The Tenth Circuit Rejects Selective Waiver: Qwest Communications International, Inc. Securities Litigation

Nancy J. Gegenheimer
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QWEST COMMUNICATIONS INTERNATIONAL, INC. SECURITIES LITIGATION

NANCY J. GEGENHEIMER

INTRODUCTION

On June 19, 2006, the United States Court of Appeals for the Tenth Circuit decided In re Qwest Communications International, Inc.1 Accepting a Writ of Mandamus,2 the court declared that the writ, "presents an issue of first impression in this Circuit, namely, whether Qwest waived the attorney-client privilege and work-product doctrine, as to third-party civil litigants, by releasing privileged materials to federal agencies in the course of the agencies' investigation of Qwest."3 During the course of investigations by the United States Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), Qwest had turned over approximately 200,000 privileged documents "pursuant to a written confidentiality agreement between Qwest and each agency."4 Those documents, in turn, had been introduced into evidence in criminal trials, produced in three separate criminal proceedings, and used as exhibits in SEC investigative testimony.5

In upholding the district court, which had in turn upheld the recommendation of the Magistrate Judge, the Tenth Circuit joined the majority of other circuits6 in refusing to allow a selective disclosure of privileged or work-product documents without the resulting waiver of the privilege or protection.7

In a 2005 Seton Hall Law Review article, the author, Andrew McNally, argued for the revitalization of the selective waiver to encour-

† Nancy Gegenheimer is a partner with Holme Roberts & Owen LLP. She received her B.A. from the University of Colorado, 1975; and J.D. from the University of Denver, 1978.
1. In re Qwest Commc'ns Int'l, Inc. Sec. Litig., 450 F.3d 1179 (10th Cir. 2006), cert. denied, 127 S.Ct. 584 (Nov. 13, 2006).
2. 28 U.S.C.A. § 1651(a) (West 2007).
3. Qwest, 450 F.3d at 1181.
4. Id.
5. Id. at 1194.
7. Qwest, 450 F.3d at 1200.
age voluntary disclosure of corporate wrongdoing. As of May 15, 2006, the Advisory Committee on Evidence Rules submitted proposed new evidence Rule 502. Proposed Rule 502(c) addresses selective waiver.

This article first lays out the history of the attorney-client privilege and work-product protection. Secondly, it sets out the landscape of the government agency policies informing Qwest’s actions, and thirdly, it discusses the case law on selective disclosure starting with the Eighth Circuit’s opinion in *Diversified Industries, Inc. v. Meredith.* This article then discusses the Tenth Circuit’s opinion in *Qwest* and the proposed new evidence Rule 502 and concludes with a discussion of what lies ahead for selective waiver of the privilege.

I. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the oldest of the privileges known to common law. Initially, the privilege worked only one way, prohibiting attorneys from revealing their client’s secrets. But the privilege quickly expanded to communications that went either way between lawyers and clients. The scope of the privilege is “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.” Federal Rule of Evidence 501 (“FRE 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

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11. 572 F.2d 596 (8th Cir. 1977) (en banc).
political subdivision thereof shall be determined in accordance with state law.  

The Federal Rules of Evidence are statutory in nature because they "were passed by both houses [of Congress] and signed into law by the President." This differs from the Federal Rules of Civil Procedure, which were promulgated under the Rules Enabling Act. A rule on privilege cannot be made effective through the ordinary rulemaking process. Congress must enact such a rule through its authority under the Commerce Clause.

The attorney-client privilege provides that:

(1) where legal advice of any kind is sought (2) from a professional adviser in his capacity as such (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or his legal adviser (8) except if the protection be waived.

The purpose of the privilege 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." The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon lawyers being fully informed by their clients. The protection of the privilege extends only to communications and not to facts, and the purpose of the communication must be for legal advice.

There are complications in the application of the privilege when the client is a corporation because the corporation is an artificial creature and

20. United States v. Mass. Inst. of Tech., 129 F.3d 681, 683, 684 (1st Cir. 1997); accord 8 WIGMORE ON EVIDENCE § 2292 (McNaughton Rev. 1961); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (providing the "privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar or a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client; (b) without the presence of strangers; (c) for the purpose of securing primarily either (i) an opinion on law; or (ii) legal services or (iii) assistance in some legal proceedings and not (a) for the purpose of committing a crime or tort; and (iv) the privilege has been (a) claimed and (b) not waived by the client").
22. See id.
23. See id. at 395.
not an individual. Nonetheless, there is no question that the privilege applies when the client is a corporation. One difficulty with the privilege when it relates to a corporation is determining whether or not the communication is actually between an attorney and a client for purposes of legal advice. In light of the vast and complicated array of regulatory legislation confronting modern corporations, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law. The privilege is also difficult in the corporate context because the restriction on privilege is that it must be legal advice, not business advice. The privilege belongs to the corporation, not to individuals.

This difficulty in applying the attorney-client privilege in the corporate setting is reflected in the nearly twenty-year period wherein the courts struggled with the control group test and who, in fact, was entitled to claim a privileged communication. In 1981, the Supreme Court took the issue up and recognized, citing ethical considerations, that a lawyer must be fully informed of the facts and must be able to predict with some degree of certainty whether particular discussions will be protected. The Court explained, “In a corporation it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel.”

But all testimony exclusionary rules, including the attorney-client privilege, contravene the fundamental principle that the public has a right to every person’s evidence. As a result, privileges are strictly construed and only accepted to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertainment.

26. See Radiant Burners, Inc. v. Am. Gas Assoc., 320 F.2d 314, 323 (7th Cir. 1963); Upjohn, 449 U.S. at 389-90 (citing United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915)).
27. See Meredith, 572 F.2d at 608.
32. Upjohn, 449 U.S. at 389, 391-93.
33. Id. at 391 (citing Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc).
The privilege is not limitless and courts take care to apply it only to the extent necessary to achieve its underlying goals.\textsuperscript{36} A party who invokes the privilege has the burden of establishing that it applies to the communication at issue.\textsuperscript{37} That party also has the burden to prove that it has not been waived.\textsuperscript{38} Just like the attorney-client privilege, questions of waiver of privilege are governed by federal common law.\textsuperscript{39} The attorney-client privilege can be waived expressly and impliedly, and both are equally binding.\textsuperscript{40} Professor Weinstein explains:

> [T]he courts have identified a common denominator in waiver by implication. In each case, the party asserting the privilege placed protected information in issue for personal benefit through some affirmative act, and the Court found that to allow the privilege to protect against disclosure of that information would have been unfair to the opposing party.\textsuperscript{41}

A client impliedly waives the privilege when the client (1) testifies concerning a portion of an attorney-client communication; (2) places attorney-client relationship itself at issue; or (3) asserts reliance on advice of counsel as an element of a claim or defense.\textsuperscript{42} On the other hand, express waivers include: (1) express and voluntary surrender of the privilege; (2) partial disclosure of a privileged document; (3) selective disclosure to some outsiders but not all; or (4) inadvertent over-hearings or disclosures.\textsuperscript{43}

When a party defends its actions by disclosing an attorney-client communication, it waives the attorney-client privilege as to all such communications regarding the same subject matter.\textsuperscript{44} But an extrajudicial disclosure, not used to gain adversarial advantage in judicial proceedings is not an implied waiver of all communications on the same

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  \item \textsuperscript{35} See Elkins v. United States, 364 U.S. 206, 216 (1960) (arguing that the benefit behind the exclusionary rule is the public good of deterring police misconduct which outweighs the traditional principles of using all available evidence in seeking the truth).
  \item \textsuperscript{36} In re Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001).
  \item \textsuperscript{37} See United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1972).
  \item \textsuperscript{38} See Maine v. U.S. Dep't of Interior, 298 F.3d 60, 71 (1st Cir. 2002); United States v. Bollin, 264 F.3d 391, 412 (4th Cir. 2001).
  \item \textsuperscript{39} See United States v. Rakes, 136 F.3d 1, 3 (1st Cir. 1998).
  \item \textsuperscript{40} The Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981).
  \item \textsuperscript{41} 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN FEDERAL EVIDENCE § 503-41[1] (Joseph M. McLaughlin Ed. 1977); cf. Keeper of the Records of XYZ Corp., 348 F.3d at 22.
  \item \textsuperscript{42} Keeper of the Records of XYZ Corp., 348 F.3d at 24.
  \item \textsuperscript{43} United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (citing MCCORMICK ON EVIDENCE, § 93 at 341-48 (J.W. Strong ed., 4th ed. 1992)).
  \item \textsuperscript{44} See Fort James Corp. v. Solo Cup Co., 412 F.3d 1340, 1349 (Fed. Cir. 2005).
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There are other well-established waivers, not involved in Qwest.  

II. WORK PRODUCT DOCTRINE

The work product doctrine is a protection, not a privilege. It has its genesis in the Supreme Court’s opinion in Hickman v. Taylor, decided in 1947. Unlike the attorney-client privilege, which protects all types of communications, both oral and written, the work-product doctrine protects documents and tangible things that are both privileged and non-privileged if prepared in anticipation of litigation. The work-product doctrine is now codified in the Federal Rules of Civil Procedure. The rule provides:

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 unable 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.

The rule specifically protects against disclosure of mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation. Thus, the work-product

46. Other waivers include a crime-fraud exception. See Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986) (citing Clark v. United States, 289 U.S. 1, 15 (1933)) (“All reasons for the attorney-client privilege are completely eviscerated when a client consults an attorney not for advice on past misconduct, but for legal assistance in carrying out a contemplated or ongoing crime or fraud.”); In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1038 (2d Cir. 1984); In re Murphy, 560 F.2d 326, 337 (8th Cir. 1977). Another exception is joint defense or communications with co-defendants. See Westinghouse Elec. Corp. v. The Republic of the Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991). Another exception not at issue is when a disclosure to a third party is necessary for the client to obtain informed legal advice. See Westinghouse Elec. Corp., 951 F.2d at 1424. By Qwest’s admission at oral argument, inadvertent disclosure was not an issue. In re Qwest Commc’ns Int’l, Inc. Sec. Litig., 450 F.3d 1179, 1182 (10th Cir. 2006), cert. denied, 127 S. Ct. 584 (Nov. 13, 2006); accord Genentech, Inc. v. U.S. Int’l Trade Comm’n, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (permitting some disclosure of confidential information without resulting in an inadvertent waiver).
49. Judicial Watch, Inc. v. Dep’t of Justice, 432 F.3d 366, 369 (D.C. Cir. 2005); In re Echo Star Commc’ns Corp., 448 F.3d 1294, 1301 (Fed. Cir. 2006).
50. FED. R. CIV. P. 26(b)(3).
doctrine encourages attorneys to write down their thoughts and opinions with the knowledge that their opponents will not be able to rob them of the fruits of their labor.51 “The purpose of the doctrine is to establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary’s preparation.”

The work has to be prepared in anticipation of litigation, but actual litigation does not have to be filed, in fact, it does not even have to be true litigation.53 For example, a summons from a department of the government qualifies as anticipation of litigation.54 The courts recognize that prudent parties anticipate litigation and begin preparation prior to the time a suit is formally commenced. The test that is applied is “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared for or obtained because of the prospect of litigation.”55 But there is no work-product protection for documents prepared in the regular course of business, or to satisfy public requirements unrelated to litigation, or for other non-litigation purposes, even if those documents are prepared while litigation is a prospect or ongoing.56

Like the attorney-client privilege, there are strong policies behind the work-product doctrine.57 The attorney-client privilege protects the attorney-client relationship and the legal system, and the work-product doctrine is said to protect the adversary system.58 In some respects, the work-product doctrine is not only different, but it is also broader than the attorney-client privilege.59 The protection given work product by the Rule is broader in the sense that it may be, but need not be, work of an attorney, and work product is not confined to information or materials gathered or assembled by an attorney.

Hickman v. Taylor distinguished between opinion and non-opinion work product and this distinction is followed in the Rule.60 “[A] showing of necessity is sufficient to overcome” the work-product protection when documents “do not contain opinion work product, i.e., writings which

51. See Hickman, 329 U.S. at 510-11; Echo Star Commc'ns, 448 F.3d at 1301.
52. United States v. Adman, 68 F.3d 1495, 1501 (2d Cir. 1995).
53. See In re Steinhardt Partners, 9 F.3d 230, 234 (2d Cir. 1993) (providing that the “presence of an adversarial relationship does not depend on the existence of litigation”).
56. WRIGHT, MILLER & MARCUS, supra note 55, § 2024; Roxworthy, 457 F.3d at 593.
60. See Hickman, 329 U.S. at 510-512.
reflect an attorney’s mental impressions, conclusions, opinions or legal theories.’ 61 Likewise, the rules as to waiver of work product differ slightly from attorney-client privilege. 62 Not every disclosure of work product necessitates a waiver. Instead, the disclosure must be to an adversary. Courts distinguish disclosure of work product to adversaries and non-adversaries. 63

Thus, waiver of work product will occur if there is a disclosure to an adversary, 64 and similar privilege waivers, 65 such as the crime-fraud waiver, also apply to work product. 66 Because the waiver of attorney-client privilege and work-product protection differs, there are cases where the same conduct resulted in a waiver of the privilege but not work product. 67

III. FACTUAL SETTING OF QWEST COMMUNICATIONS CASE

In early 2002, the SEC began investigating Qwest’s business practices. 68 In the summer of 2002, Qwest learned that the DOJ had also commenced a criminal investigation of Qwest. 69 In those investigations, Qwest produced 220,000 pages of documents that were protected by the attorney-client privilege and work-product doctrine. 70 Qwest also withheld 390,000 pages of privileged documents. 71

Prior to the initiation of the federal investigations, the plaintiffs had filed civil actions against Qwest that involved many of the same issues as the investigation. 72 In the civil cases, Qwest produced millions of pages of documents, but withheld all of the privileged documents, including

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63. Westinghouse Elec. Corp., 951 F.2d at 1428; see also Mass. Inst. of Tech., 129 F.3d at 687; Columbia/HCA Healthcare Corp. Billing Practices, 293 F.3d at 305-06.
65. See supra note 46.
66. In re Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986); In re Int’l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982).
68. In re Qwest Commc’ns Int’l Inc., 450 F.3d 1179, 1181 (10th Cir. 2006), cert. denied, 127 S. Ct. 584 (Nov. 13, 2006).
69. Qwest, 450 F.3d at 1181.
70. Id.
71. Id.
72. Id. at 1182.
those that it had produced to the SEC and the DOJ. Qwest disclosed the withheld documents on a privilege log, as it must.

Qwest had a written agreement with the SEC to maintain the confidentiality of the documents and to not disclose them to any third party, except to the extent staff determines that disclosure is otherwise required by law or would be in furtherance of the SEC discharge of its duties and responsibilities. But Qwest agreed that the DOJ could share the documents with other state, local and federal agencies and that the DOJ could make direct or derivative use of the documents in any proceeding and in its investigation. The DOJ agreed to maintain the confidentiality and not disclose the documents to third parties except to the extent that the DOJ determined that disclosure was otherwise required by law or would be in furtherance of the DOJ’s discharge of its duties and responsibilities. The confidentiality agreements with both the DOJ and the SEC were in writing. But the documents, given the scope of the DOJ’s permission, were introduced into evidence in criminal trials, were produced in discovery in three separate criminal proceedings, and used as exhibits to SEC investigative testimony. The DOJ was not required to file these documents under seal, keep a record of how they were used or to deal with the documents in any special way.

Private parties in civil litigation found the documents identified on privileged logs and moved to compel. The Magistrate Judge held that Qwest had waived the attorney-client privilege and work-product protection by producing the documents. The District Court upheld the Magistrate Judge’s order compelling production and required further production of certain reports prepared by Qwest’s counsel, redacted of attorney opinion work product. The order to disclose the redacted version of counsel’s report was not challenged in the Tenth Circuit. The district court stayed its order pending outcome of the writ of mandamus.

73. Id.
74. See Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541-42 (10th Cir. 1984) (providing that a party seeking to assert the privilege must make a clear showing that it applies); FED. R. CIV. P. 26(b)(5); FED. R. CIV. P. 34.
75. See Qwest, 450 F.3d at 1181.
76. Id.
77. Id. at 1181-82.
78. Id. at 1181.
79. Id. at 1194.
80. Id.
81. See id. at 1182.
82. Id. There was no issue of inadvertent disclosure or involuntary waiver in the Qwest case.
83. Id. at 1182.
84. See id.
85. Id.
IV. LANDSCAPE REGARDING FEDERAL AGENCIES’ POLICIES FACED BY QWEST

At the time that the DOJ and the SEC began investigations of Qwest, there were years of precedent where corporations waived the privilege to either: (1) not be labeled uncooperative; or (2) secure leniency during an investigation. Both the DOJ and the SEC have written policies regarding waiver of attorney-client privilege.

A. Department of Justice

The DOJ has a corporate leniency policy for antitrust violations. With respect to leniency before any investigation has begun, the DOJ policy includes, as one of its six conditions: “The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation.”

With respect to all of its investigations, the DOJ is also guided by its principles of Federal Prosecution of Corporations, which appeared in a memorandum from Deputy Attorney General Eric Holder and provided guidance to prosecutors about whether to prosecute a corporation. The memorandum was not made public at the time that Deputy Attorney General Holder issued it. The memorandum attaches guidelines titled Department’s Federal Prosecution of Corporations (the “Guidelines”). The memorandum emphasizes that the factors laid out in the Guidelines are not outcome determinative and are for guidance only. Prosecutors are not required to reference the factors or document the weight they accorded specific factors in reaching their decision. In setting out factors to be considered in charging corporations, the Holder Memorandum states that, in general, prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals. The Guidelines go on to state, however, that due to the nature of the corporate “person” some additional factors are present. For example, one of those factors is: “The Corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the cor-

87. Id. This is also a policy for individuals. See id.
89. Id. [hereinafter Guidelines] (“Guidelines” refers to the Federal Prosecution of Corporation guidelines attached to the Holder Memorandum).
90. See Holder Memorandum, supra note 88.
91. See Guidelines, supra note 89, § II.A.
92. Id.
porate attorney-client and work product privileges (see section VI, infra).93

Section VI of the Guidelines then addresses whether a corporation’s voluntary disclosure was sufficient.94 The section discusses the importance of the completeness of disclosure and that it will be a factor weighed in assessing the adequacy of the corporation’s cooperation.95 The disclosure may include waiver of attorney-client and work-product protections with respect to its internal investigation and its communications with its officers, directors, and employees of counsel.96 The Guidelines provide that prosecutors may therefore request a waiver in appropriate circumstances.97 The government recognized that waiver by the corporation may be the only way the government could get the statements of possible witnesses, subjects, or targets.98 The Guidelines state:

One factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work-product protections, both with respect to its internal investigations and with respect to communications between specific officers, directors, and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.99

The Guidelines imply that the government may consider a corporation not cooperative if it enters into joint defense agreements with its officers, directors or employees or continues to pay and advance their attorneys’ fees, unless required to do so by law, or otherwise supports culpable employees.100

In a November 2003 interview published in the United States Attorneys Bulletin, United States Attorney James B. Comey stated that because of an individual’s rights to invoke the Fifth Amendment, the internal investigation and notes of counsel during an internal investigation may be the only way for the government to get to certain facts.101 United States Attorney Comey reiterated in this 2003 interview that:

93. Id. § II.A.4.
94. See id. § VI.
95. See id.
96. Id. § VI.B.
97. Id.
98. Id.
99. Id.
100. See id.
It is hard for me to understand why a corporation would ever enter into a joint defense agreement because doing so may prevent it from making disclosures it must make if it is in a regulated industry or may wish to make to a prosecutor. In any event, how a joint defense agreement will affect the corporation’s ability to cooperate will vary in every case. If the joint defense agreement puts the corporation in a position where it is unable to make full disclosure about the criminal activity, then no credit for cooperation will be factored into the government’s charge and decision, and it will get no credit for that cooperation under the guidelines.102

Subsequent to the Holder Memorandum, in 2003 Deputy Attorney General Larry D. Thompson issued the “Thompson Memorandum.”103 Attached to the memorandum were revisions to Holder’s Principles of Federal Prosecution of Business Organizations. The main focus of the revisions, according to the Thompson Memorandum, is to increase emphasis on and scrutiny of the authenticity of a corporation’s cooperation.104 He notes that:

Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions made clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address[ed] the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than a mere paper program[].105

The revision that addresses this focus appears in Section VI of the Thompson Memorandum, on collaboration and voluntary disclosure.106 The revisions added that agreements for immunity or amnesty or pretrial diversion may be entered into only with the approval of each affected district or the appropriate department official.107 Another factor was added into Section VI as follows:

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such

102. Id. at 4.
104. Id. at 1.
105. Id.
106. See id. at 6-8.
107. Id. at 6.
as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to properly disclose illegal conduct known to the corporation.108

The Thompson Memorandum would have been issued during the investigations of Qwest.109 The Justice Department sent out another memorandum on October 21, 2005 from Acting Deputy Attorney General Robert D. McCallum Jr. which provided that, to ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the Thompson Memorandum, each district was directed to establish a written waiver review process.110 The McCallum Memorandum acknowledged the fact that waiver review processes may vary from district to district (or component to component) so that each United States Attorney or Component retained the prosecutorial discretion necessary, consistent with their circumstances, to seek timely, complete, and accurate information from business organizations.111

The Thompson Memorandum, like the Holder Memorandum, states that a corporation's offer of cooperation does not automatically entitle the corporation to immunity from prosecution.112 It is merely one factor considered in conjunction with other factors. In fact, a waiver of the attorney-client privilege and cooperation will not even assure that a corporation will be given any leniency. Prosecutors must and do retain wide discretion in determining the charges to bring against a corporation and waiver of the privilege is just one of the factors.113

The Thompson Memorandum came under strong criticism from the Southern District of New York in United States v. Stein.114 In Stein, the district court found that provisions of the Thompson Memorandum relating to factors to weigh in determining whether the corporation appeared to be protecting its employees and agents, including through advancing

108. Id. at 8.
109. Compare id. at 1 (noting the Thompson Memorandum was issued on January 20, 2003), with Qwest, 450 F.3d at 1181 (noting the SEC and DOJ investigations of Qwest began in the summer of 2002). In United States v. Stein, 435 F. Supp. 2d 330, 364-65 (S.D.N.Y. 2006), the court held that portions of the Thompson Memorandum were unconstitutional violations of due process under the Fifth Amendment and the right to counsel under the Sixth Amendment.
111. Id.
112. Compare Thompson Memorandum, supra note 103, at 1, with Holder Memorandum, supra note 88, § VI.
113. Thompson Memorandum, supra note 103, at 6.
attorneys’ fees, were unconstitutional. The court held that they violated the due process clause of the United States Constitution.

On December 12, 2006, Deputy Attorney General Paul J. McNulty issued new guidelines. In a memorandum to all Heads of Department Components, Deputy Attorney General McNulty states that the new memorandum supersedes and replaces guidance contained in the memorandum from Deputy Attorney General Larry D. Thompson entitled “Principles of Federal Prosecution of Business Organizations,” dated January 20, 2003. However, as was the case when the Thompson Memorandum supplanted the Holder Memorandum, much of the Principles of Federal Prosecution of Business Organizations remain the same. What changed, however, was Section VII. Section VII of the McNulty Memorandum sets out specifics on how the value of cooperation will be treated in charging a corporation.

The McNulty Memorandum expressly states that waiver of attorney-client and work-product protections is not a prerequisite to a finding that a company has cooperated in the government’s investigation. The McNulty Memorandum goes on to state, “However, a company’s disclosure of privileged information may permit the government to expedite its investigation . . . . A corporation’s response to a government’s request for waiver of privilege may be considered in determining whether a corporation has cooperated in the government’s investigation.” The McNulty Memorandum identifies two categories of information that can be requested, seriatim, from a corporation. Category I must be requested first and entails purely factual information, which may or may not be privileged, relating to the underlying misconduct. If the Category I purely factual information provides an incomplete basis to conduct a thorough investigation, prosecutors may then request Category II information. Category II information includes attorney-client communications or nonfactual attorney-work product. Such information in-

115. Id.
116. Id. at 365.
118. Id. at 2.
119. Id. at 7-12.
120. Id.
121. Id.
122. Id. at 8, 11.
123. Id. at 9-11.
124. Id. at 9.
125. Id. at 10.
126. Id.
cludes "legal advice given to the corporation before, during, and after the underlying misconduct occurred."^{127}

B. Securities and Exchange Commission

The SEC has its own rules, guidelines and criteria that will be considered if the SEC is to give credit for self-policing, self-reporting, remediation and cooperation. These are set forth in a release known as the "Seaboard Report" which came out in 2001.^{128} Criteria No. 11 of the Seaboard Report is footnoted with the statement that in some cases the desire to provide information to the SEC staff may cause companies to consider choosing not to assert the attorney-client privilege, the work product protection and other privileges, protections, and exemptions with respect to the SEC. Of the thirteen criteria, only Criteria No. 11 goes to the company's cooperation. It provides:

Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?^{129}

Section 307 of the Sarbanes-Oxley Act^{130} directed the SEC to enact rules of professional responsibility for attorneys.^{131} These rules, as enacted, provide that with regard to the attorney-client privilege and work

127. Id.
129. Id.
131. 15 U.S.C.A. § 7245. Section 307 of the Sarbanes-Oxley Act provides:
Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

Id.
product doctrine, a lawyer is required to report "evidence of a material violation," which is defined as "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." The Rule then goes on to provide that the attorney is supposed to report such material violations up the ladder to the chief legal counsel or chief executive officer. The Rule instructs that confidential information can be disclosed by an attorney, to prevent commission of an illegal act that would be likely to perpetrate a fraud on the SEC or could cause substantial injury to the financial or property interests of the issuer. While much broader rules had in the past been proposed, they were withdrawn. The rules as enacted do not dramatically change the state of the law on attorney-client privilege. Many states already allow an attorney to reveal confidential information to prevent a crime or fraud.

C. The Sarbanes-Oxley Act

The Sarbanes-Oxley Act (the "Act") was signed into law by the President on July 30, 2002. The Act makes sweeping changes to the law applicable to public companies and their officers and directors. Its provisions are wide ranging and far beyond the scope of this article. With respect to attorney-client privilege, the SEC enacted professional responsibility rules for attorneys appearing while practicing before the SEC, as required by Section 307 of the Act. These rules are discussed above.

The Act also includes broad whistle-blowing provisions. Section 806 of the Act amends Title 18 of the United States Code to protect employees of publicly traded companies against retaliation in fraud.

136. The SEC proposed a rule on selective waiver which read: Where an issuer, through its attorney, shares with the Commission information related to a material violation, pursuant to a confidentiality agreement, such sharing of information shall not constitute a waiver of any otherwise applicable privilege or protection as to other persons. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,706 (Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205). In 1984, the SEC proposed to amend the Securities and Exchange Act of 1934 to establish a selective waiver but the proposal was never taken up by Congress. SEC Oversight and Technical Amendments: Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of The H. Comm. on Energy and Commerce, 98th Cong. 51 (1984).
cases. The Act also sets out a criminal provision for retaliation or any harmful action, including interference with lawful employment or livelihood, against any person for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense.

D. Federal Sentencing Guidelines

A provision added to the Federal Sentencing Guidelines in 2004 addressed waiver of the privilege. Section 8C2.5(g)(1) allowed for a five-point reduction in a corporation’s culpability score if the defendant fully cooperated in the investigation. The final sentence of § 8C2.5(g)(1) as of 2004 previously read: “Waiver of attorney-client privilege and work product protection is not a prerequisite to reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.” Under pressure from many sources, including the American Bar Association, the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, and others, the amendment was removed in April 2006.

V. LEGAL PRECEDENT FACED BY QWEST

A. Tenth Circuit

At the time Qwest faced investigation by the DOJ and the SEC, there was no Tenth Circuit precedent in support of selective waiver. Tenth Circuit precedent followed the traditional rule of waiver upon disclosure. For example, United States v. Bernard was a criminal proceeding wherein the defendant had disclosed attorney advice to a third party. The court held any voluntary disclosure by the client is inconsistent with the attorney-client relationship and waives the privilege. In 1990, in United States v. Ryans, the Tenth Circuit reiterated that any voluntary disclosure by the client to a third party waives the privilege.

143. Id.
145. 877 F.2d 1463 (10th Cir 1989).
146. Bernard, 877 F.2d at 1465.
147. Id. (citing United States v. Suarez, 820 F.2d 1158 (11th Cir. 1987), cert. denied, 484 U.S. 987 (1987)).
148. 903 F.2d 731 (10th Cir. 1990).
149. Ryans, 903 F.2d at 741 n.13.
Likewise, as to work product protection, Tenth Circuit precedent held that production of work-product material to a non-adversary waives the work product protection.\textsuperscript{150}

\section*{B. Other Circuits}

Limited waiver of attorney-client privilege was first recognized by the Eighth Circuit in \textit{Diversified Industries, Inc. v. Meredith}.\textsuperscript{151} Diversified Industries was under investigation by the SEC.\textsuperscript{152} The Board of Directors hired a law firm to conduct an investigation into the Company's business practices when it was revealed that the Company may have maintained a slush fund that was used to bribe purchasing agents.\textsuperscript{153} The law firm undertook an investigation and reported the results to the Company's Board in a memorandum that summarized employee interviews, analyzed accounting data, evaluated the conduct of certain employees, drew conclusions as to the propriety of their conduct and made recommendations as to steps the company could take.\textsuperscript{154} In its initial opinion, the Eighth Circuit concluded that the law firm had not been hired to render legal advice and therefore found that the materials, which civil litigants sought in subsequent civil litigation, were not privileged.\textsuperscript{155}

The court also found the materials were not work product because they were not prepared in anticipation of litigation.\textsuperscript{156} As such, the Eighth Circuit determined that it did not have to deal with a claim of waiver of the privilege as a result of the materials having been turned over to the government during a governmental agency investigation.\textsuperscript{157} The Eighth Circuit in its initial opinion noted that the waiver issue was a serious one but need not be decided since the court had found the materials were not privileged.\textsuperscript{158} The court went on to note:

\begin{quote}
[W]e would be reluctant to hold that voluntary surrender of privileged material to a governmental agency in obedience to an agency subpoena constitutes a waiver of the privilege for all purposes, including its use in subsequent private litigation in which the material is sought to be used against the party which yielded it to the agency.\textsuperscript{159}
\end{quote}

\begin{footnotesize}
\begin{itemize}
  \item[150.] See \textit{Grace United Methodist Church v. City of Cheyenne}, 451 F.3d 643, 668 (10th Cir. 2006); \textit{Foster v. Hill}, 188 F.3d 1259, 1272 (10th Cir. 1999).
  \item[151.] 572 F.2d 596, 611 (8th Cir. 1978) (en banc).
  \item[152.] \textit{Diversified Indus.}, 572 F.2d at 611.
  \item[153.] \textit{Id.} at 607.
  \item[154.] \textit{Id.} at 607-08.
  \item[155.] \textit{Id.} at 606.
  \item[156.] \textit{Id.} at 604.
  \item[157.] \textit{Id.} at 604.
  \item[158.] \textit{Id.}
  \item[159.] \textit{Id.} at 604 n.1.
\end{itemize}
\end{footnotesize}
The Eighth Circuit reconsidered its opinion in *en banc.* As to attorney-client privilege, the court found upon reconsideration, that the memoranda prepared by counsel, corporate minutes and a letter that revealed the content of the memoranda prepared by counsel were indeed privileged and that the privilege had not been waived when Diversified turned its memorandum over to a governmental agency. The court stated:

As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privileged occurred. *Bucks County Bank and Trust Co. v. Storek,* 297 F. Supp. 1122 (D. Haw. 1969), *United States v. Goodman,* 289 F.2d 256 (4th Cir.), *vacated on other grounds,* 368 U.S. 14 (1961). To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.

The cases relied upon by the Eighth Circuit in its *en banc* opinion are not directly on point as to waiver. *Bucks County Bank & Trust Co. v. Storek,* involved testimony given in a suppression hearing not being admissible at a subsequent criminal trial. *United States v. Goodman* dealt with the Fifth Amendment privilege against self-incrimination in a subsequent criminal investigation.

As to the work-product protection sought for several non-privileged documents, the court found that they were not prepared in anticipation of litigation and, therefore, were not protected.

Four years later the Circuit Court of Appeals for the District of Columbia considered a limited waiver issue in *The Permian Corp. v. United States.* In *Permian,* Occidental Petroleum Corporation and its subsidiary, the Permian Corporation, were involved in litigation with respect to Occidental’s proposed exchange offer for shares of Mead Corporation. Millions of documents were produced and Occidental and Mead had an

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160. *Id.* at 606.
161. *Id.* at 611.
162. *Id.*
163. Diversified was dealing with selective waiver which is to waive the privilege as to some parties and not others. Courts distinguish this from partial disclosure which is to waive as to some documents but not all. See Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1423 n.7 (3d Cir. 1991).
165. *Buck County Bank & Trust Co.,* 297 F. Supp. at 1123.
166. 289 F.2d 256 (4th Cir. 1961), *vacated on other grounds,* 368 U.S. 14 (1961).
167. *Goodman,* 289 F.2d at 257.
168. *See id.* at 262.
170. *Permian Corp.,* 665 F.2d at 1215.
agreement that there would not be an inadvertent waiver if a privileged document was inadvertently produced. 171

Meanwhile, Occidental was involved with the SEC trying to get approval of its registration statement. 172 As part of that process, Occidental agreed that the SEC could have documents that had been produced to Mead. 173 Once again, there were agreements that the documents may contain privileged information and they would not be delivered to any persons other than the SEC or SEC staff, but the agreements appeared to grant the SEC the right to turn the documents over to other governmental agencies after notice to Occidental. 174 Even though the letters were not explicit about the SEC being forbidden to release the information to other governmental agencies, counsel for Occidental had indicated that there was such an oral understanding. 175 Seven of the documents produced were attorney-client privilege and twenty-nine were protected as work product. 176

Thereafter, the Department of Energy sought to get the same documents that the SEC had received, including the seven documents that were protected by attorney-client privilege and twenty-nine that were protected as attorney work product. 177 While there seemed to be some disagreement over what exactly was Occidental's arrangement with the SEC regarding their use of the documents, the court's analysis was that there was no dispute that the documents had indeed been turned over for the SEC's use. 178 The Circuit found that the mantel of confidentiality had been breached and an effective waiver of the privilege had been accomplished. 179

As to attorney-client privilege, the D.C. Circuit declined to adopt the Diversified selective waiver, finding that the limited waiver would not serve the interests underlying common law privilege for confidential communications between an attorney and a client, stating "[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." 180

171. Id. at 1215-16.
172. Id. at 1216.
173. Id.
174. See id.
175. Id. at 1217.
176. Id.
177. Id.
178. See id. at 1217-18.
179. Id. at 1220. As with the Qwest case, there was no question of inadvertent disclosure since Occidental had authorized disclosure by Mead to the SEC. See id. at 1219.
180. Id. at 1221.
Because the corporation had turned the documents over to the SEC but was resisting disclosure to the Department of Energy, the court took the opportunity to state that it was unaware of any congressional directive or judicially-recognized priority system that places a higher value on cooperation with the SEC than cooperation with other regulatory agencies stating:

Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If 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.181

As to work product, with little analysis the court upheld the district court's finding of no waiver with respect to the work-product documents. The court, citing United States v. AT&T, noted a more liberal standard applicable to waiver of the work-product doctrine as opposed to the strict standard of waiver for attorney-client privilege:

The attorney-client privilege exists to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship. Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.

By contrast, the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent . . . . A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege. We conclude, then, that while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.182

In *In re Subpoena Duces Tecum* the Circuit Court for the District of Columbia again rejected selective waiver, regardless of whether there were confidentiality agreements in place with the government agency.183

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181. Id.
The following year the Second Circuit joined the D.C. Circuit. In re John Doe Corp., the company was under investigation for, amongst other things, bribing governmental officials. The privileged document, an investigatory memorandum titled Business Ethics Review ("BER"), had not been shown to a governmental agency but instead to underwriter's counsel to assure the underwriter's counsel there were no merits to claims of illegal bribes, ostensibly because there was no mention of an illegal bribe of a governmental official in the BER. It was this silence that the Second Circuit considered a waiver once the BER was shown to underwriter's counsel. The company argued for a selective waiver due to "the legal duty of due diligence and the millions of dollars riding on the public offering of registered securities." The Second Circuit was unmoved:

We view this argument with no sympathy whatsoever. A claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes.

The next circuit to address selective waiver was the Fourth Circuit. The Fourth Circuit had previously refused to embrace the concept of selective waiver created in Diversified. As to attorney-client privilege, the court in Martin Marietta said, "[I]f a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as the details underlying the data . . . will not enjoy the privilege." In Martin Marietta, the court was really addressing the issue of subject matter waiver rather than selective waiver. Martin Marietta sought to limit the waiver to documents actually disclosed to the government rather than implying waiver to all materials on the same subject as those provided to the government. But the court found there was waiver as to the entire subject.

As for work product, the court noted a broader protection for work product, but held that a waiver as to some work product will waive the
entire subject matter. The court also held that there was subject matter waiver of non-opinion work product but not of opinion work product, deciding an issue it had previously left open in Duplar Corp. v. Deering Milliken.

The next circuit to deal with the selective waiver issue was the Third Circuit in Westinghouse Electric Corp. v. The Republic of the Philippines. Westinghouse had disclosed documents relating to an internal investigation regarding possible bribes of foreign officials. The documents had been turned over to the SEC during an SEC investigation. When the Republic of the Philippines later sued Westinghouse, alleging it had obtained a government contract in the Philippines through bribes, the civil litigants sought all the documents that had been turned over to the SEC. The Third Circuit found that Westinghouse had waived both the attorney-client privilege and the work-product protection. Westinghouse had turned over several reports generated during investigations by the SEC and the DOJ. The court found that this turnover effectuated a complete waiver of the attorney-client privilege as to subsequent civil litigation.

The court found that selective waiver does not have anything to do with the purposes underlying the attorney-client privilege, which is to protect the confidentiality of attorney-client communications in order to encourage clients to obtain informed legal assistance. The court reviewed the only known exceptions to waiver despite a disclosure: (1) for co-defendants or (2) disclosure to an agent necessary to obtain informed advice and found that each of these continued to promote the purposes behind the privilege. The Third Circuit found that a selective waiver, designed to encourage corporations to undertake internal investigations, does not serve any purpose of encouraging full disclosure to one’s attorney in order to obtain informed legal assistance.

In fact, the Third Circuit opined that a whole new privilege was being sought and was not persuaded that a new privilege was necessary to encourage corporations to cooperate with the government. The court noted that no such privilege had been created as of the time corporations,

195. Id. at 624-25.
196. Id. at 625-26.
197. 540 F.2d 1215, 1222-23 (4th Cir. 1976); see FED. R. CIV. P. 26(b)(3).
198. 951 F.2d 1414 (3d Cir. 1991).
199. Westinghouse Elec. Corp., 951 F.2d at 1417.
200. Id.
201. Id.
202. Id. at 1418.
203. Id. at 1417.
204. Id. at 1418.
205. Id. at 1424.
206. Id.; see also supra note 46.
207. Westinghouse Elec. Corp., 951 F.2d at 1425.
208. Id.
like Westinghouse, were cooperating with the government in its various agency investigations.209

Likewise, the Third Circuit found that Westinghouse waived the work-product protection for work-product documents by turning them over to the SEC and the DOJ.210 The court held:

When 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.211

The next circuit to address selective waiver was the Second Circuit in In re Steinhardt Partners.212 Steinhardt Partners addressed only waiver of work-product documents. In Steinhardt Partners, the company was alleged to have manipulated the market for two-year treasury notes.213 In civil litigation relating to this same conduct, the company withheld a memorandum prepared by its attorneys and previously given to the SEC.214 The memorandum had been solicited by the SEC during the investigation of the company and while there was a pending threat of an enforcement action.215 There was no agreement that the SEC would maintain confidentiality of the memorandum.

The Second Circuit rejected Steinhardt’s attempt to use the work-product protection to sustain this unilateral use of a work-product memorandum containing counsel’s legal theories which had been voluntarily submitted to an investigatory body.216 The court stated, “[W]e agree that selective assertion of privilege should not be merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.”217 The court said the same rationale used for attorney-client privilege and work-product cases on selective privilege applied, citing Permian and Westinghouse.218

But in rejecting Steinhardt’s plea for selective waiver in this case, the Second Circuit declined to adopt a per se rule and held that “[c]rafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis.”219 The court implied that

209. Id.
210. Id. at 1429.
211. Id.
212. 9 F.3d 230 (2d Cir. 1993).
213. Steinhardt Partners, 9 F.3d at 232.
214. Id.
215. Id.
216. Id. at 234.
217. Id. at 235.
218. Id.; Permian Corp., 665 F.2d at 1221; Westinghouse Elec. Corp., 951 F.2d at 1428.
219. Steinhardt Partners, 9 F.3d at 236.
if a written agreement had been in place, that would have been a consideration.\textsuperscript{220}

Four years later, the First Circuit rejected any selective waiver in \textit{United States v. Massachusetts Institute of Technology}.\textsuperscript{221} Pursuant to contract between MIT and the Department of Defense, MIT had submitted certain billing statements to the defense contract audit agency.\textsuperscript{222} In a subsequent IRS investigation as to MIT’s tax-exempt status, the IRS sought the same documents.\textsuperscript{223} MIT initially redacted the documents for attorney-client privilege and work-product material.\textsuperscript{224} The IRS then sought to get the redacted information from the defense contract audit agency.\textsuperscript{225} The IRS went to the district court to enforce its subpoena, and the district court held that the disclosure of the legal bills to the audit agency forfeited the attorney-client privilege.\textsuperscript{226} Rejecting various arguments, including an argument that MIT had to make these kinds of disclosures in order to become a government defense contractor, the First Circuit held, “[A]nyone 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.”\textsuperscript{227}

As to a work-product privilege, however, the First Circuit followed prior case law and held that the work-product protection is not as easily waived as the attorney-client privilege.\textsuperscript{228} The court found that disclosure to the audit agency was disclosure to a potential adversary because there was a potential for controversy and even a potential for litigation.\textsuperscript{229} While undoubtedly MIT hoped to avoid that controversy, it was still disclosure to an adversary.\textsuperscript{230}

The Federal Circuit has not recognized limited waiver and refused to do so under the facts in \textit{Genentech, Inc. v. United States International Trade Commission}.\textsuperscript{231}


\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{220} \textit{Id.}
\item \textsuperscript{221} 129 F.3d 681 (1st Cir. 1997).
\item \textsuperscript{222} \textit{United States v. Mass. Inst. of Tech.}, 129 F.3d 681, 683 (1st Cir. 1997).
\item \textsuperscript{223} \textit{Mass. Inst. of Tech.}, 129 F.3d at 682-83.
\item \textsuperscript{224} \textit{Id.} at 683.
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{Id.} at 686.
\item \textsuperscript{228} \textit{Id.} at 687 & n.6 (citing \textit{WRIGHT, MILLER & MARCUS, supra} note 55, § 2024); \textit{Westinghouse Elec. Corp.}, 951 F.2d at 1428-29; \textit{Steinhardt Partners}, 9 F.3d at 234-35; \textit{In re Subpoena Duces Tecum}, 738 F.2d at 1371-75; \textit{Martin Marietta Corp.}, 856 F.2d at 625; \textit{In re Chrysler Motors Corp. Overnight Eval. Program Litig.}, 860 F.2d 844, 846-47 (8th Cir. 1988)).
\item \textsuperscript{229} \textit{Mass. Inst. of Tech.}, 129 F.3d at 687.
\item \textsuperscript{230} \textit{Id.} at 686.
\item \textsuperscript{231} 122 F.3d 1409, 1417 (Fed. Cir. 1997).
\item \textsuperscript{232} 293 F.3d 289 (6th Cir. 2002).
\end{itemize}
\end{footnotesize}
documents had been provided to the DOJ and other government agencies. These documents were sought thereafter in civil litigation. After a thorough review of the state of the law, the court summarized the following: (1) cases where selective waiver was permissible; (2) cases where selective waiver was permissible in situations where government agrees to a confidentiality order; and (3) cases where selective waiver was rejected under any situation. After consideration, the Sixth Circuit rejected the concept of selective waiver, in all of its various forms.

C. District Court Opinions

Several district courts have held that disclosure to governmental agencies does not waive the protections of the attorney-client privilege. Most notably for Qwest, the District of Colorado had adopted one of the exceptions for a waiver.

In 1993, in M&L Business Machines, Inc., the district court in Colorado found a limited waiver in circumstances wherein the party makes a contemporaneous reservation or stipulation that it does not intend to waive the privilege and makes some effort to preserve the privacy of the privilege. The district court in M&L Business Machines discussed the state of the law of selective waiver of attorney-client privilege and acknowledged that the Tenth Circuit had not addressed the issue. The district court held that because the Bank of Boulder, in cooperating with the government in its investigation of M&L Business Machines, had provided privileged material but had reserved the right to assert the privilege in other proceedings, it had not waived the privilege.

The approach adopted by the District of Colorado came from Teachers' Insurance and Annuity Association of America v. Shamrock Broadcasting Co. In that case, Shamrock had turned over documents to the SEC in response to subpoenas and had not entered into any confidentiality agreements with the SEC. The court held that if the documents had been turned over under a protective order, stipulation or other

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233. In re Columbia/HCA Healthcare Corp., 293 F.3d at 292.
234. Id. at 293.
235. Id. at 295 (citing Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc)).
237. Permian Corp., 665 F.2d at 1221, In re John Doe Corp., 675 F.2d at 489; Westinghouse Elec. Corp., 951 F.2d at 1426, Steinhardt Partners, 9 F.3d at 236.
238. In re Columbia/HCA Healthcare Corp., 293 F.3d at 302.
240. Id. at 696.
241. Id. at 696-97.
express reservation of the producing parties’ claim of privilege as to the material disclosed, there would be no waiver in subsequent litigation.\textsuperscript{244}

Notably in the districts that have not decided the selective waiver issue, the Seventh Circuit, Fifth Circuit and Ninth Circuit, there are district court opinions supporting selective waiver. In \textit{In re Grand Jury Subpoena}, dated July 13, 1979, the district court held that a privileged report turned over as part of cooperation with the SEC and to the Internal Revenue Service, did not waive the attorney-client privilege.\textsuperscript{245} In Texas, a district court prevented class action discovery of documents that had been turned over to the SEC in \textit{In re LTV Securities Litigation}.\textsuperscript{246}

The Northern District of California has also adopted the \textit{Teachers’ Insurance} approach in \textit{Fox v. California Sierra Financial Services}.\textsuperscript{247}

\textbf{D. Congressional Actions}

1. Proposed Rule 502

On May 15, 2006, the Advisory Committee on Evidence Rules submitted to the Standing Committee on Rules of Practice and Procedure proposed Federal Rule of Evidence 502.\textsuperscript{248} The Rule addresses a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. The proposed Rule 502 addresses the scope of the waiver, inadvertent disclosure, selective waiver, controlling effect of court orders, controlling effect of party agreements, and a definition of attorney-client privilege and work product as used in the Rule. With respect to selective waiver, however, the standing Committee unanimously agreed that a provision on selective waiver should be included in any proposed rule released for public comment but should be placed in brackets to indicate that the Committee has not yet determined whether a provision on selective waiver should be sent to Congress.\textsuperscript{249} The standing Committee recognized that any rule prepared by the Advisory Committee should proceed through the rule-making process, but it would have to eventually be enacted directly by Congress as it would be a rule affecting privileges.\textsuperscript{250} The proposed Rule 502, which the standing Committee has not yet determined to send to Congress with respect to selective waiver would provide:

\begin{itemize}
\item \textsuperscript{244} \textit{Id.} at 646.
\item \textsuperscript{245} \textit{In re Grand Jury Subpoena}, 478 F. Supp. 368, 373 (D. Wis. 1979).
\item \textsuperscript{246} \textit{In re LTV Sec. Litig.}, 89 F.R.D. 595, 605 (N.D. Tex. 1981).
\item \textsuperscript{247} \textit{Fox v. Cal. Sierra Fin. Servs.}, 120 F.R.D. 520, 526 (N.D. Cal. 1988).
\item \textsuperscript{249} \textit{Id.} at 3.
\item \textsuperscript{250} \textit{Id.} at 9; \textit{see also} 28 U.S.C.A. § 2074(b) (West 2006).
\end{itemize}
[(c) Selective Waiver. — In a federal or state 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.251

2. Proposed Legislation

On the last day of the 109th Congress, Second Session, Senator Arlen Specter introduced a bill titled the “Attorney-Client Privilege Protection Act of 2006.”252 If enacted, the Act would prohibit consideration of waiver of privilege; prohibit conditioning treatment on waiver; protect corporations paying attorneys fees of individuals, joint defense agreements and sharing information with employees.253

VI. THE TENTH CIRCUIT’S OPINION

The Qwest case involved issues of waiver of attorney-client privilege and non-opinion work-product documents.254 Like the Second Circuit in Steinhardt Partners and several other courts that have addressed selective waiver, the Tenth Circuit did not adopt a per se rule against selective waiver.255

The Tenth Circuit, placing heavy emphasis on the state of the record before it, declined to expand the testimonial exclusionary rules of attorney-client privilege or work-product doctrine.256 After discussing the facts and analyzing the law as discussed above, the court’s conclusion


253. Id.


255. See Steinhardt Partners, 9 F.3d at 230; Delwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122 (7th Cir. 1997) (addressing law enforcement investigatory privilege but applying the same analysis); In re Sealed Case, 676 F.2d 793, 824 (D.C. Cir. 1982); Subpoena Duces Tecum, 738 F.2d at 1371-72.

256. Qwest, 450 F.3d at 1195.
under the heading “No Selective Waiver in This Case” states, “For the reasons discussed above, the record in this case does not justify adoption of selective waiver.”257 The court made a reference to a deficient record on at least ten occasions:

- We conclude the record in this case is not sufficient to justify adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material.258

- The record does not establish a need for a rule of selective waiver to assure cooperation with law enforcement, to further the purposes of the attorney-client privilege and work-product doctrine, or to avoid unfairness to the disclosing party.259

- On this record “[W]e are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination.”260

- The record before us, however, does not support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine. Most telling is Qwest’s disclosure of 220,000 pages of protected materials knowing the Securities Case was pending, in the face of almost unanimous circuit-court rejection of selective waiver in similar circumstances, and despite the absence of Tenth Circuit precedent.261

- The record is equally deficient concerning whether the DOJ and the SEC may have independently gained access to the Waiver Documents by invoking other means or theories, such as the crime or fraud exception to the attorney-client privilege.262

- The record does not support reliance on the Qwest agreements with the SEC and the DOJ to justify selective waiver. The agreements do little to restrict the agencies’ use of the materials they received from Qwest.263

- The record does not indicate whether Qwest negotiated or could have negotiated for more protection for the Waiver Documents, or whether, as it asserted at oral argument, seeking further restrictions would have so diluted its cooperation to render it valueless.264

- The concession highlights a further record deficiency: the nature and severity of the burden placed upon the district court to sort through all 220,000 pages of Waiver Documents to determine what

257.  Id. at 1201.
258.  Id. at 1192.
259.  Id.
260.  Id. (quoting Branzburg v. Hayes, 408 U.S. 665, 703 (1972)).
261.  Id. at 1193.
262.  Id.
263.  Id. at 1194.
264.  Id.
use the government made of each document, and whether any further disclosure had vitiated an otherwise applicable privilege or protection.\textsuperscript{265}

- The record in this case does not indicate that the proposed exception would promote the purposes of the attorney-client privilege or work product doctrine.\textsuperscript{266}

- As discussed above, the record is silent on whether selective waiver truly is necessary to achieve cooperation.\textsuperscript{267}

Some of the circuit courts that have declined to follow Diversified have noted that, in doing so, they are not adopting a per se rule.\textsuperscript{268} The Tenth Circuit also falls into this category. In doing so, the courts are preserving the ability to craft rules relating to privilege on a case-by-case basis as recognized in Federal Rules of Evidence 501 ("FRE 501") and the Supreme Court in Upjohn.\textsuperscript{269} FRE 501 was substituted by Congress for a proposed set of privilege rules drafted by The Judicial Conference Advisory Committee on Rules of Evidence and approved by The Judicial Conference of The United States and by the Supreme Court.\textsuperscript{270} Avoiding any per se rule is consistent with FRE 501 and the Advisory Committee Notes, which state that the rule "reflect[s] the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case by case basis."\textsuperscript{271} FRE 501 manifests a desire to provide the courts with flexibility to develop rules of privilege on a case-by-case basis.\textsuperscript{272}

The Tenth Circuit, while acknowledging its power under FRE 501, made it clear that, under the facts of the case, it saw no compelling reason to adopt a selective waiver rule on privilege.\textsuperscript{273} Granted, Qwest had entered into written confidentiality agreements with the government agencies.\textsuperscript{274} The First, Second, Seventh and District of Columbia Circuits have, in declining to adopt a per se rule, indicated a written confidentiality agreement may have been considered in allowing some selective waiver under certain circumstances. But, each of those courts de-

\begin{thebibliography}{99}
\bibitem{265} Id.
\bibitem{266} Id. at 1195.
\bibitem{267} Id. at 1196.
\bibitem{268} See, e.g., Steinhardt Partners, 9 F.3d at 236.
\bibitem{270} Trammel, 445 U.S. at 46.
\bibitem{271} Qwest, 450 F.3d at 1184 (citing Trammel, 445 U.S. at 50).
\bibitem{272} Id.
\bibitem{273} Id. at 1192.
\bibitem{274} Id. at 1181.
\end{thebibliography}
clined any selective waiver of attorney-client privilege or work product under their particular case.275

Likewise, the Tenth Circuit found the circumstances in Qwest merited no allowance of selective waiver. It appeared to be the breadth of the disclosure; the excessive use of the documents in other state criminal proceedings and agency actions; the knowledge of existing civil suits at the time of disclosure; the lack of any of solid precedence, all of which persuaded the Tenth Circuit, on this record, to decline to adopt selective waiver.276 The Tenth Circuit also noted that, if selective waiver was essential to government operations, the agencies should have supported Qwest’s request; however, they did not.277

VII. SELECTIVE WAIVER GOING FORWARD

Although the Sixth Circuit characterized the state of the law of limited waiver as a state of “hopeless confusion,”278 the reality is that no corporation in the past two decades could have turned over privileged documents or work product documents to the DOJ, SEC or any other “adversary” agency without knowing that said decision may indeed result in a full waiver of the privilege, including to civil litigants.

The Sixth Circuit carefully segregated the law of selective waiver into cases in which selective waiver is allowed—(the Eighth Circuit stands alone); selective waiver is never allowed; and selective waiver might be allowed.279 But in reality, with the exception of the Eighth Circuit, each of the circuit courts refused to allow selective waiver under the facts presented in each case. The various circuit courts’ passing references to the possibility of some factual situation in the future wherein privileged documents are turned over but no full waiver is found, is more an adherence to FRE 501 than a state of hopeless confusion of the law of selective waiver. FRE 501 leaves interpretation of privilege up to the courts, applying common law.

Notwithstanding lack of any supportive precedence, as the above-discussed case law demonstrates, many corporations chose to make the decision to turn over privileged materials to government agencies. Under the current state of the law, that decision must involve careful consideration, weighing the merits of handing over privileged documents to the government, either because they demonstrated that the company was not guilty of wrongdoing or because the corporation determines that get-

ting leniency from the government is important enough that the corporation would risk waiving the privilege and deal with the consequences of waiver in subsequent civil litigation. That decision-making process is a process worth preserving. As discussed above, a new proposed Rule 502 has been drafted and circulated by the Committee on Rules of Practice and Procedure. So, the question is why do we need a new rule; what will the rule really add?

The rule will make the corporation’s consideration and decision easier. A corporation would be able to waive the privilege and not risk having those documents disclosed in subsequent civil litigation. But what does this really do for the attorney-client privilege? The attorney-client privilege is the “bastion of ordered liberty.” Its purpose is not to facilitate government investigations, but rather to encourage full and frank discussions between an attorney and his or her client to get to the truth so that the lawyer can best represent the client. It has been suggested that half of a privilege is not worth having at all. And, indeed, it is appropriate that there be some concern over whether the proposed Rule 502 will have an adverse impact on the attorney-client privilege when a corporation tries to gather facts in an internal investigation.

Indeed, when Deputy Attorney General Paul J. McNulty made remarks at the Lawyers for Civil Justice Membership Conference on December 12, 2006, he acknowledged that there must be integrity in what a company does when investigating misconduct and that to do the job right: “[C]orporate attorneys have told me that they need full and frank communication between attorney and employee if they are expected to steer conduct away from law breaking or uncover criminal wrongdoing.”

When an individual discusses the internal affairs of a corporation with inside counsel, the hope is that they will always be frank and candid. But United States Attorney James B. Comey candidly revealed that turnover of privileged internal investigations of a corporation may be the only way that the government can get statements of individuals due to the Fifth Amendment. From employees’ point of view, they may be more willing to discuss matters candidly when they are armed with the knowledge that a corporation will have to carefully consider all of the consequences of waiving the privilege, including the possibility the privilege is waived in full.

280. See supra note 248.
283. McNulty Memorandum, supra note 117.
Despite radical changes in Section VII of the McNulty Memorandum, it is not likely to have much impact on corporations' waiver of privilege. This is so because although the fact that the McNulty Memorandum expressly states that prosecutors must not use a corporation's declination against the corporation in making charging decisions, it nonetheless provides that "prosecutors may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation." Most corporations waive the privilege in hopes of getting favorable treatment. For similar reasons, the proposed Rule 502, while it may indeed facilitate corporations' cooperation in government investigations, is not likely to have a favorable impact on the attorney-client privilege itself.

With proposed Rule 502, corporations could certainly undertake the kind of analysis discussed above. Or, corporations could choose to turn over privilege documents to plead for leniency, knowing there will be fewer consequences in later civil litigation. This could have an impact on the individuals whose statements helped the corporation get favorable consideration, at their personal expense. In the long-run, this may have an adverse impact on the privilege because individuals will stop communicating.

If a corporation has to weigh the risks of waiving the privilege to the government in full, meaning accepting all the consequences including that the information may be available in civil litigation, this simply makes the decision to waive the privilege more calculated. Knowing that the corporation can waive the privilege without having to consider the consequences of that waiver in other arenas, such as civil litigation, could make employees uneasy about discussing matters with their in-house counsel. Employees do not want to become the chip the corporation uses with the government. Proposed Rule 502 undermines the gravity of a corporation's decision to waive the privilege. That decision should never be made lightly given the importance of the privilege in common law.

While the Rules Committee has not determined whether to submit proposed Rule 502(c) to Congress, such a Congressional change to the privilege is what Andrew McNally argues for in his article Revitalizing Selective Waiver. Mr. McNally appropriately points out that selective waiver encourages corporate cooperation with government investigations, which is indeed a laudable goal. But he candidly admits there is no case for arguing that selective waiver will further the goals and pur-

286. See generally McNally, supra note 8.
287. See id. at 826.
poses of the attorney-client privilege itself.\textsuperscript{288} Nothing has prevented corporations from waiving the privilege, after weighing all of the consequences, in each of the cases discussed above. No doubt, even without a rule, selective waiver and government disclosures are likely to continue.

But, no doubt some corporations have refused to waive the privilege despite pressure from the government after considering the consequences and possible disclosure of that information in subsequent civil litigation. In \textit{Stein}, the district court found that the Thompson Memorandum, as invoked by the United States Attorney’s Office, caused KPMG to consider departing from its longstanding policy of paying legal fees and expenses of its personnel.\textsuperscript{289} KPMG was extremely anxious to curry favor with the USAO by demonstrating how cooperative it could be.\textsuperscript{290}

At the time, the Thompson Memorandum expressly identified willingness to waive the privilege as a factor to be considered in whether a corporation is being cooperative. The McNulty Memorandum does not change this, but does say a corporation cannot be penalized for not waiving the privilege. With a new selective disclosure rule approved by Congress, corporations will be hard pressed to justify their refusal to waive the privilege to the government. And, for this reason alone, it seems that the proposed rule undermines the privilege. The government may consider it a right once a corporation does not have to consider the consequences of further disclosure to third parties, for example in civil litigation.

The privilege is too important a bastion of the common law and too critical to an attorney’s ability to represent his or her client to risk undermining it with a rule that is unnecessary given the last two decades wherein hundreds of corporations have waived the privilege and participated in voluntary cooperation with government agencies.

\textsuperscript{288} See \textit{id.} at 857.
\textsuperscript{290} \textit{Stein}, 435 F. Supp. 2d at 353.