

**LOSING THE BATTLE IN THE WAR ON ATTORNEY-CLIENT PRIVILEGE
THROUGH SELECTIVE WAIVER: VIEWING THE SELECTIVE WAIVER QUAGMIRE
THROUGH THE LENS OF THE TENTH CIRCUIT’S OPINION IN *IN RE QWEST
COMMUNICATIONS INTERNATIONAL***

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The “problem . . . is that the exception may have limited efficacy absent uniformity among courts. It would be difficult to remove the disincentive to cooperate with the government if protection from waiver depended on the circuit in which a party would be eventually involved in litigation.”¹

INTRODUCTION

The attorney-client privilege, which belongs to the client, not to the lawyer, enables individual and corporate clients to communicate with their lawyer in confidence.² It is the “bedrock of the client’s rights to effective counsel and confidentiality in seeking legal advice.”³ Attorney-client privilege “plays a key role in helping companies act legally by permitting corporate clients to seek out and obtain guidance on how to conform conduct to the law.”⁴ In addition, the privilege “facilitates self-investigation into past conduct to identify shortcomings and remedy problems as soon as possible, to the benefit of corporate institutions, the investing community and society-at-large.”⁵ Moreover, the attorney work product doctrine “underpins [the American] adversarial justice system” and “allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.”⁶ All but one circuit that has considered the issue of selective waiver in recent years has rejected the concept, instead holding that waiver of privileged material as to one party for a specific purpose constitutes a waiver as to all parties for any purpose.⁷

The circuit court majority rejecting selective waiver of attorney-client privilege ignore the harsh reality currently facing corporations. In the course of a governmental investigation, companies accused of

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¹ *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting).

² Statement of Karen J. Mathis, President of the American Bar Association, before the U.S. Senate Judiciary Committee (September 12, 2006), <http://www.abanet.org/buslaw/attorneyclient/materials/064/064.pdf>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *In re Martin Marietta Corp.*, 856 F.2d 619, 622 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

wrongdoing, or who engage in voluntary self-evaluation or self-reporting, are often forced to selectively waive attorney-client privilege in order to be judged as “cooperating” with federal prosecutors of government agencies under current governmental policies.⁸ The result is the erosion of the attorney-client privilege having a wholly negative impact: executives who would otherwise consult with corporate counsel about sensitive issues become embroiled in confusion about whether the attorney-client privilege will apply to their conversations thereby chilling communications; lawyers investigating allegations of wrongdoing become concerned about how their honest attempts to unearth and correct serious problems may be used against the company’s interests in the future; and employees who lack sophistication may be left without rights normally guaranteed to any other person whose actions are under scrutiny as a result of a government investigation.⁹

Legal scholars and corporate attorneys believe a war is being waged against attorney-client privilege. The latest battle involves the current policies of governmental agencies which encourage selective waiver of attorney-client privilege thereby corroding the confidential attorney-client relationship between companies and their lawyers, resulting in “great harm both to companies and the investing public.”¹⁰ Lawyers play a key role in helping business entities comply with the law and to fulfill this role and “must enjoy the trust and confidence of the managers and the board, and must be provided with all relevant information necessary to properly represent a client.”¹¹ By requiring routine selective waiver of an entity’s attorney-client and work product protections, governmental policies encouraging selective waiver “discourage entities from consulting with their lawyers, thereby impeding the lawyers’ ability to

⁸ Written Testimony Submission by the Coalition to Preserve the Attorney-Client Privilege to the Senate Judiciary Committee, The Negative Impact for Clients, Corporate Compliance, and the American Legal System (September 12, 2006), <http://www.acca.com/public/attyclientpriv/coalitionsenjudtestimony.pdf>

⁹ *Id.*

¹⁰ Statement of Karen J. Mathis, *supra* note 2.

¹¹ *Id.*

effectively counsel compliance with the law.”¹² This results in harm not only to companies, but the investing public as well.¹³

The following sections will discuss the chasm between majority circuit belief that selective waiver does little to foster the attorney-client privilege, and the quagmire that corporation’s face in the choice between disclosing privileged information to aid in a governmental investigation and appearing non-cooperative under the DOJ’s Thompson Memorandum and its progeny. In addition, this article will explore current congressional actions to federalize a selective waiver rule under proposed FRE 502(c) and whether it might present a possible solution to the majority circuit refusal to effectively address selective waiver. Moreover, the circuits rejecting selective waiver fail to acknowledge that many state and district courts approve of selective waiver. Accordingly, uniformity is lacking across circuits and lower courts presenting a danger for the administration of justice. In ignoring the de facto landscape of selective waiver, the Tenth Circuit fails to provide its circuit with sufficient judicial rationale to assist parties with battling the increasingly complex policies facing 21st century corporations.

Part I of this article details the history of the attorney-client privilege and the attorney work product doctrine as the long standing “bedrock” right to effective counsel and confidentiality in seeking legal advice. This section also includes a survey of the landscape of selective waiver of attorney-client privilege and the battle being waged over selective waiver. Part II of this article discusses the circuit split regarding selective waiver of attorney client privilege and the Tenth Circuit decision rejecting selective waiver in *In re Qwest Communications International*, a case of first impression. Finally, Part III presents two arguments. First, that the Tenth Circuit decision largely mirrors the weak rationale presented by its sister circuits in rejecting selective waiver while selectively ignoring recent developments in the national legal community and congress over selective waiver and the attack on attorney-client privilege. Second,

¹² *Id.*

¹³ *Id.*

given the circuit split, and potential constitutional issues associated with federalizing a selective waiver rule, that there is an urgent need for greater judicial predictability across federal and state courts which is vitally important to the administration of justice.

I. GENERAL BACKGROUND

A. *The Attorney-Client Privilege and the Attorney Work Product Doctrine.*

All communications between a client and an attorney, for the purpose of obtaining or providing legal advice, are confidential.¹⁴ The attorney-client privilege is based on the notion that both clients and society are best served when a client is able to obtain “fully informed legal advice” from a lawyer.¹⁵ The privilege is enforced to encourage an open atmosphere where a client would otherwise be discouraged from communicating openly with the attorney unless there is a promise that the communication will remain secret.¹⁶ Under the common law, a critical component of the attorney-client privilege “is whether the communication between the client and the attorney is made in confidence of the relationship, and under circumstances from which it may reasonably be assumed that the communication will remain in confidence.”¹⁷ The privilege applies equally to corporations and individuals.¹⁸

The attorney-client privilege has been summarized by Wigmore in a formula that federal courts frequently cite:

(1) Where legal advice of any kind is sought (2) from a professional legal 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 by the legal adviser, (8) except the protection be waived.¹⁹

¹⁴ David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 149 (2000).

¹⁵ *Id.*

¹⁶ *Id.* at 150.

¹⁷ *United States v. Lopez*, 777 F.2d 543, 552 (10th Cir. 1985).

¹⁸ *Id.*

¹⁹ 8 J. Wigmore, *Evidence* § 2292, at 554 (McNaughton rev. 1961).

The Tenth Circuit Court of Appeals has held that the key to attorney-client privilege is confidentiality. The “privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party.”²⁰ The Court reasoned that “the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived.”²¹ The “courts will grant no greater protection to those who assert the privilege than their own precautions warrant.”²² The Tenth Circuit has further held that “[c]ourts need not allow the claim of attorney-client privilege when the party claiming the privilege is attempting to utilize the privilege in a manner that is not consistent with the privilege.”²³ Moreover, any “voluntary disclosure by the client is inconsistent with the attorney-client relationship and waives the privilege.”²⁴

The attorney work product doctrine was first addressed by the U.S. Supreme Court in *Hickman v. Taylor*.²⁵ The Court held that where no showing is made of need for the materials or justification for securing materials falls “outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.”²⁶ The Court reasoned that it is “essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.”²⁷ Under the attorney work product doctrine, “an attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation.”²⁸

²⁰ *United States v. Ryans*, 903 F.2d 731, 741 n.13 (10th Cir. 1990).

²¹ *Id.*

²² *Id.*

²³ *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989).

²⁴ *Id.*

²⁵ 329 U.S. 495, 499-500 (1947).

²⁶ *Id.* at 510.

²⁷ *Id.*

²⁸ *In re Doe*, 662 F.2d 1073, 1077 (4th Cir. 1981) (citing FED. R. CIV. P. 26(B)(3)); *see also* *Upjohn v. United States*, 449 U.S. 383, 398 (discussing the purposes of the work product doctrine).

Fact work product may be obtained by an adversary only “upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.”²⁹ Opinion work product consists of the attorney’s “mental impressions, conclusions, opinions or legal theories”³⁰ relative to the client’s case, and is “virtually undiscoverable.”³¹ The work product doctrine is based on the “public policy underlying the orderly prosecution and defense of legal claims”³² based on an adversarial system where an attorney should not be compelled to share work product with a client’s adversary.³³ If an attorney’s work product were discoverable, the attorney would be discouraged from memorializing thoughts on paper.³⁴ In 1948, the attorney work-product doctrine was incorporated into FED. R. CIV. P. 26(B)(3).³⁵

In the American legal system, the attorney-client privilege, and the attorney work product doctrine facilitate the role of attorneys as confidential legal advisors.³⁶ Clients are afforded an opportunity to understand both their rights and responsibilities under the law.³⁷ Specifically, clients obtain guidance about the “legality of past and prospective behavior as well as advice concerning the details of the legal system if an investigation or proceeding is imminent.”³⁸ In *Upjohn v. United States*, the United States Supreme Court extended the attorney-client privilege to corporate communications and reasoned that

²⁹ *Id.*

³⁰ 329 U.S. at 508.

³¹ *Director, Office of Thrift Supervision v. Vinson & Elkins, LP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) (citing FED. R. CIV. P. 26(B)(3)); *see also Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981) (requiring more than substantial need and undue hardship to overcome the attorney work product doctrine).

³² *Hickman*, 329 U.S. at 510.

³³ *Zornow & Krakaur*, *supra* note 14, at 150.

³⁴ *Id.*

³⁵ FED. R. CIV. P. 26(b)(3) states:

“[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’s representative . . . 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.”

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

corporate attorneys are needed both to “formulate sound advice when [a] client is faced with a specific legal problem” as well as to “ensure [a] client's compliance with the law.”³⁹

B. *The U.S. Department of Justice’s Corporate Criminal Liability Policies Regarding Selective Waiver.*

When Attorney General Robert Jackson addressed a meeting of all United States Attorneys at the Justice Department in Washington in April 1940, he noted that “the prosecutor has more control over life, liberty, and reputation than any other person in America . . . [prosecutorial] discretion is tremendous.”⁴⁰ Corporate criminal liability for illegal conduct has been black letter law since 1909 when the United States Supreme Court first held that a corporation, which profits by illegal transaction(s), can be held criminally liable for that conduct.⁴¹ The DOJ had no uniform policy on corporate prosecution until June 1999, when then-Deputy Attorney General Eric Holder issued a policy memorandum titled “Federal Prosecution of Corporations” (hereinafter “Holder Memorandum”).⁴² The Holder Memorandum guided federal prosecutors in determining whether to file criminal charges against a corporation (rather than potentially culpable individual employees).⁴³ Specifically, the memorandum identified eight factors to be considered by prosecutors in making a corporate charging determination including “the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents including, if necessary, the waiver of the corporate attorney-client and work product privileges.”⁴⁴

³⁹ *Upjohn*, 449 U.S. at 392.

⁴⁰ Testimony by Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal and Judiciary Studies at the Heritage Foundation, to the United States Senate Judiciary Committee (September 12, 2006), <http://www.heritage.org/Research/LegalIssues/tst091206a.cfm>.

⁴¹ *New York C. & H. R. R. Co. v. United States*, 212 U.S. 481, 495-496 (1909) (reasoning that Corporations immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of correcting the abuses).

⁴² Memorandum from Eric H. Holder, Jr., Deputy Attorney General, to All Component Heads and United States Attorneys (June 16, 1999), <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>. See also U.S. Dep’t. of Justice, *Principles of Federal Prosecution* (2002), reprinted in U.S. Dep’t. of Justice, *U.S. Attorneys Manual*, tit. 9, ch. 27, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm (this manual has guided federal prosecutors since 1980 and applies to all federal prosecutions of all types of defendants (corporate and individual) for all types of crimes).

⁴³ Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1099 (2006).

⁴⁴ Holder Memorandum, *supra* note 42, at Part II.A.

The Holder Memorandum emphasized the “great benefits” that result from the “vigorous enforcement of the criminal laws against corporate wrongdoers . . . particularly in the area of white collar crime.”⁴⁵ These benefits include “enabling the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover and punish white collar crime.”⁴⁶

The collapse of Enron in 2001 commenced a series of high-profile corporate scandals involving Adelphia, WorldCom, and HealthSouth.⁴⁷ Fraud and corruption at the highest levels of corporate america sparked a “crisis of confidence in the markets and the economy.”⁴⁸ In response, President George W. Bush introduced the Corporate Fraud Initiative, which included the enactment of the Sarbanes-Oxley Act of 2002, and the creation of the President’s Corporate Fraud Task Force in July 2002.⁴⁹ In the shadows of Enron, in January 2003, DOJ officials completed a review of the Holder Memorandum, and then-Deputy Attorney General Larry Thompson replaced it with a newer policy document titled “Principles of Federal Prosecution of Business Organizations”⁵⁰ (hereinafter the “Thompson Memorandum”).⁵¹ The Thompson Memorandum had a profound effect on the Department of Justice’s enforcement efforts in a wide range of matters and the ways in which companies respond to government investigations of misconduct.⁵² It set out two primary objectives: (1) to increase the authenticity of corporate cooperation with investigations; and (2) increase the focus on corporate governance and compliance programs.⁵³ The Holder Memorandum emphasized the “great benefits” that result from the “vigorous enforcement of the criminal

⁴⁵ Zornow & Krakaur, *supra* note 14, at 148.

⁴⁶ *Id.*

⁴⁷ Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1100-01 (2006).

⁴⁸ *Id.*

⁴⁹ See Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002) (establishing Corporate Fraud Task Force), www.usdoj.gov/dag/cftf/execorder.htm (establishing the Corporate Fraud Task Force chaired by the Deputy Attorney General, and senior Justice Department officials, the heads of the Departments of Treasury and Labor, and the heads of the Securities and Exchange Commission, Commodity Futures Trading Commission, Federal Energy Regulatory Commission, Federal Communications Commission, Office of Federal Housing Enterprise Oversight, and United States Postal Inspection Service).

⁵⁰ Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

⁵¹ Wray & Hur, *supra* note 47, at 1101.

⁵² *Id.* at 1097.

⁵³ *Id.*

laws against corporate wrongdoers . . . particularly in the area of white collar crime.”⁵⁴ These purported benefits include “enabling the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover and punish white collar crime.”⁵⁵

While prosecutions of corporations were once the exception rather than the rule, the pursuit of corporate convictions is now a primary goal of the DOJ.⁵⁶ Federal prosecutors are no longer content to build criminal cases by relying on “powerful tools of grants of immunity and grand jury subpoenas for non-privileged evidence.”⁵⁷ Instead, federal prosecutors insist that corporations turn over “privileged communications, attorney work product, and incriminating statements from corporate employees as a condition of favorable treatment in the exercise of the prosecutor’s considerable discretion.”⁵⁸ The government views a corporation’s failure to immediately disclose privileged information as a “clandestine effort to hide the truth.”⁵⁹ The “growing focus on corporate culpability in our criminal justice system,” has forced corporations to waive privileges when turning over materials to the government in the hope of cooperating with government investigations.⁶⁰

In an attempt to address the growing problem of routine governmental demands for privilege waiver, Acting Deputy Attorney General Robert McCallum sent a memorandum (hereinafter “McCallum Memorandum”) to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt “a written waiver review process” and many local U.S. Attorneys are now in the process of implementing this directive.⁶¹ The main objectives of the McCallum Memorandum included “providing greater uniformity, predictability, and transparency to the process that federal prosecutors use when

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Zornow & Krakaur, *supra* note 14, at 148.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Memorandum of Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Department Components and United States Attorneys (October 21, 2005), <http://www.abanet.org/poladv/mccallummemo212005.pdf>.

requesting a waiver of a business organization's attorney-client privilege."⁶² However, the McCallum Memorandum does nothing to address the inherently nature of the Thompson Memorandum to coerce selective waiver of attorney-client privilege.⁶³ Moreover, the McCallum Memorandum fails to establish minimum standards or require national uniformity regarding privilege waiver demands by federal prosecutors.⁶⁴ As a result, the McCallum Memorandum would likely result in numerous different waiver policies throughout the country, many of which may impose only "token restraints on the ability of federal prosecutors" to encourage selective waiver.⁶⁵

Following significant backlash from the Thompson and McCallum memorandums, on December 12, 2006, the DOJ announced changes to its corporate prosecution policies in a memorandum issued by Deputy Attorney General Paul McNulty.⁶⁶ The new policy "replaces and effects a number of changes" to the Thompson and McCallum memorandums.⁶⁷ The "most significant changes are in two areas: rules for prosecutors seeking waivers of the attorney-client privilege or production of attorney work product, and prosecutor's considerations in assessing corporate cooperation where a company pays its officers' or employees' legal fees in connection with an investigation."⁶⁸ The McNulty Memorandum appears to accept the almost universal perception that "prior policy and its implementation has a deleterious effect on the attorney-client relationship."⁶⁹ Moreover, the McNulty Memorandum highlights the "extremely important function in the U.S. legal system" served by the attorney-client privilege and work product doctrine and notes that the attorney-client privilege is "one of the oldest and most sacrosanct privileges

⁶² Testimony of Edwin W. Meese, III, *supra* note 40.

⁶³ *Id.*

⁶⁴ Statement of Karen J. Mathis, *supra* note 2.

⁶⁵ *Id.*

⁶⁶ Memorandum of Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys (December 6, 2006), http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

⁶⁷ George J. Terwilliger III, *The McNulty Memorandum: Recent Modifications to Federal Prosecutorial Policy Regarding Corporations*, J. FED. SOC. PRAC. GROUPS, at 45, available at http://www.fed-soc.org/doclib/20070322_Engage81Feb2007.pdf.

⁶⁸ *Id.*

⁶⁹ *Id.*

under U.S. law.”⁷⁰ Although the DOJ’s revised policy explicitly states that “[w]aiver of attorney-client and work production protections is not a prerequisite to finding that a company has cooperated in the government’s investigation” it also details that disclosure of such information may “permit the government to expedite its investigation” and might play a critical role in “enabling the government to evaluate the accuracy and completeness of the company’s voluntary disclosure” of information.⁷¹ It is important to note that a similar statement appeared in the Thompson Memorandum.⁷² Whether the McNulty Memorandum constitutes a cease-fire in the battle over selective waiver of attorney-client privilege remains to be seen as it is implemented by U.S. Attorneys through investigations nationwide. Moreover, its unknown effects most certainly add complications to the quagmire facing attorneys and their clients in the course of corporate investigations.

Lastly, 2004 Amendments to the Federal Sentencing Guidelines also suggested that “waiver might be a prerequisite for a sentencing reduction where it was necessary to provide ‘timely and thorough disclosure of all pertinent information known to the organization.’”⁷³ Although the U.S. Sentencing Commission proposed changes that would abandon this policy in November 2006, the commission’s actions will not affect the current policies or practices of the DOJ or other agencies.⁷⁴ There is a fear among legal scholars and experts that the attorney-client privilege is weakening under selective privilege at the very time when, given the increased focus on corporate prosecutions, business entities are in “greater need of confidential legal advice than ever before.”⁷⁵

⁷⁰ McNulty Memorandum, *supra* note 66, at 8 (citing *Upjohn*, 449 U.S. at 389).

⁷¹ *Id.*

⁷² Terwilliger, *supra* note 67, at 45 n.6 (citing the Thompson Memorandum, *supra* note 50, at 7).

⁷³ Nolan Mitchell, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power Over State Courts*, 86 B.U.L. REV. 691, 691-92 (2006).

⁷⁴ Terry Carter, *Privilege Waiver Policy Dumped; But Federal Prosecutors May Still Seek Waivers From Corporations*, A.B.A. J. eReport (April 14, 2006), <http://www.abanet.org/journal/ereport/a14privil.html>.

⁷⁵ *Id.*

C. *The Selective Waiver Quagmire.*

To accommodate the government's interest in obtaining a corporation's cooperation and desire to maintain the confidentiality of its disclosure, some courts have applied the doctrine of limited or selective waiver.⁷⁶ In an attempt to avoid problems stemming from sharing confidential materials with federal agencies, "corporations are increasingly entering into 'selective waiver' agreements with the government prior to any disclosure."⁷⁷ These agreements "purport to maintain attorney-client privilege and work product protection over the results of internal corporate investigations as to private third party litigants."⁷⁸ The United States Court of Appeals for the Eighth Circuit created the limited or selective waiver doctrine in *Diversified Industries v. Meredith*.⁷⁹ The doctrine is based on the significant public policy concern in favor of encouraging voluntary cooperation with the government.⁸⁰

The growing trend of selective waiver in light of current DOJ policies was confirmed by a recent survey of over 1,200 in-house and outside corporate counsel that was completed by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the American Bar Association in March 2006.⁸¹ According to the survey, almost 75% of corporate counsel respondents believe that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate to expect a company under investigation to "broadly waive attorney-client or work product protections."⁸² In addition, 52% of in-house respondents, and 59% of outside respondents, indicated a marked increase in recent years in waiver requests as a condition of investigation

⁷⁶ Nancy H. Burke, *The Price of Cooperating with the Government: Possible Waiver of Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 34 (1997).

⁷⁷ Mitchell, *supra* note 73, at 691-92.

⁷⁸ *Id.*

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

⁸⁰ *Enron Corp. v. Borget*, No. 88 CIV. 2828, 1990 WL 144879, at *2 (S.D.N.Y. Sept. 22, 1990) (reasoning that the public policy concern of encouraging cooperation with law enforcement militates in favor of a no waiver finding); *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 688 (S.D.N.Y. 1980) (agreeing with the view that voluntary disclosures to agencies should be encouraged).

⁸¹ Detailed survey results are available at <http://www.acca.com/Surveys/attyclient2.pdf>.

⁸² *Id.*

cooperation.⁸³ Corporate counsel also indicate that when prosecutors give a reason for requesting privilege waiver, the Thompson/Holder/McCallum Memoranda were among the reasons most frequently cited.⁸⁴ Former Solicitor General Theodore B. Olson recently pointed out the severe consequences corporations face if they fail to selectively waive attorney-client privilege and appear uncooperative in a corporate investigation.⁸⁵ Corporate consequences of prosecution include:

immeasurable immediate damage to share price, and thus to the value of the stockholders' collective investment; the company's ability to raise capital; credit rating; reputational injury to the brand and product line; inability to transact certain business; issues of disbarment; serious injury to the officers' reputations; pressure on Boards of Directors to change management, wholesale housecleaning before there has been any determination of guilt of those individuals under Government suspicion; immense legal fees; damage to the company's credibility with regulators.⁸⁶

D. *Proposed Federal Rule of Evidence 502 and the Battle over Selective Waiver of Attorney-Client Privilege.*

On June 30, 2006, the Judicial Conference Advisory Committee on Evidence Rules approved proposed amendment 502(c) which provides for selective waiver of attorney client privilege if the initial disclosure is made to "a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation."⁸⁷ Only Congress can enact rules of evidentiary privilege.⁸⁸ Some scholars believe that an "act of Congress is desirable, because the proposed rule would alter the balance between two conflicting aspects of public policy."⁸⁹ Congress has the authority to override conflicting case law and "reach beyond the Federal Rules to enact a statute

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ George J. Terwilliger III, et. al., *Attorney-Client Privilege Waivers in Criminal Investigations*, J. FED. SOC. PRAC. GROUPS, at 60, available at http://www.fed-soc.org/doclib/20070322_Engage81Feb2007.pdf.

⁸⁶ *Id.*

⁸⁷ Proposed Federal Rule of Evidence 502, entitled "Attorney-Client Privilege and Work Product; Limitations on Waiver" (June 30, 2006), http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf.

⁸⁸ Lauren Rosenblatt, *Will Selective Waiver Become a Reality Under Proposed Rule 502?* (August 17, 2006), <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1155732412262>.

⁸⁹ *Id.*

applicable in state courts and other forums not governed by the Federal Rules of Evidence.”⁹⁰ In the face of inconsistent judicial decisions regarding selective waiver, some legal scholars believe Rule 502(c) may be a “solution enabling corporations to cooperate with government investigations without the side effect of opening their files to discovery by private litigants.”⁹¹ In particular, the “proposed rule [may] permit corporations to avoid costly and time-consuming privilege reviews at the investigations stage” and “make it safer and easier for Corporations to provide evidence to aid government investigations to illustrate that criminal charges are inappropriate.”⁹² As of April 2007, proposed FRE 502(c) is currently before the Standing Committee on Rules of Practice and Procedure of the Judicial Conference.⁹³ Pending amendments, the rule will take effect on December 1, 2008.⁹⁴

However, the American Bar Association (hereinafter “ABA”) believes proposed Rule 502(c) would exacerbate the continuing trend toward selective waiver of attorney client privilege.⁹⁵ The ABA views the promulgation of Rule 502(c) to be an “unintended and undesirable by-product” of the “culture of waiver” and “should not be promulgated” until government encroachment through selective waiver is rolled-back and corporate clients “have the ability to make a decision about waiver on a completely voluntary basis.”⁹⁶ It is the ABA’s position that any proposed evidence rule involving selective waiver must ensure that “such rule can be adopted on its own merit without becoming a tool for undermining the very protections it seeks to preserve.”⁹⁷ The ABA believes that DOJ selective waiver policies have resulted in the “compelled waiver of attorney-client privilege and work product protections.”⁹⁸ To that

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ U.S. Courts Federal Rulemaking Status, Pending Rules Amendments, available at <http://www.uscourts.gov/rules/newrules6.htm#proposed0806>.

⁹⁴ *Id.*

⁹⁵ American Bar Association Comments to the Judicial Conference Advisory Committee on Evidence Rules on Proposed Rule of Evidence 502 (April 19, 2006), <http://www.abanet.org/buslaw/attorneyclient/materials/056/056.pdf>

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Statement of Karen J. Mathis, *supra* note 2.

end, the ABA has urged Attorney General Alberto Gonzales to modify the DOJ attorney-client privilege waiver policy as articulated in the Holder and Thomson Memoranda.⁹⁹

Moreover, the ABA has proposed revisions to the DOJ Thompson Memorandum that it believes would “remedy the problem of government coerced waiver while preserving the ability of prosecutors to obtain the important factual information that they need to effectively enforce the law” by: “(1) preventing prosecutors from seeking privilege waiver during investigations;” “(2) specifying the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation;” and “(3) clarifying that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective cooperation.”¹⁰⁰ The ABA believes this proposal strikes the proper balance between effective law enforcement and the preservation of essential attorney-client and work product protections.¹⁰¹

Recently, on March 8, 2007, ABA President Karen Mathis testified before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security.¹⁰² Mathis cited what the ABA believes is shortcomings in the recent DOJ McNulty Memorandum and urged committee members to introduce or support corrective legislation in the House similar to Senate Bill 186, sponsored by Senator Arlen Specter.¹⁰³ The Senate’s proposed legislation would:

- (1) prohibit federal prosecutors from demanding, requesting, or encouraging, directly or indirectly, that companies waive their attorney-client or work product protections during investigations;
- (2) specify the types of factual, non-privileged information

⁹⁹ Letter from Michael S. Greco, former ABA President, to the Honorable Alberto Gonzalez, United States Attorney General, regarding proposal for revising department of justice attorney-client privilege and work product doctrine waiver policy (May 2, 2006), <http://www.abanet.org/poladv/acprivgonz5206.pdf>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Statement of Karen J. Mathis, President of the American Bar Association, before the SubCommittee on Crime, Terrorism, and Homeland Security of the Committee on Judiciary of the U.S. House of Representatives Concerning the McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations (March 8, 2007), at 13, available at <http://judiciary.house.gov/media/pdfs/Mathis070308.pdf>.

¹⁰³ *Id.* Following DOJ resistance to adopt sufficient changes to its selective-waiver policies, the “Attorney-Client Privilege Protection Act of 2006,” was introduced by Sen. Arlen Specter (R-PA) on December 7, 2006 as S. 30. When the McNulty Memorandum was issued on December 12, 2006, and it became clear that the new policy fell far short of what is needed to prevent further erosion of these fundamental legal rights, the Senate legislation was reintroduced on January 4, 2007 as S. 186.

that prosecutors may request from companies during investigations as a sign of cooperation; and (3) clarify that any voluntary decision by a company to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation.¹⁰⁴

The ABA believes that the McNulty Memorandum continues to allow prosecutors to demand privilege waiver after receiving high level Department approval, and grants companies credit for “voluntarily” waiving without a formal request.¹⁰⁵ Moreover, it “continues to allow prosecutors to force companies to take certain punitive actions against employees in return for cooperation credit.”¹⁰⁶ In sum, the McNulty Memorandum fails to solve the problem of the selective waiver of attorney-client privilege in corporate investigations.

II. CIRCUIT SPLIT

The federal circuits are split regarding the adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material.

A. *Eighth Circuit Approval of Selective Waiver – the Government Investigation Exception.*

There is almost unanimous rejection of selective waiver. Only the Eighth Circuit has adopted selective waiver in circumstances applicable to Qwest. In *Diversified Industries v. Meredith*,¹⁰⁷ the Eighth Circuit Court of Appeals addressed the issue of whether Diversified waived its attorney-client privilege with respect to the privileged material by voluntarily surrendering it to the SEC pursuant to an agency subpoena.¹⁰⁸ The Court held that only a limited waiver of privilege occurred when Diversified disclosed documents in a separate and nonpublic SEC investigation.¹⁰⁹ The Eighth Circuit reasoned that holding otherwise might 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

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.*

¹⁰⁷ 572 F.2d 596 (8th Cir. 1977).

¹⁰⁸ *Diversified*, 572 F.2d at 611.

¹⁰⁹ *Id.*

stockholders and customers.”¹¹⁰ The Court noted that litigants are not foreclosed from obtaining the same information from non-privileged sources such as business documents, corporate employee depositions, interview of non-employees, and preexisting documents and financial records not prepared by the corporation for the purpose of confidential attorney-client communications.¹¹¹

B. *Reluctance to Approve Selective Waiver to the Government.*

Most circuits have rejected selective waiver of the attorney-client privilege.¹¹² Reluctance to adopt selective waiver in furtherance of governmental investigations has come from the First, Third, Sixth, Seventh, and D.C. Circuits. These courts have acknowledged that cooperating with the government is “laudable,” but hold that “encouraging such cooperation has little to do with the purpose of the attorney-client privilege and work product doctrine which protects the confidential nature of the attorney-client relationship, and the attorney’s case preparation.”¹¹³ Because the investigating government authority is a potential litigation adversary, “upholding the protection for materials disclosed to the government squarely contradicts well-established authority that disclosure to an adversary establishes a clear case of waiver.”¹¹⁴

In *Permian Corp. v. United States*,¹¹⁵ the D.C. Circuit rejected the “tactical” waiver¹¹⁶ holding that the plaintiff had destroyed the “confidential status of . . . attorney-client communications by permitting . . . disclosure to SEC staff.”¹¹⁷ The Court reasoned that 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 . . . to protect the attorney-client

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 450 F.3d at 1187.

¹¹³ Rosenblatt, *supra* note 88; *see also* *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

¹¹⁴ Rosenblatt, *supra* note 88.

¹¹⁵ *Permian*, 665 F.2d at 1214; *see also* *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (reiterating its position in *Permian*).

¹¹⁶ *Permian*, 665 F.2d at 1221 (noting that attorney-client privilege is not designed for “tactical” employment).

¹¹⁷ *Id.* at 1219.

relationship.”¹¹⁸ Thus, any “voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.”¹¹⁹ Moreover, the D.C. Circuit noted that “because the attorney-client privilege inhibits the truth-finding process, it has been narrowly construed, and courts have been vigilant to prevent litigants from converting the privilege into a tool for selective disclosure.”¹²⁰ In addition, the Court noted that the “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.”¹²¹

In *United States v. Massachusetts Institute of Technology*,¹²² the First Circuit Court of Appeals rejected selective waiver holding that “anyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage.”¹²³ The Court noted that the “choice to disclose [privileged information] may have been reasonable but it was still a foreseeable gamble.”¹²⁴ The First Circuit reasoned that following the Eighth Circuit's approach would require, at the very least, a new set of “difficult line-drawing exercises that would consume time and increase uncertainty.”¹²⁵

In *In re Steinhardt Partners*,¹²⁶ the Second Circuit, while pointing out “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,” declined to adopt a “per se rule that all voluntary disclosures to the

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1221 (citing *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672, 675 (D.C. Cir. 1979)).

¹²¹ *Id.* at 1221.

¹²² 129 F.3d 681 (1st Cir. 1997).

¹²³ *Massachusetts Institute of Technology*, 129 F.3d at 686.

¹²⁴ *Id.*

¹²⁵ *Id.* at 685.

¹²⁶ 9 F.3d 230 (2d Cir. 1993).

government” waives the protection of privilege.¹²⁷ The Court reasoned that “establishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories” or situations in which the “disclosing party [has] entered into an explicit agreement . . . to maintain the confidentiality of the disclosed materials.”¹²⁸

In *Westinghouse Electric Corp. v. Republic of the Philippines*,¹²⁹ the Third Circuit Court of Appeals held that “voluntary disclosure to government agencies . . . [extended] the [attorney-client] privilege beyond its intended purpose.” The Court reasoned that a “selective waiver rule” that “encourages corporations to conduct internal investigations and to cooperate with federal investigative agencies” goes “beyond the policies underlying the attorney-client privilege” and would “create an entirely new privilege.”

In *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*,¹³⁰ the Sixth Circuit entered a thorough opinion noting that available case law fell primarily into three categories: (1) selective waiver is permissible; (2) selective waiver is not permissible in any situation; and (3) selective waiver is permissible in situations where the Government agrees to a confidentiality order.¹³¹ In *Columbia*, civil plaintiffs sought documents the company had already provided to the DOJ and other government agencies. The Sixth Circuit rejected the “concept of selective waiver, in any of its various forms.”¹³² The Court reasoned that there was no clear relationship between selective waiver and “fostering frank communication between a client and . . . attorney.”¹³³ In addition, the Court noted that “any form of selective waiver, even [where stemming] from a confidentiality agreement, transforms the attorney-client

¹²⁷ *Steinhardt Partners*, 9 F.3d at 236.

¹²⁸ *But see In re Grand Jury Proceedings*, 219 F.3d 175, 184 (2d Cir. 2000) (noting that “where a corporation has disseminated information to the public that reveals parts of privileged communications or relies on privileged reports, courts have found the privilege waived.”).

¹²⁹ 951 F.2d 1414, 1425 (3d Cir. 1991).

¹³⁰ 293 F.3d 289 (6th Cir. 2002).

¹³¹ *Columbia/HCA*, 293 F.3d at 295.

¹³² *Id.* at 302.

¹³³ *Id.*

privilege into another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage.”¹³⁴ The Sixth Circuit recognized that there is “considerable appeal, and justification, for permitting selective waiver when the initial disclosure is to an investigating arm of the Government” but “no logical terminus” and that attorney-client privilege is “not a creature of contract, arranged between parties to suit the whim of the moment.”¹³⁵

Judge Boggs, however, entered a dissent based on the belief that “a government investigation exception” would increase the “information available over that produced by the court’s rule and would aid the truth-seeking process.”¹³⁶ He reasoned that “when the question is whether the attorney-client privilege is waived by certain actions, the presumption shifts in favor of preserving the privilege . . . a court should begin its analysis with a presumption in favor of preserving the privilege.”¹³⁷

III. CASE OF FIRST IMPRESSION: *IN RE QWEST COMMUNICATIONS INTERNATIONAL*¹³⁸

In a case of first impression for the Tenth Circuit, *In re Qwest Communications International* addressed the issue of 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.¹³⁹ The Tenth Circuit had previously indicated that production of work-product material during discovery waives a work-product objection.¹⁴⁰

A. *Facts and Procedural History.*

In early 2002, the Securities Exchange Commission (hereinafter “SEC”) began investigating Qwest’s business practices.¹⁴¹ Several months later, Qwest learned that the DOJ, through the United

¹³⁴ *Id.*

¹³⁵ *Id.* at 303.

¹³⁶ *Id.* at 307.

¹³⁷ *Id.* at 308 (citing *In re Perrigo Co.*, 128 F.3d 430, 440 (6th Cir. 1997).

¹³⁸ 450 F.3d 1179 (10th Cir. 2006).

¹³⁹ *Qwest*, 450 F.3d at 1181.

¹⁴⁰ *Grace United Methodist Church v. City of Cheyenne*, 427 F.3d 775, 801-02 (10th Cir. 2005); *but see Foster v. Hill*, 188 F.3d 1259, 1272 (10th Cir. 1999) (indicating that the work-product doctrine is affected when a disclosure is to an adversary).

¹⁴¹ *Qwest*, 450 F.3d at 1181.

States Attorney's Office for the District of Colorado, had also commenced a criminal investigation of Qwest.¹⁴² In the course of the SEC and DOJ investigations, Qwest produced over 220,000 pages of documents to the agencies protected by the attorney-client privilege and the work-product doctrine.¹⁴³ These documents were produced pursuant to a subpoena and written confidentiality agreements between Qwest and both the SEC and DOJ.¹⁴⁴ These agreements stated that Qwest "did not intend to waive the attorney-client privilege or work-product protection."¹⁴⁵ The SEC agreed to "maintain the confidentiality of [these documents] and . . . not disclose them to any third party, except to the extent that the Staff determines that disclosure is otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities."¹⁴⁶ Similarly, the DOJ agreed to maintain the waiver documents' confidentiality and not disclose them to third parties, "except to the extent that DOJ determines that disclosure is otherwise required by law or would be in furtherance of DOJ's discharge of its duties and responsibilities."¹⁴⁷ Qwest agreed that the DOJ could share these documents with other state, local, and federal agencies, and that it could "make direct or derivative use of the [these documents] in any proceeding and its investigation."¹⁴⁸ In other agreements with the DOJ, Qwest agreed that the DOJ could:

make full use of any information it obtains under this agreement in any lawful manner in furtherance of its investigation, including, without limitation, analyses, interviews, grand jury proceedings, court proceedings, consultation with and support of other federal, state or local agencies, consultations with experts or potential experts, and the selection and/or retention of testifying experts.¹⁴⁹

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1181-82.

Prior to the initiation of the federal investigations, civil cases were pending against Qwest that involved many of the same issues as the SEC and DOJ investigations.¹⁵⁰ Additional actions were filed after the federal investigations began.¹⁵¹ Several of the cases were filed in the United States District Court for the District of Colorado, and many were consolidated into a federal securities action designated *In re Qwest Communications International, Inc., Securities Litigation* (hereinafter “Securities Case”).¹⁵²

In the course of the Securities Case, Qwest produced millions of pages of documents to the Plaintiffs, but did not produce the waiver documents produced to the SEC and DOJ.¹⁵³ Qwest argued the SEC/DOJ documents remained privileged despite its production of these documents to the SEC and DOJ.¹⁵⁴ The Securities Case plaintiffs moved to compel production of the SEC/DOJ documents.¹⁵⁵ A federal magistrate judge concluded Qwest had waived the attorney-client privilege and attorney work-product doctrine “by producing [the documents] to the agencies” and ordered Qwest to produce the SEC/DOJ documents to the Securities Case plaintiffs.¹⁵⁶ Qwest filed the instant action in the Tenth Circuit Court of Appeals when the U.S. District Court for the District of Colorado refused to overrule the magistrate judge's order compelling production of the SEC/DOJ documents, and declined to certify an interlocutory appeal of the waiver issue.¹⁵⁷

B. *The Tenth Circuit’s Decision on Selective Waiver.*

The Tenth Circuit Court of Appeals decision in *Qwest* mirrored the decisions of its sister circuits who have resisted selective waiver based on the belief that the record did not establish “a need for a rule of selective waiver to assure cooperation with law enforcement, to further the purposes of the attorney-

¹⁵⁰ *Id.* at 1182.

¹⁵¹ *Id.*

¹⁵² *In re Qwest Commc’n Int’l, Inc. Secs. Litig.*, D.C. No. 01-CV-1451-REB-CBS, 2006 U.S. Dist. LEXIS 14358 (D. Colo., Mar. 10, 2006).

¹⁵³ *Qwest Securities Litigation*, 450 F.3d at 1182.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

client privilege or work-product doctrine, or to avoid unfairness to the disclosing party.”¹⁵⁸ The Court reasoned that it would be “far from a universally accepted perspective of fairness” to allow Qwest to “choose among its opponents would be privy” to privileged documents.¹⁵⁹ The Tenth Circuit reasoned that evidence was lacking to support the “contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine.”¹⁶⁰ Moreover, the Court noted that Qwest seeks the “substantial equivalent of an entirely new privilege, i.e., a government-investigation privilege.”¹⁶¹ In addition, the Tenth Circuit reasoned that allowing selective waiver of privilege may have the “opposite effect of inhibiting communication between attorney and client.”¹⁶² If “officers and employees know their employer could disclose privileged information to the government without risking a further waiver of the attorney-client privilege, they may well choose not to engage the attorney or do so guardedly.”¹⁶³

Like several of its sister circuits, the Tenth Circuit left open the possibility of future movement regarding selective waiver. The Court reasoned that a ruling in favor of selective waiver/governmental investigation privilege would be a “leap, not a natural, incremental next step in the common law development of privileges and protections, concluding that the Tenth Circuit was “unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination.”¹⁶⁴

IV. ANALYSIS

In arriving at its decision to reject a selective waiver privilege, the Tenth Circuit Court of Appeals based its decision on a survey of existing precedent surrounding selective waiver of attorney-client

¹⁵⁸ *Id.* at 1192.

¹⁵⁹ *Id.* at 1196.

¹⁶⁰ *Id.* at 1193.

¹⁶¹ *Id.* at 1192.

¹⁶² *Id.* at 1195.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1192 (citing *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972)).

privilege¹⁶⁵ As justification, the Court noted that “there are no grounds to buck the trend of declining to create a new privilege . . . no groundswell in the state legislatures for a privilege for materials produced in a government investigation . . . nor was such a privilege among the nine originally proposed for inclusion in the Federal Rules of Evidence.”¹⁶⁶ Further, the Tenth Circuit observed that the United States Supreme Court has indicated a reluctance to “recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.”¹⁶⁷ In support of its position, the Tenth Circuit noted that Congress rejected a SEC-proposed amendment to the Securities and Exchange Act of 1934 that would have established a selective waiver rule in 1984.¹⁶⁸ Further, the SEC withdrew a proposed regulation implementing selective waiver in 2003 in light of questions about its authority to adopt such a regulation under the Sarbanes Oxley Act.¹⁶⁹ The Tenth Circuit views these factors as counseling “against establishing a new government-investigation privilege” and “adopting Qwest’s proposed rule regardless of whether it be characterized as a new privilege or a new rule governing waiver.”¹⁷⁰

However, the Tenth Circuit selectively ignores the battle currently being waged in the national legal community and Congress over selective waiver and the attack on attorney-client privilege. In addition, the majority of circuits rejecting selective waiver fail to address the strong-arm DOJ policies stemming from the Thompson Memorandum which effectively coerce business entities into waiving attorney-client privilege in order to be viewed as “cooperating” with even the most routine governmental inquiry and investigation. Specifically, in April 2006, a full two months before the Tenth Circuit Qwest decision, the Advisory Committee on Evidence Rules approved proposed amendment FRE 502,

¹⁶⁵ See generally *Qwest*, 450 F.3d 1179.

¹⁶⁶ *Id.* at 1198.

¹⁶⁷ *Id.* (citing *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990)).

¹⁶⁸ *Westinghouse*, 951 F.2d at 1425; see also 16 Sec. Reg. & L. Rep. 461 (Mar. 2, 1984).

¹⁶⁹ See SEC Release Nos. 33-8185, 34-47276, Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003) (explaining withdrawal of 17 C.F.R. Part 205.3(e)(3)).

¹⁷⁰ *Qwest*, 450 F.3d 1199.

ultimately for direct enactment by Congress, recommending that the Standing Committee release it for public comment.¹⁷¹ Contrary to the Tenth Circuit’s assertion, concerns about the common law of waiver of privilege and work product have been voiced in Congress stemming directly from the federal judiciary’s refusal to adequately address the current landscape on selective waiver. The Chairman of the House Committee on the Judiciary requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by selective waiver of attorney-client privilege. While any rule prepared by the Advisory Committee could proceed through the rulemaking process, it would eventually have to be enacted by Congress as a rule affecting privileges.¹⁷² The Evidence Committee has approved proposed Federal Rule of Evidence 502(c) for public comment regarding selective waiver of attorney-client privilege.¹⁷³ Alarming, the DOJ policies encouraging selective waiver of attorney-client privilege have never fully been addressed by a court.¹⁷⁴

The Tenth Circuit has previously held that “courts need not allow the claim of attorney-client privilege when the party claiming the privilege is attempting to utilize the privilege in a manner that is not consistent with the privilege” and that “any voluntary disclosure by the client is inconsistent with the attorney-client relationship and waives the privilege.”¹⁷⁵ In its *Qwest* decision, the Court notes that it is the “nature of the common law to move slowly . . . swift and massive movements are not impossible, but

¹⁷¹ Letter from the Honorable Jerry E. Smith, Chair, Advisory Committee on Evidence Rules, to the Honorable David Levi, Chair, Standing Committee on Rules of Practice and Procedure, regarding Report of the Advisory Committee on Evidence Rules (May 15, 2006), <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>.

¹⁷² See 28 U.S.C. § 2074(b) (2006).

¹⁷³ The text of Proposed FRE 502(c) is as follows:

[(c) Selective waiver. – In a federal or state proceeding, a disclosure of 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 governmental agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

¹⁷⁴ Letter from Michael J. Garcia, United States Attorney, to Hon. Lewis A. Kaplan, United States District Judge 1 (June 30, 2006), <http://online.wsj.com/public/resources/documents/kpmsg-20060630-letter.pdf>.

¹⁷⁵ *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989).

they are relatively rare.”¹⁷⁶ However, the Tenth Circuit fails to take even a minute step towards addressing the compromising Hobson’s Choice¹⁷⁷ corporations face between failing to cooperate under current DOJ policies and selectively waiving attorney-client privilege and work product when the majority of circuits refuse to honor the selective waiver agreements corporations enter into with government agencies.

A. *The Hobson’s Choice Facing Corporations under the DOJ Thompson Memorandum.*

The Tenth Circuit’s reasoning in rejecting selective waiver mirrors the D.C. Circuit’s belief that a selective waiver rule has little to do with the “confidential link between the client and his legal advisor.”¹⁷⁸ Courts rejecting selective waiver reason that if the “client feels the need to keep . . . communications with [an] attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege.”¹⁷⁹ However, the dangerously duplicative logic the majority of circuits embrace in continuously rejecting a selective waiver rule ignores the reality of the choice corporations face under the DOJ Thompson Memorandum and its progeny. The reasoning the circuits apply in refusing to approve of selective waiver can be analogized to a photocopied original which becomes weaker, and less readable, with every duplication. Federal prosecutors insist that corporations turn over “privileged communications, attorney work product, and incriminating statements from corporate employees as a condition of favorable treatment in the exercise of considerable prosecutorial discretion.”¹⁸⁰ The reality under current DOJ policies is that a corporation’s failure to immediately disclose privileged information is viewed as a “clandestine effort to hide the truth.”¹⁸¹ The problem is that the objectives inherent in disclosing protected materials to a government agency “to forestall prosecution

¹⁷⁶ *Qwest*, 450 F.3d at 1192.

¹⁷⁷ Ballentine’s Law Dictionary defines the Hobson’s Choice as an “election by compulsion or without freedom of choice; a choice without an alternative.” See also *Pictorial Review Co. v. Helvering*, 68 F.2d 766, 769 (D.C. Cir. 1934).

¹⁷⁸ *Permian*, 665 F.2d at 1220.

¹⁷⁹ *Id.*

¹⁸⁰ Thompson Memorandum, *supra* note 50.

¹⁸¹ *Id.*

(if the charges are unfounded) or to obtain lenient treatment (in the case of wellfounded allegations),” are “alien to the objectives” central to attorney-client privilege and the attorney work product doctrine.¹⁸²

In rejecting Qwest’s argument that selective waiver was “necessary to ensure cooperation with government investigations,” the Tenth Circuit engaged in a fact-based analysis reasoning that Qwest disclosed protected materials “in the face of almost unanimous circuit-court rejection of selective waiver in similar circumstances, and despite the absence of Tenth Circuit precedent.”¹⁸³ The reality is exactly the opposite - prior to any disclosure of attorney-client privilege, corporations “enter into selective waiver agreements” with government agencies in an “attempt to avoid the uncertainties that result from sharing confidential materials” with federal agencies.¹⁸⁴ Selective waiver agreements “purport to maintain attorney-client privilege and work product protection” as to private third party litigants.¹⁸⁵ They have developed as a means to “navigate between the pressures and perils surrounding such cooperation” and are intended to “avoid the harsh consequences of traditional privilege law, under which any disclosure of privileged or protected materials constitutes an absolute waiver of the right to withhold those materials from third parties seeking access, for example, during discovery in later civil proceedings.”¹⁸⁶ Under current DOJ policies, “corporations often have little practical choice regarding disclosure” both to demonstrate “cooperation” and to “mitigate potential civil and criminal penalties.”¹⁸⁷

Moreover, at the time privileged communications occur, or work product is created, an unpredictability occurs which creates a “chilling effect that inhibits a company seeking legal advice.”¹⁸⁸ The corporation, its employees, and inside and outside counsel are left to guess whether, “under the legal, financial, and public relations pressures of a criminal investigation, the company will feel compelled to

¹⁸² *Columbia/HCA*, 293 F.3d at 305-06.

¹⁸³ *Qwest*, 450 F.3d at 1193.

¹⁸⁴ *Mitchell*, *supra* note 66, at 691-92.

¹⁸⁵ *Id.* at 692.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Zornow & Krakaur*, *supra* note 14, at 149.

waive privilege.”¹⁸⁹ As a result of this pressure, business entities almost always turn over privileged information to appear cooperative with a government investigation.¹⁹⁰ Legal scholars argue that the criminal justice system has already begun to “suffer the loss of fully informed and vigorously adversarial legal representation in exchange for prosecutorial expediency.”¹⁹¹ The fear is that prosecutors have now made it a matter of policy to leverage the important carrot of “cooperation” to extract waivers of privilege,¹⁹² while many courts, like the Tenth Circuit, fail to adopt a selective waiver rule even in circumstances where a confidentiality agreement is in place between the privilege holder/corporation and the governmental investigating agency.

B. *The Need for Predictability and Uniformity Across Federal and State Courts.*

The attorney-client privilege and work-product doctrine are the “most commonly invoked privileges in the federal courts.” Accordingly, the “need for consistency in upholding or waiving” privilege” is vitally important to the administration of justice.¹⁹³ Ironically, the majority of federal circuit courts have rejected selective waiver on the grounds that “preserving the traditional confines of the rule affords both an ease of judicial administration as well as a reduction of uncertainty for parties faced with such a decision.”¹⁹⁴ In contrast, the ABA has pointed out that “uncertainty results from the fact that the relevant case decisions (and, in some states, statutes) differ from jurisdiction to jurisdiction.”¹⁹⁵ The U.S. Supreme Court has “resolved only a limited number of questions concerning the boundaries of the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 160.

¹⁹³ *See, e.g., Columbia/HCA*, 293 F.3d at 304 (noting that following the First Circuit ruling rejecting selective waiver made “the law more predictable and certainly eases its administration”) (quoting *United States v. Mass. Inst. of Tech.*, 129 F.3d at 681).

¹⁹⁴ *Westinghouse*, 951 F.2d at 1429.

¹⁹⁵ American Bar Association, Task Force Report and Recommendation to the ABA House of Delegates on Audit Issues (August 2006), http://www.abanet.org/buslaw/attorneyclient/materials/hod/0806_report.pdf

privilege, and on the remaining questions, different districts and circuits – and even different judges within a given federal district – may take different approaches.”¹⁹⁶

While “federal courts are in a state of confusion with regard to the enforceability of selective waiver agreements, state courts confronting similar issues have produced no greater clarity.”¹⁹⁷ Following the Eight Circuit Court of Appeals decision in *Diversified*, “several district courts held that disclosures to government agencies (typically the SEC in a voluntary disclosure program situation) do not waive the protections of the attorney-client privilege.” Citing *Diversified*, the District Court of Wisconsin held that “cooperation [with the SEC] should be encouraged” and that it would not “treat the release of [a] report to the SEC as a waiver of the corporation's attorney-client privilege.”¹⁹⁸ The Northern District of Texas arrived at a similar conclusion holding that “disclosure of . . . additional materials to the SEC does not justify the . . . discovery of the identity . . . of documents believed . . . to be most . . . privileged.”¹⁹⁹ The Southern District of New York found that “voluntary submissions to agencies in separate, private proceedings should be a waiver only as to that proceeding.”²⁰⁰

In stark contrast to the Tenth Circuit’s *Qwest* decision, in *In re M&L Business Machine Company, Inc.*,²⁰¹ the United States District Court of the District of Colorado held that there was a proper balance between “the policy goal of encouraging cooperation with the government,” found by the *Diversified* court, with the “strict requirement of confidentiality held paramount in *Permian*.”²⁰² In *M&L*, the plaintiff entered into a selective waiver agreement between a bank and the U.S. Attorney’s Office who was

¹⁹⁶ *Id.*

¹⁹⁷ Mitchell, *supra* note 73, at 717.

¹⁹⁸ *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 373 (D. Wis. 1979).

¹⁹⁹ *See In re LTV Securities Litigation*, 89 F.R.D. 595, 605 (N.D. Tex. 1981).

²⁰⁰ *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 689 (S.D.N.Y. 1980); *see also* *Enron Corp. v. Borget*, 1990 U.S. Dist. LEXIS 12471, No. 88 CIV. 2828 (DNE), 1990 WL 144879 (S.D.N.Y. Sept. 22, 1990), at *2 (encouraging cooperation with law enforcement militates in favor of a no attorney-client privilege waiver finding.).

²⁰¹ 161 B.R. 689, 695 (D. Col. 1993); *see also* *Teachers Insurance & Annuity Assoc. of America v. Shamrock Broad. Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981).

²⁰² *Id.*

investigating the bankruptcy of M&L.²⁰³ The bank agreed to give the U.S. Attorney certain information, provided the information was held in confidence by the U.S. Attorney and the grand jury.²⁰⁴ Subsequently, the bankruptcy trustee attempted to obtain the same information pursuant to a subpoena.²⁰⁵ The bank filed a motion to quash, arguing that only a selective waiver as to attorney-client privilege occurred.²⁰⁶ In approving selective waiver in favor of the privilege holder, the U.S. District Court for the District of Colorado noted the steps taken to ensure confidentiality by the bank, but also that disclosing the information to the U.S. Attorney, the bank was not doing so “for the purpose of obtaining some benefit for itself.”²⁰⁷

In addition, the majority circuit rejection of selective waiver stands in complete contradiction to a recent resolution by the Conference of Chief Justices who have endorsed the creation of state and local bar committees devoted to the preservation of the attorney-client privilege and work-product doctrine in response to law enforcement and regulatory authorities have adopted policies, practices and procedures that could have the effect of eroding the attorney-client privilege and work-product doctrine.²⁰⁸ In the Sixth Circuit Court of Appeal’s most recent opinion rejecting selective waiver, the Court noted that plaintiff’s counsel “admitted during oral arguments that the company knew the unsettled nature of the law, and arrived at the decision to enter into the agreement with the Government after contemplating the possibility the agreement would not protect its confidential information.”²⁰⁹

Because courts confronting selective waiver “consistently evaluate the issue of waiver in light of the legal rationales supporting the attorney-client privilege and work product doctrine - and not in light of the policy rationales that support selective waiver - it is unlikely that the issue will be resolved by courts

²⁰³ *Id.* at 695.

²⁰⁴ *Id.* at 691.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 693.

²⁰⁷ *Id.* 693.

²⁰⁸ Conference of Chief Justices Professionalism and Competence of the Bar Committee Resolution Adopted at the 58th Annual Meeting (August 2, 2006), <http://ccj.ncsc.dni.us/resol9StateCommitteesOnAttorneyClientPrivilege.html>.

²⁰⁹ *Columbia/HCA*, 293 F.3d at 304.

in favor of upholding selective waiver agreements.”²¹⁰ For that reason, the legislative solution pending under FRE 502(c) appears to present the most viable and likely solution to the selective waiver quagmire. While the Tenth Circuit ignores the current battle over selective waiver, and the circuit court majority rejecting selective waiver defer resolution of the issue to Congress, the reality is that the effectiveness of any selective waiver legislation would depend on its state court applicability.²¹¹ A legislative solution is not a simple fix to the creation of uniformity across state and federal courts. Constitutionally, the questions remains as to whether federalizing a selective waiver rule under FRE 502(c) would alter the scope of state privilege law as applied in state court proceedings.²¹² The limits of Congress’s authority to regulate state court proceedings remain largely undefined.²¹³ If the rule fails to bind state and federal courts uniformly, the justice system may be faced with even greater problems.

Existing case law offers little guidance as to the scope of federal power over state courts or the proper analysis governing such inquiries.²¹⁴ To bind state courts, “Congressional authority to enact selective waiver legislation applicable to corporate disclosures to the SEC or DOJ must derive from an enumerated power in the Constitution.”²¹⁵ By “expressly requiring the involvement of a federal actor, and by linking the enforcement of selective waiver agreements to the effectuation of that actor’s constitutional

²¹⁰ *Id.*

²¹¹ Mitchell, *supra* note 73, at 732 (citing *Jinks v. Richland County*, 538 U.S. 456, 462-63 (2003) (holding that the tolling of state statutes of limitations is necessary for effective administration of justice).

²¹² Mitchell, *supra* note 73, at 694.

²¹³ *Jinks v. Richland County*, 538 U.S. 456, 464 (2003) (acknowledging that it is an open question whether Congress can prescribe procedural rules for state courts' adjudication of purely state-law claims under the U.S. Constitution); *see also* Anthony J. Bellia, *Federal Regulation of State Court Proceedings*, 110 *YALE L.J.* 947, 993-1001 (2001) (arguing that Congress lacks the power to impose procedural rules on state courts and lacks Congressional authority to require State courts to use specific procedures).

²¹⁴ *See In re Transcript Int'l Sec. Litig.*, 57 F. Supp. 2d 836, 841 n.2 (1999) (questioning whether Congress has the power to regulate state procedural law and the state courts' power to govern the progression of cases on their own dockets).

²¹⁵ Bellia, *supra* note 213, at 963-64.

prerogatives,” courts “will likely sustain legislation as a ‘Necessary and Proper’ corollary of that power.”²¹⁶

The SEC and DOJ derive “enforcement powers from the Commerce Clause.”²¹⁷ If Congress enacts legislation to bind State courts, the U.S. Supreme Court would likely “sustain the law as a valid exercise of Congressional power” based upon a “determination that enforcing selective waiver agreements in both federal and state courts is ‘necessary’ for the effectuation of the SEC’s enforcement and investigative mandates.”²¹⁸ The DOJ is also “empowered under the Constitution to enforce criminal and civil laws enacted by Congress.”²¹⁹ If Congress determined “that in order to investigate and enforce validly enacted civil or criminal laws, corporations should be able to enter into binding selective waiver agreements with the DOJ” that legislation would likely constitute a “Necessary and Proper” means to “a valid legislative end.”²²⁰ The Supreme Court has been particularly deferential to Congressional judgments in such circumstances.²²¹ Accordingly, Congress would likely have the “power to enact ‘substantive’ selective waiver legislation in cases involving the SEC and DOJ.”²²² By operation of the Supremacy Clause, this legislation will bind state courts – the Supremacy Clause “expressly binds state judges to enforce federal substantive law.”²²³

²¹⁶ Mitchell, *supra* note 73, at 732 (citing Sabri v. United States, 541 U.S. 600, 605 (2004) (stating that the Necessary and Proper Clause confers broad powers on Congress effect Constitutional powers because Congress does not have to accept the risk of operations thwarted by state or local action).

²¹⁷ Wright v. SEC, 112 F.2d 89, 94-95 (2d Cir. 1940) (finding the Securities Exchange Act of 1934 valid as a constitutional attempt to regulate interstate commerce, and as a legitimate delegation of legislative power).

²¹⁸ Mitchell, *supra* note 73, at 732 (citing Gonzales v. Raich, 125 S. Ct. 2195, 2216 (2005) (Scalia, J., concurring)).

²¹⁹ Mitchell, *supra* note 73, at 732 (citing Touby v. United States, 500 U.S. 160, 164-65 (2001) (discussing that Congress has power to legislate broadly under Article I powers, and executive agencies may be called upon to enforce those laws).

²²⁰ Bittaker v. Woodford, 331 F.3d 715, 732 (9th Cir. 2003) (O’Scannlainn, J., concurring) (reasoning that power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution).

²²¹ Mitchell, *supra* note 73, at 732.

²²² See Raich, 125 S. Ct. at 2212 (reasoning that the Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail); see also Wickard v. Filburn, 317 U.S. 111, 124 (1942) (holding that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress); United States v. Darby, 312 U.S. 100, 114 (1941) (holding that Commerce power can neither be enlarged nor diminished by the exercise or non-exercise of state power).

²²³ Bellia, *supra* note 213, at 976 (state judges must enforce constitutionally enacted federal claims and defenses, even when they conflict with state laws).

CONCLUSION

Many jurists have noted that the development of privilege laws should embrace the common law as it evolves.²²⁴ In arriving at its *Qwest* decision, the Tenth Circuit noted Justice Harlan F. Stone's observation that the common law's methodology has been described as its strength and weakness, its "strength is derived from the manner in which it has been forged from actual experience by the hammer and anvil of litigation" and "its weakness lies in the fact that law guided by precedent which has grown out of one type of experience can only slowly and with difficulty be adapted to new types which the changing scene may bring."²²⁵ For that reason, experience and reason dictate the fair judicial solution recognizing selective waiver when a corporation discloses information to a government entity pursuant to a confidentiality agreement.²²⁶ This exception is necessary to promote public policy interests and protect justice.²²⁷ If the majority of circuits began recognizing selective waiver, in light of current DOJ policies, courts would balance corporate accountability to shareholders with promotion of efficient government policing of corporations.²²⁸

The current uncertainty regarding the enforceability of selective waiver agreements, in conjunction with the frequency of governmental demands waiver of attorney-client and work product protections, require resolution.²²⁹ Given the current circuit split, mirrored in the Tenth Circuit *Qwest* decision, as well as conflicting state and lower federal decisions regarding selective waiver of attorney client privilege, clear judicial resolution is unlikely. Legal scholars believe that "properly tailored federal legislation

²²⁴ See, e.g., *Funk v. United States*, 290 U.S. 371, 383 (1933) (noting that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions").

²²⁵ *Qwest*, 450 F.3d at 1192 (citing Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 1, 7 (1936)).

²²⁶ *Hawkins v. United States*, 358 U.S. 74, 77 (1958) (reasoning that if the Court is "urged to modify the privilege rule as the government urges, we must look to experience and reason, not to authority.").

²²⁷ Jody E. Okrzes, *Selective Waiver: Should the Government be Privy to Privileged Information Without Waiving the Attorney-Client Privilege and Work Product Doctrine?*, 34 U. MEM. L. REV. 115, 188 (2003).

²²⁸ *Id.*

²²⁹ Mitchell, *supra* note 73, at 739.

codifying the enforceability of such agreements would bind federal and state courts equally.”²³⁰ It is unknown whether proposed FRE 502(c) will have a positive impact on the current quagmire surrounding selective waiver of attorney-client privilege and the battle the circuit courts virtually ignore. In light of the circuit court majority’s failure to acknowledge and address the governmental policies forcing corporations to selectively waive attorney-client privilege, the new rule might be the only solution to “sweep away the muddled case law and encourage courts to write on a clean slate.”²³¹

²³⁰ *Id.*

²³¹ Rosenblatt, *supra* note 88.