification, for permitting selective waiver when the initial disclosure is to an investigating arm of the Government."<sup>106</sup> The court, however, ultimately rejected selective waiver because of its concerns that selective waiver may be used as a tool by which a party may gain a tactical advantage, which runs against the intent of the attorney-client privilege.<sup>107</sup> The court held work-product protection to the same standard, and ruled that it was also waived.<sup>108</sup> The court also expressed its concern that, through entering into confidentiality agreements with corporations, the government may be complicit in "obfuscating the 'truth-finding process,'" for potential private litigants.<sup>109</sup>

*D. Recent Trends in Federal Investigative Policies and Practices and the "Culture of Waiver"*

As the profile of white-collar crime has risen in the public consciousness in recent years, so has the intensity of government investigation into such alleged misconduct. As will be shown in the following section, federal agencies have developed aggressive tactics for rooting out corporate wrongdoing. In developing these strategies and tactics, however, concerns have been raised about the possible abuse of prosecutorial discretion in requesting privilege waiver in the course of investigations. The investigative environment has deteriorated to the point that commentators, including members of the corporate defense bar, the

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102. *Id.* The United States Court of Appeals for the First Circuit also followed this reasoning when it rejected selective waiver of attorney-client privilege in *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 687 (1st Cir. 1997).

103. *Westinghouse Elec. Corp.*, 951 F.2d at 1425.

104. *Id.* at 1429.

105. 293 F.3d 289 (6th Cir. 2002).

106. *Id.* at 303.

107. *Id.* at 302-03.

108. *Id.* at 307.

109. *Id.* at 303. In a strong dissenting opinion, Judge Boggs contended that government investigations were of greater importance than the interest of private litigants and argued that selective waiver should be adopted as a means to increase the efficiency and decrease the costs of governmental investigation. *Id.* at 311-12 (Boggs, J., dissenting).

federal judiciary, and Congress, have coined the phrase “culture of waiver” to describe it.

### 1. Department of Justice Practices

On June 16, 1999, the Holder Memo presented the DOJ’s first uniform policy on corporate prosecution and discussed eight factors to consider when deciding whether to prosecute a corporation.<sup>110</sup> The factor affecting privilege waiver states that prosecutors may consider “[t]he 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.”<sup>111</sup> By late 2002, the collapse of Enron and other corporate scandals pushed the issue of corporate misconduct to the forefront of the nation’s conscience. Congress reacted by passing much of President Bush’s Corporate Fraud Initiative, including SOX,<sup>112</sup> to tighten enforcement of corporate crime.

As a result, the DOJ completed a review of the Holder Memo and released a revised version of the guidelines in the Thompson Memo in January 2003.<sup>113</sup> The intent of the revisions was to place an “increased emphasis on and scrutiny . . . of a corporation’s cooperation” with prosecutors.<sup>114</sup> The Thompson Memo took a skeptical view of corporations’ purported cooperation and stated that corporations too often “take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation.”<sup>115</sup> The memo emphasized what it termed “authentic” cooperation.<sup>116</sup> In determining authentic cooperation, prosecutors often place great weight on whether a company waived attorney-client and work-product protections.<sup>117</sup>

The Thompson Memo had an immediate impact on corporate investigations, and prosecutorial requests for privilege waivers are now common.<sup>118</sup> Given the potential liability to which corporations might expose themselves by voluntarily disclosing such privileged information, many have been reluctant to do so. The DOJ entered into confidential-

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110. See Holder Memo, *supra* note 7, at para. 10. There are eight factors that Mr. Holder urges prosecutors to take into account, including: “(1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the corporation”; (3) the history of similar conduct in the corporation; (4) voluntary disclosure of wrongdoing, including privilege waiver; (5) the “adequacy of the corporation’s compliance program”; (6) remedial actions taken by the corporation; (7) collateral consequences of the wrongdoing; and (8) “the adequacy of non-criminal remedies.” *Id.*

111. *Id.*

112. See SOX, *supra* note 3.

113. See Thompson Memo, *supra* note 6.

114. *Id.* (Thompson’s cover letter introducing the new DOJ policy).

115. *Id.*

116. *Id.*

117. *Id.*

118. See Survey, *supra* note 5.

ity agreements with numerous targets in an effort to allay such fears. Unfortunately, the courts have often held these confidentiality agreements to be unenforceable, as was the case in *Qwest*.<sup>119</sup>

In an effort to ameliorate corporate concerns of overzealous pursuit of privilege waiver by prosecutors, Acting Deputy Attorney General Robert McCallum issued a memorandum (McCallum Memo) on October 21, 2005.<sup>120</sup> The McCallum Memo noted that some prosecutors were required to obtain prior approval from their supervisors before requesting privilege waiver.<sup>121</sup> Additionally, the McCallum Memo directed each of the ninety-three United States Attorneys to “establish a written waiver review process for [their] district.”<sup>122</sup> These instructions were intended to provide more oversight of prosecutors and a standardized waiver policy in each office, while still allowing prosecutors the flexibility to exercise autonomous authority over individual cases.<sup>123</sup>

Some members of the corporate defense bar consider the McCallum Memo to be a step in the right direction because it provides for at least some degree of standardization of prosecutorial pursuit of privilege waiver.<sup>124</sup> Critics argue that instead of providing a standard guidance to prosecutors, the McCallum Memo creates the possibility that each of the ninety-three United States Attorney’s offices could create its own unique written waiver policy.<sup>125</sup> Former Attorney General Edwin Meese III argued that “the McCallum Memo does nothing to address the inherently coercive nature of the Thompson Memorandum factors” and that it provides no guidance to potential corporate targets because it does not require that the written waiver policies be made public.<sup>126</sup>

Recognizing that the McCallum Memo did not represent a significant departure from the Thompson Memo, the DOJ released the McNulty Memo in December 2006.<sup>127</sup> The McNulty Memo retains the categorical approach of preceding DOJ policy, departing from previous policy only in its reworking of procedures prosecutors must follow when

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119. See, e.g., *In re Qwest Commc’ns Int’l Inc. Sec. Litig.*, 450 F.3d 1179, 1194 (10th Cir. 2006).

120. See Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Department Components and United States Attorneys (Oct. 21, 2005) [hereinafter McCallum Memo].

121. *Id.*

122. *Id.*

123. See *id.*

124. Paul J Martinek, *DOJ Wants Review Process for Privilege Waiver Requests*, COMPLIANCE WEEK, Nov. 8, 2005, available at <http://www.mckennalong.com/news-in-the-archive-1518.html>.

125. See *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Edwin Meese, III, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal and Judicial Studies of the Heritage Foundation).

126. *Id.* para. 33.

127. See McNulty Press Release, *supra* note 9.

they request a privilege waiver.<sup>128</sup> Before requesting privileged materials, prosecutors must demonstrate that they have a “legitimate need” for the disclosure.<sup>129</sup> Prosecutors must then limit the scope of their request to only those documents that are “necessary to conduct a complete and thorough investigation.”<sup>130</sup> Prosecutors must obtain written authorization before making any request, and the level of authorization that must be obtained is linked to the nature of the materials sought.<sup>131</sup> If prosecutors seek “Category 1” information, which includes “purely factual information,” they must obtain approval from the United States Attorney.<sup>132</sup> If prosecutors seek “Category 2” information, which includes opinion work-product and materials protected by attorney-client privilege, the United States Attorney must obtain written authorization directly from the Deputy Attorney General.<sup>133</sup> The McNulty Memo further states that prosecutors may not consider a corporation’s refusal to provide privileged material in making their decision to indict.<sup>134</sup> However, prosecutors may look favorably on a corporation’s accommodation of such a request in their determination of that corporation’s cooperation.<sup>135</sup>

The initial reviews of the McNulty Memo have been mixed, and it is too early to determine what impact the new policy will have on prosecutorial conduct. Many have hailed the Memo as a positive development because the DOJ can no longer threaten indictment to compel production of privileged materials.<sup>136</sup> The McNulty Memo also continues the trend begun by the McCallum Memo to provide for more institutional oversight of prosecutors by requiring written pre-approval of any waiver request.<sup>137</sup> Some commentators have argued, however, that the practical impact of the McNulty Memo on prosecutors will be negligible.<sup>138</sup> The first criticism is that even if a prosecutor cannot negatively consider a corporation’s refusal to produce privileged information in deciding whether to charge the corporation, he may positively consider a corporation’s acquiescence in determining whether a corporation “cooperated” with his investigation.<sup>139</sup> Thus, waiver cannot be directly con-

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128. See Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, at 8 (Dec. 12, 2006) [hereinafter McNulty Memo].

129. McNulty Memo, *supra* note 128, at 8.

130. See *id.* at 9.

131. *Id.*

132. *Id.*

133. *Id.* at 10.

134. *Id.*

135. *Id.*

136. See, e.g., *Review & Outlook: The McNulty Memo*, WALL ST. J., Dec. 13, 2006, at A18.

137. The McCallum Memo was the first policy statement by the DOJ that required written documentation of waiver-seeking activities. See McCallum Memo, *supra* note 120.

138. See Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, A.B.A.J. E-REP., Dec. 15, 2006, <http://www.abanet.org/journal/ereport/d15specter.html>.

139. See, e.g., *Review & Outlook: The McNulty Memo*, *supra* note 136; see also McNulty Memo, *supra* note 128, at 10.

sidered by a prosecutor, but it may be weighed as a subfactor in the corporation's favor. The criticism is that if waiver is viewed favorably, failure to waive will therefore be viewed unfavorably and the current environment will remain unchanged.<sup>140</sup> Second, the McNulty Memo does not address implied waiver requests. Ostensibly, prosecutors are still free to make inducements to voluntarily waive privilege so long as such inducements are not explicit "requests" for waiver.<sup>141</sup> Under the McNulty Memo, voluntary waiver does not require authorization.<sup>142</sup> The third criticism is that the McNulty Memo is only an internal policy and contains no provision for enforcement or remedy in the event of a violation. Thus, there is no opportunity for the target of an investigation to complain of improper conduct by prosecutors.<sup>143</sup>

## 2. Federal Sentencing Guidelines

In 2004, the United States Sentencing Commission incorporated language concerning waiver as a factor for consideration in determining cooperation for purposes of sentence reduction. The amended section stated that:

[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.<sup>144</sup>

Critics of this policy argued that it served to encourage waiver, that waiver requests would become more routine, and that corporations would be forced to comply with such requests because there is no clear way to "challeng[e] the government's assertion that waiver is 'necessary.'"<sup>145</sup> In response to the complaints, the Sentencing Commission heard testimony from representatives of various organizations about the "unintended but potentially deleterious effects" of the language.<sup>146</sup> The Commission opened the issue for public comment and approved the deletion of the "waiver" language from Section 8C2.5 of the Guidelines because of the effect of unintended consequences.<sup>147</sup> The new provision became effective on November 1, 2006.<sup>148</sup>

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140. See *Review & Outlook*, *supra* note 139, at A18.

141. See Press Release, National Association of Criminal Defense Lawyers, DOJ Policy on Privilege Waivers Disappoints Defense Bar (Dec. 13, 2006), available at <http://www.nacdl.org/public.nsf/newsreleases/2006mn024?OpenDocument>.

142. McNulty Memo, *supra* note 128, at 11.

143. See Neil, *supra* note 138, at \*2.

144. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5, 69 Fed. Reg. 29,021 (May 19, 2004) (effective Nov. 1, 2004).

145. Statement of Donald C. Klawiter, to the United States Sentencing Commission, at 4 (Nov. 15, 2005).

146. 71 Fed. Reg. 4804 (Jan. 27, 2006).

147. 71 Fed. Reg. 28073 (May 15, 2006).

148. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5, 71 Fed. Reg. 28073 (May 15, 2006) (effective Nov. 1, 2006) The recent United States Supreme Court decision in *United States v. Booker*, 543

### 3. Securities and Exchange Commission Practices

The SEC outlined its policy concerning corporate prosecution in an October 23, 2001, cease-and-desist order.<sup>149</sup> The report focused on the Commission's decision to punish an individual corporate employee, who committed accounting fraud, but not the employer.<sup>150</sup> The Commission declined to take action against the corporation because of its cooperation with investigators and diligent efforts to comply with the law.<sup>151</sup> The Commission listed criteria it considers when determining whether to give a corporation credit for cooperating with investigators when the Commission makes its decision to commence further action against the corporation.<sup>152</sup> Among these criteria is whether the corporation voluntarily disclosed information to the Commission.<sup>153</sup> This factor often implicates material protected by attorney-client privilege and work-product protection, and the Commission utilizes confidentiality agreements to ease corporations into voluntarily disclosing such information in the course of its investigations.<sup>154</sup>

## IV. COURT'S DECISION

In *Qwest*, the United States Court of Appeals for the Tenth Circuit considered whether the disclosure to federal investigators of materials protected by attorney-client privilege and work-product doctrine waived those protections against third-party civil litigants.<sup>155</sup> The court held that a voluntary disclosure in the course of a government investigation waived the protection and that "the district court did not abuse its discretion in ordering Qwest to produce the Waiver Documents to the Plaintiff."<sup>156</sup>

Qwest's contention that "selective waiver is necessary to ensure

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U.S. 220 (2005), declared mandatory application of the federal sentencing guidelines unconstitutional. Advisory guidelines may still be consulted. *See id.*

149. Press Release, U.S. Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Oct. 23, 2001) (commonly referred to as the "Seaboard Report").

150. *Id.* para. 1-2.

151. *Id.*

152. *Id.* para. 9-21.

153. *Id.* para. 19. The Seaboard Report includes thirteen groups of considerations, including: (1) the nature of misconduct; (2) the origin of the misconduct; (3) the organizational level at which the misconduct arose or persisted; (4) the duration of the misconduct; (5) the severity of harm caused by the misconduct; (6) how the misconduct was discovered; (7) the length of time between discovery of misconduct and remedial action; (8) the nature of remedial steps taken by the corporation; (9) the auditing processes undertaken by the corporation; (10) the thoroughness of internal review; (11) the level of cooperation with SEC investigators; (12) the likelihood of recurring misconduct; (13) whether the identity or structure of the corporation has changed due to merger or bankruptcy. *Id.* at 9-21.

154. *See In re Qwest Commc'ns Int'l Inc. Sec. Litig.*, 450 F.3d 1179, 1181 (10th Cir. 2006); *Perman Corp. v. United States*, 665 F.2d 1214, 1216 (D.C. Cir. 1981).

155. *In re Qwest*, 450 F.3d at 1181.

156. *Id.* at 1201.

cooperation with government investigations” was addressed first by the court.<sup>157</sup> After acknowledging that selective waiver may have a positive effect toward cooperation with investigators, the Tenth Circuit rejected the argument on two grounds.<sup>158</sup> First, the court noted that Qwest cooperated with law enforcement by voluntarily disclosing the waiver documents despite unsettled law on the matter; thus, Qwest cooperated without the benefit of selected waiver.<sup>159</sup> Second, the court reasoned that if selective waiver was vital to cooperation, then the relevant government agencies would support selective waiver.<sup>160</sup> The court found no such agency support of selective waiver in the record.<sup>161</sup>

Qwest next asserted that the confidentiality agreements made with both the SEC and the DOJ preserved its privilege against third parties.<sup>162</sup> The circuit court noted that the law surrounding confidentiality agreements is unsettled because some circuits would enforce such agreements while others deemed the agreements irrelevant to a determination of waiver.<sup>163</sup> The court declined to give effect to Qwest’s confidentiality agreements because the agreements offered the SEC and the DOJ wide latitude in their use of the documents.<sup>164</sup>

Qwest’s assertion that it would be unfair not to adopt selective waiver was then addressed.<sup>165</sup> Qwest argued that if a party does not feel secure that material disclosed to government investigators will be kept confidential against third parties, it will simply not disclose such privileged material to investigators.<sup>166</sup> The court rejected this argument because it found no evidence that Qwest was subjected to any unfairness as a result of its decision to disclose protected materials to the government.<sup>167</sup>

The Tenth Circuit then reviewed existing case law and determined that the selective waiver sought by Qwest amounted to a new privilege that generally has not, and likely would not, be recognized by the courts.<sup>168</sup> The court noted the reluctance to extend privilege to journal-

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157. *Id.* at 1193.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1194.

163. *Id.* Compare *Salomon Bros. Treasury Litig. v. Steinhardt Partners*, 9 F.3d 230, 236 (2d. Cir. 1993) (declining to adopt a per se rule regarding third party waiver when a confidentiality agreement is at issue), with *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002) (adopting a per se rule rejecting confidentiality agreements).

164. *In re Qwest*, 450 F.3d at 1194. The waiver documents were widely circulated by the SEC and the DOJ. *Id.* The DOJ noted in its brief that some of the waiver documents were used in a number of criminal trials, as exhibits in another SEC investigation, and that the DOJ was not responsible to take any special action to safeguard the documents. *Id.*

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

166. *Id.*

167. *Id.* at 1196.

168. *Id.* at 1197.

ists, peer-review materials, and legislative aides.<sup>169</sup> It then compared the judicial adoption of a psychotherapist-patient privilege in *Jaffe v. Redmond*<sup>170</sup> to the present issue.<sup>171</sup> The psychotherapist-patient privilege was included among the privileges originally proposed for inclusion in the Federal Rules of Evidence, but Congress decided to leave privilege rules to the common law, and did not adopt any of the proposals.<sup>172</sup> The United States Supreme Court found that the broad support the psychotherapist-patient privilege enjoyed among the states,<sup>173</sup> and its status as one of the originally proposed Rules of Evidence, justified its adoption.<sup>174</sup> The Tenth Circuit found that the support for the adoption of selective waiver did not meet the standard set by *Jaffe* because: (1) selective waiver did not have a broad base of support in the states; (2) it was not one of the proposed privileges under the Federal Rules of Evidence; (3) the legislature did not act to create the privilege; and (4) agencies were unsure about what effect SOX might have on possible regulations concerning selective waiver.<sup>175</sup>

The court then addressed the contention that the modern federal investigative environment has created a “culture of waiver” in which a corporation’s freedom to withhold documents from investigators is essentially chimerical.<sup>176</sup> This argument, propounded in an amicus brief submitted by the Association of Corporate Counsel and the Chamber of Commerce of the United States of America, suggests that prevailing regulatory standards have undermined attorney-client privilege and work-product protection.<sup>177</sup> Although the court acknowledged that this culture of waiver may exist, it nevertheless declined to offer selective waiver as a remedy.<sup>178</sup> First, it found no evidence in the record to suggest that Qwest was a direct victim of this culture of waiver.<sup>179</sup> Second, while recognizing that the courts do have the “responsibility for development of the common law of testimonial privilege,” the court reasoned that such development must be gradual and guided by the record.<sup>180</sup> As

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169. *Id.*

170. 518 U.S. 1, 15 (1996).

171. *In re Qwest*, 450 F.3d at 1197-98.

172. FED. R. EVID. 501 advisory committee’s note (adopting the Report of the House Committee on the Judiciary). Nine of the original thirteen rules proposed for inclusion in Article V of the Federal Rules of Evidence “defined specific non-constitutional privileges which the federal courts must recognize. [These included] required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer.” *Id.*

173. *Jaffe v. Redmond*, 518 U.S. 1, 9 n.7 (1996).

174. *Id.* at 15.

175. *In re Qwest*, 450 F.3d at 1198-99.

176. *Id.* at 1199.

177. See Brief for Association of Corporate Counsel & Chamber of Commerce of the United States of America as Amici Curiae Supporting Petitioner at 9, *In re Qwest Commc’ns Int’l. Inc. Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006) (No. 06-1070).

178. *In re Qwest*, 450 F.3d at 1199.

179. *Id.*

180. *Id.* at 1200.

such, the circuit court followed *Branzburg v. Hayes*,<sup>181</sup> a case in which the Supreme Court declined to create a journalist's privilege in the face of increased issuance of subpoenas to journalists, stating that "changing policies and practices [are] insufficient to support the creation of a [new] privilege."<sup>182</sup> The *Qwest* court determined that if selective waiver were to be recognized, it would be the job of Congress and the Committee on Rules of Practice and Procedure to do so, not the court.<sup>183</sup>

## V. COMMENTARY

In rejecting selective waiver of attorney-client privilege and work-product protection in *Qwest*, the Tenth Circuit relied on outdated authority that does not reflect the current environment of federal investigations. The current prosecutorial culture, in which waiver of privileges are routinely sought, forces the corporate defendant to choose between aggressive prosecution if privileged materials are not voluntarily produced to investigators, and civil liability if they are. Considerations of fairness render this dual exposure unacceptable. If federal investigators emphasize cooperation, it is simply unfair that cooperation can create an increased risk that internal documents will be discoverable by a third party in a civil action.

### A. *The Tenth Circuit Relied Upon Outdated Precedent*

The Tenth Circuit's decision in *Qwest* is the newest decisional voice on an issue that has been the subject of a split among the federal circuit courts for nearly thirty years.<sup>184</sup> The court enters the debate on the side of the majority of circuits in rejecting selective waiver.

The jurisprudence of the majority view must be distinguished from the situation faced by the court in *Qwest*. Such a distinction is necessary because all of the previous cases concerning selective waiver were decided before the dynamic shift of the federal investigatory environment that followed the issuance of the Thompson Memo. It was temporally impossible for the courts deciding prior cases to take into account the acute impact that the Thompson Memo has had on prosecutorial tactics.<sup>185</sup> Therefore, the majority rule that disclosure to government agencies waives privilege to third-party civil plaintiffs is no longer a tenable position.

Courts rejecting selective waiver posit that it "transforms the attor-

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181. 408 U.S. 665 (1972).

182. *In re Qwest*, 450 F.3d at 1200.

183. *Id.* at 1201.

184. *Compare Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir 1977) (recognizing selective waiver), *with Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981) (rejecting selective waiver).

185. *See supra* Part III.D.1.

ney-client privilege into ‘merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.’”<sup>186</sup> The present investigatory environment, however, shows that government investigators often operate from a position of strength and use the chimeras of selective waiver to their advantage. *Columbia*, the most recent case among the circuit courts, was decided nearly a year before the DOJ released the Thompson Memo in January 2003.<sup>187</sup> As a result, it would have been impossible for the court to consider the policies outlined in the memo. Unfortunately, in *Qwest*, the Tenth Circuit failed to take notice of the fundamental change in circumstance.

In addition to changed circumstances, the court failed to recognize the distinction between governmental and non-governmental parties seeking discovery of privileged materials. In *Qwest*, the third party seeking discovery of the documents is the plaintiff in a subsequent civil suit.<sup>188</sup> Conversely, in a majority of the previous cases rejecting selective waiver, the third parties seeking documents were other government agencies.<sup>189</sup> This distinction is important for two reasons. First, certain disclosures to government agents are considered admissible for use by the government when such statements are not admissible if made to a civil party.<sup>190</sup> Second, because courts have found that government investigations have priority over civil lawsuits, government agents should have wider latitude to access previously disclosed materials than non-governmental parties.<sup>191</sup>

### B. *Leaving the Question of Selective Waiver Open for Future Litigants.*

Although the Tenth Circuit rejected selective waiver in *Qwest*, that rejection may have been based, to some degree, on facts peculiar to that case. The court rejected *Qwest*’s argument that “selective waiver is

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186. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002) (quoting *Salomon Bros. Treasury Litig. v. Steinhardt Partners*, 9 F.3d 230, 235 (2d. Cir. 1993)).

187. Compare Thompson Memo, *supra* note 6, with *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002).

188. *In re Qwest*, 450 F.3d at 1182.

189. See *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 683 (1st Cir. 1997) (IRS seeking documents previously disclosed to the United States Department of Defense); *In re Sealed Case*, 676 F.2d 793, 797 (D.C. Cir. 1982) (grand jury seeking documents previously disclosed to the SEC); *Permian Corp. v. United States*, 665 F.2d 1215 (D.C. Cir. 1981) (United States Department of Energy seeking documents previously disclosed to the SEC); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1417 (3d Cir. 1991) (Republic of the Philippines and its National Power Corporation seeking documents previously disclosed to the SEC).

190. Compare *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (creating an exception to the Federal Rule of Evidence 408 exclusionary rule for statements of fault made to government agents in the course of compromise negotiations of securities enforcement action), with *Blu-J, Inc. v. Kemper C.P.A. Group*, 916 F.2d 637, 642 (11th Cir. 1990) (applying Federal Rule of Evidence 408 exclusionary rule to statements made in negotiations between civil parties).

191. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d at 312 (Boggs, J., dissenting).

necessary to ensure cooperation with government investigations” because it did not find justification for it in the record.<sup>192</sup> Furthermore, the court rejected Qwest’s fairness argument because it found no evidence that Qwest was subjected to any unfairness by voluntarily disclosing documents without the benefit of selective waiver.<sup>193</sup>

This result simultaneously opens the door for future litigants to make a good-faith argument for selective waiver, while also failing to provide a per se rule that the Tenth Circuit will never recognize selective waiver. If the court found that the record was insufficient to support the adoption of selective waiver, does that mean that a case with stronger facts could lead to an opposite result? The court seems to leave open the possibility that if it had found evidence that Qwest had in fact been dealt with unfairly, suffered some prejudice, or that the confidentiality agreements were ironclad, it might have granted Qwest’s motion.

*C. The Future of Selective Waiver and Proposed Federal Rule of Evidence 502*

The Tenth Circuit’s reliance on outdated precedent may signal the end of selective waiver as a judicially construed doctrine.<sup>194</sup> A number of the courts rejecting selective waiver have indicated that a legislative remedy is necessary.<sup>195</sup> In September 2006, the Senate Judiciary Committee held a hearing concerning the Thompson Memo’s effect on the right to counsel in corporate investigations.<sup>196</sup>

The House Committee on the Judiciary requested that the Committee on Rules of Practice and Procedure initiate the process to make a new Rule of Evidence concerning selective waiver in early 2006.<sup>197</sup> After meeting in April, the Advisory Committee on Evidence Rules approved Federal Rule of Evidence 502, which would preserve the privilege against non-governmental civil litigants on materials voluntarily disclosed to government investigators.<sup>198</sup> The Advisory Committee ap-

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

193. *Id.* at 1195-96.

194. *See* SEC v. Brady, No. 3:05-CV-1416-M, 2006 U.S. Dist. LEXIS 74979, at \*27 (5th Cir. Oct. 16, 2006) (granting motion by defendant, a former officer in a company, to compel production of materials created in the course of an internal investigation of that company that had been previously disclosed to the SEC).

195. *See, e.g., In re Qwest*, 450 F.3d at 1200-01.

196. John Gibeaut, *Hearings Target Thompson Memo: Former Prosecutors, Defenders Criticize Policy on Waiver of Attorney-Client Privilege*, A.B.A.J. E-REP., Sept. 15, 2006, <http://www.abanet.org/journal/ereport/s15talk.html>.

197. *See* Memorandum from Judge Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to Judge David E. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, Judicial Conference of the U.S., at 2 (May 15, 2006), available at <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf> (reporting on the new proposed Federal Rule of Evidence 502) [hereinafter Smith Memo].

198. *See id.* at 2, 5. The attachment contains the text of the proposed rule:

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

(a) Scope of waiver. – In federal proceedings, the waiver by disclosure of an attorney-

proved publishing Rule 502 for public comment at its Fall 2006 meeting.<sup>199</sup> If adopted by Congress, the rule would codify selective waiver under Federal Rule of Evidence 502(c) and render the *Qwest* holding obsolete.

The new rule is intended to serve two fundamental purposes. First, the Advisory Committee drafted the rule to resolve the circuit split that has arisen regarding selective waiver.<sup>200</sup> Second, it intended the rule to provide a uniform standard for parties when they determine whether to disclose privileged information.<sup>201</sup>

The rule provides four exceptions to the third-party waiver rule. First, it preserves privilege over materials that have been inadvertently disclosed to an opposing party.<sup>202</sup> This issue arises in cases involving electronic discovery, which often involves the pre-disclosure review of hundreds of thousands of documents. The producing party must review all such documents and parse out privileged materials from ordinary information, often at a high economic cost and with the risk that privi-

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client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. – A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings – and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

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

(d) Controlling effect of court orders. – A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

(e) Controlling effect of party agreements. – An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(f) Included privilege and protection. – As used in this rule:

- 1) “attorney-client privilege” means the protection provided for confidential attorney-client communications, under applicable law; and
- 2) “work product protection” means the protection for materials prepared in anticipation of litigation or for trial, under applicable law.

*Id.* at attachment 1-4 [hereinafter Proposed Official Draft 2006].

199. 71 Fed. Reg. 58004 (Oct. 2, 2006).

200. FED. R. EVID. 502 advisory committee’s note 1 (Proposed Official Draft 2006).

201. *Id.* at note 2.

202. Smith Memo, *supra* note 197, at 2.

leged documents may be accidentally disclosed. The new rule provides that such an accidental disclosure will not result in subject matter waiver if the producing party took reasonable precautions and steps to rectify the situation.<sup>203</sup>

Second, the new rule codifies selective waiver by providing that disclosure of privileged materials to “a federal . . . agency in the exercise of its regulatory, investigative, or enforcement authority” does not waive privileges against civil third-parties.<sup>204</sup> This would directly address the issue that arose in *Qwest* by protecting privileged materials from the plaintiffs in the Securities Case.

Third, the rule provides that privileges may be preserved by order of a federal court, “in connection with . . . litigation pending before the court.”<sup>205</sup> This order would bind all persons or entities, regardless of their involvement in the initial litigation.<sup>206</sup>

Finally, the rule gives effect to confidentiality agreements between parties, like the one at issue in *Qwest*. Such an agreement would only be binding on non-parties if the agreement was included in a court order.<sup>207</sup>

The proposed rule is not a panacea to the selective waiver dilemma, however. One objection to the rule is that it does not clearly resolve whether a voluntary disclosure to government investigators will waive privilege to subsequent disclosure requests from other government agencies. Proposed Rule 502 is conspicuously silent on the issue, stating only that it does not “limit[] or expand[]” any authority a government agency may have to disclose information to other agencies.<sup>208</sup> Thus, notwithstanding any confidentiality agreement or court order, parties disclosing materials to the government should expect that government agencies may be free to pass around information among themselves.

## VI. CONCLUSION

The Tenth Circuit’s holding in *Qwest* leaves corporate counsel at an uncomfortable crossroads. The decision likely signals the end of a judicially construed selective waiver doctrine. The adoption of a legislative measure concerning selective waiver may be the only solution to the problem, but even that remedy is not without its risks. One thing that does seem certain is that governmental agencies will not curtail their reliance on privilege waivers in the course of corporate investigation at

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203. *Id.*

204. FED. R. EVID. 502(c) (Proposed Official Draft 2006).

205. FED. R. EVID. 502(d) (Proposed Official Draft 2006).

206. *Id.*

207. FED. R. EVID. 502(e) (Proposed Official Draft 2006).

208. FED. R. EVID. 502 (Proposed Official Draft 2006).

any point in the near future. As a result, attorneys and their corporate clients must weigh the benefits of cooperation with governmental investigations against the risk that any privileged information surrendered in the course of that investigation may be discoverable by plaintiffs in a subsequent civil case.