

TURNING OUT THE “LIGHT OF REASON AND EXPERIENCE”: THE SELECTIVE WAIVER DOCTRINE AND PROPOSED FEDERAL RULE OF EVIDENCE 502

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INTRODUCTION

A trial requires the truth to meet the ends of justice.¹ At the same time, common law has created the law of privileges because “society has valued the trust and confidentiality of certain relationships enough to allow certain individuals the right to refuse to offer testimony at trial.”² Thus, the confidential nature of privileged communications is in tension with the primary truth-seeking goal of litigation.³ Courts have addressed this

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¹ See PAUL C. GIANELLI, UNDERSTANDING EVIDENCE § 1.07 (2d ed. 2006); 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2192, at 70 (McNaughton rev. 1961). Trials in the federal court system are governed by the Federal Rules of Evidence, which state: “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” FED. R. EVID. 102.

² Stacey A. Garber, Note, *Cox v. Miller: The Clergy Privilege and Alcoholics Anonymous*, 31 CAP. U. L. REV. 917, 917 (2003). Confidence has been considered necessary for the existence of privileges. “‘The moment confidence ceases,’ said Lord Eldon, ‘privilege ceases.’” 8 WIGMORE, *supra* note 1, § 2311, at 599.

³ See *Swidler & Berlin v. United States*, 524 U.S. 399, 411–12 (1998) (O’Connor, J., dissenting); *Trammel v. United States*, 445 U.S. 40, 50 (1980) (“Testimonial exclusionary rules and privileges contravene the fundamental principle that ‘the public . . . has a right to every man’s evidence.’” (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950))); see also GIANELLI, *supra* note 1, at 562. Additionally, the Federal Rules of Evidence allow for all relevant evidence to be admitted into trial unless it is precluded by “the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.” FED. R. EVID. 402. Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

delicate balance by narrowly construing privileges to minimize the exclusion of relevant evidence from judicial proceedings.⁴

The attorney-client privilege is the oldest of the recognized privileges.⁵ The privilege allows clients to communicate with their attorneys with confidence that these communications will not later be admissible in judicial proceedings.⁶ In addition, the attorney-client privilege also encompasses communications made by corporate employees to the corporation's counsel under certain circumstances.⁷ Yet in either circumstance, the privilege is not indestructible. If the attorney or client later discloses a privileged communication to a third party, the privilege is waived and the communication is no longer protected from disclosure in future litigation.⁸

Lately, government investigative agencies have pressured corporations to cooperate with ongoing investigations by voluntarily turning over privileged communications to the government.⁹ As stated above, when corporations, like any other clients, disclose privileged communications to government agencies, which are third parties outside of the attorney-client relationship, the corporations normally waive the privilege as to any other future third party litigants.¹⁰

it would be without the evidence." *Id.* 401. Often times, privileged information that is inadmissible in the fact-finding process would fit the definition of relevant evidence. See GIANNELLI, *supra* note 1, at 13.

⁴ See *Trammel*, 445 U.S. at 50 (explaining that testimonial privileges should be "strictly construed"); *United States v. Nixon*, 418 U.S. 683, 710 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 689–90 (1972).

⁵ See 8 WIGMORE, *supra* note 1, §§ 2290–91, at 542–45 (discussing the history of attorney-client privilege from the Elizabethan era until present day).

⁶ See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); 8 WIGMORE, *supra* note 1, § 2327, at 634 ("The privilege is designed to secure the client's confidence in the secrecy of his communications . . .").

⁷ See *Upjohn*, 449 U.S. at 395–96 (holding that corporations could utilize the attorney-client privilege). The Court also distinguished what types of communications could be deemed privileged. See *id.* at 396.

⁸ See GIANNELLI, *supra* note 1, at 567 n.41; 8 WIGMORE, *supra* note 1, § 2327, at 634–38.

⁹ See Memorandum from Larry D. Thompson, Deputy Attorney Gen., to the Heads of Dep't Components and U.S. Attorneys § VI (Jan. 20, 2003) [hereinafter Thompson Memo], http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (advocating prosecutorial leniency for corporations who waive its attorney-client privilege); Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., to All Component Heads and U.S. Attorneys § VI (June 16, 1999) [hereinafter Holder Memo], <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html> (discussing bringing criminal charges against corporations).

¹⁰ See *In re Qwest Commc'ns Int'l Inc., Sec. Litig.*, 450 F.3d 1179, 1201 (10th

Surprisingly, not all jurisdictions treat a corporation's disclosure of privileged communications to the government as waiver of the attorney-client privilege. One circuit court of appeals chose to depart from this bedrock principle of the attorney-client privilege and has recognized the selective waiver doctrine, which allows a corporation to disclose privileged communications to the government while maintaining its attorney-client privilege to any third party litigants in relation to those disclosed communications.¹¹ More notably, all other circuit courts of appeals faced with this issue have not recognized the selective waiver doctrine because of its opposition to the historically narrow and strict construction of the attorney-client privilege.¹² In addition, courts have gone so far as to suggest that the selective waiver doctrine embodies a new privilege between the government and corporations—not the corporations and their attorneys.¹³ Yet, even though the doctrine has been rejected by most of the judiciary, a proposal for the adoption of a new Federal Rule of Evidence, which includes the selective waiver doctrine, has been approved by the Federal Rules of Evidence Advisory Committee and published for public comment.¹⁴

Due to the inconsistent purpose of the selective waiver doctrine with the attorney-client privilege, the inclusion of the selective waiver doctrine in proposed Federal Rule of Evidence 502 would create a new government-investigatory privilege and would in effect be the first federal codification of a specific

Cir. 2006), *cert. denied*, 127 S. Ct. 584 (2006); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 291 (6th Cir. 2002); *United States v. MIT*, 129 F.3d 681, 686 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1425–26 (3d Cir. 1991) (rejecting formation of new attorney-client privilege created by selective waiver); *John Doe Corp. v. United States*, 675 F.2d 482, 489 (2d Cir. 1982).

¹¹ See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc); see also 1 EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 494–507 (5th ed. 2007) (describing the circuit courts of appeals' split over the selective waiver doctrine). The scope of this Note will not cover selective waiver of the work-product and it should be noted that the state of the common law of selective waiver of attorneys' work-product is different from that of the attorney-client privilege. See 2 EPSTEIN, *supra*, at 1118.

¹² See *infra* note 43 and accompanying text.

¹³ See *Qwest*, 450 F.3d at 1197–98; *Westinghouse*, 951 F.2d at 1424–25.

¹⁴ See FED. R. EVID. 502(c) (Proposed Draft 2006), available at <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>; see also *infra* notes 122–30 and accompanying text.

privilege.¹⁵ Part I of this Note will describe the attorney-client privilege and also how the Federal Rules of Evidence presently govern the law of privileges in federal judicial proceedings. Part II will discuss the selective waiver doctrine and its current state in the circuit courts of appeals. Part II will also introduce proposed Federal Rule of Evidence 502 and its inclusion of the selective waiver doctrine. Part III of this Note will propose that the selective waiver doctrine embodies a new privilege separate from that of the attorney-client privilege. This will be demonstrated by the selective waiver doctrine's distinctly different purpose than that of the attorney-client privilege. In doing so, Part III will highlight how the selective waiver doctrine opposes the core principles of the attorney-client privilege. Lastly, this Note will posit that as a new type of "government-investigatory" privilege, selective waiver would not survive judicial scrutiny. Therefore, any recognition of this privilege would be an extreme divergence from the creation of other privileges.

I. THE JUDICIARY'S NARROW CONSTRUCTION OF THE ATTORNEY-CLIENT PRIVILEGE AND THE FEDERAL RULES' DEFERENCE TO THE COMMON LAW

A. *The Rationales Behind Privileged Communications*

Two basic rationales support the exclusion of relevant and reliable evidence deemed as "privileged."¹⁶ First, Dean John Henry Wigmore presented a utilitarian justification, known as the instrumental theory, which assumes that the privilege is the "but for" cause of the underlying relationship.¹⁷ A second rationale focuses on the concern for the privacy needed to foster

¹⁵ At this time, Federal Rule of Evidence 501 provides that common law governs privileges. See *infra* notes 70–72 and accompanying text.

¹⁶ See GIANNELLI, *supra* note 1, at 562–66 (comparing the instrumental justification for privileges with the privacy rationale). Although it is beyond the scope of this Note, the testimonial privilege is dwarfed by the attorney's ethical obligation to maintain confidentiality of a client's confidences. See 1 EPSTEIN, *supra* note 11, at 15–19; see also Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 286–94 (1989) (discussing the ethical responsibilities of attorneys in relation to privileges).

¹⁷ Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 317–18 (2003).

certain types of relationships.¹⁸ Although both the instrumental theory and the privacy rationale may be used to justify the same privilege, the rationales separately address the need for confidentiality in different types of relationships.¹⁹

The instrumental theory is premised on the “behavioral assumption” that a person would not enter into a consultant relationship “but for the assurance of confidentiality furnished by a formal evidentiary privilege.”²⁰ Professor Wigmore defined four fundamental conditions needed for a privileged communication as the basis of his theory:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.²¹

In other words, this theory assumes that the average person would be deterred from going to a consultant, such as an attorney or a psychotherapist, without the protection of the evidentiary privilege.²² Thus, neither the relationship nor “the excluded evidence would . . . have come into existence without the privilege.”²³ Therefore, the privileged nature of the communications places litigants in the same position they would have been had there never been a privilege.²⁴

The second “privacy” rationale justifies the law of privileges from a slightly different perspective.²⁵ “A liberal democratic state should assure its citizens that they may enter into intimate consultative relationships with minimal risk that their autonomy

¹⁸ See GIANNELLI, *supra* note 1, at 565; *see also* Imwinkelried, *supra* note 17, at 333.

¹⁹ *See infra* notes 32–36 and accompanying text.

²⁰ Imwinkelried, *supra* note 17, at 317.

²¹ 8 WIGMORE, *supra* note 1, § 2285, at 527; *see also* GIANNELLI, *supra* note 1, at 563 n.24.

²² Imwinkelried, *supra* note 17, at 317.

²³ *Id.* at 318.

²⁴ *See id.* at 317–18; *see also* Swidler & Berlin v. United States, 524 U.S. 399, 408 (1998); Jaffee v. Redmond, 518 U.S. 1, 11–12 (1996) (explaining how without the privilege the communications were probably “unlikely to come into being”).

²⁵ *See* GIANNELLI, *supra* note 1, at 565–66; Imwinkelried, *supra* note 17, at 333–37.

will be violated during the consultation.”²⁶ Thus, privacy creates a trusting relationship that allows a person to speak with their consultant openly to obtain accurate, helpful advice.²⁷ With this in mind, a person can be free to expose the facts in a relationship—“warts-and-all”²⁸—in order to facilitate open communication and a “private enclave” relationship.²⁹ “The individuals communicating within these enclaves must not only have negative freedom from the molestation of their relationship, but must also feel that they have an affirmative freedom to engage in the intimate communication that is necessary to the person’s making intelligent, independent life preference choices.”³⁰ Additionally, privacy allows the consultant to provide proper advice without any societal motivations or pressures.³¹

Each rationale justifies privileged communications for different types of relationships.³² Relationships where one person seeks advice from another, such as attorney-client or psychotherapist-patient, fit the instrumental theory due to the fact that the privileged communications are the basis of the relationship.³³ Therefore, the relationship may never have been formed for fear of exposure. In contrast, the spousal privilege relies mainly on the privacy rationale because communications made during a marriage are not the foundation of the marital relationship.³⁴ It can be easily said that the institution of marriage would not cease in the absence of an evidentiary privilege attached to spousal communications.³⁵ It should be noted that most privileges, such as the attorney-client privilege, could be justified by using either rationale.³⁶

²⁶ Imwinkelried, *supra* note 17, at 333.

²⁷ *See id.*

²⁸ *Id.* at 336.

²⁹ *See id.* at 335.

³⁰ *Id.*

³¹ *See id.* at 336–37 (explaining how the consultant can only provide unfettered advice under the cloak of privacy).

³² *See id.* at 329–33 (describing the different relationships that are typically formed in society and their justifications).

³³ *See id.* at 333; *see also* Swidler & Berlin v. United States, 524 U.S. 399, 407–08 (1998) (basing the formation of the relationship on the existence of the privilege).

³⁴ *See* GIANNELLI, *supra* note 1, at 601–02.

³⁵ *See id.*

³⁶ *See* Alexander, *supra* note 16, at 219.

There is no reason why instrumental and noninstrumental rationales must be viewed as mutually exclusive; it is perhaps a matter of emphasis. For example, the instrumental argument is bolstered if consideration is given

B. *The Attorney-Client Privilege*

The attorney-client privilege is the oldest of the confidential communication privileges.³⁷ The privilege dates back to the reign of Elizabeth I in England.³⁸ Professor Wigmore defined the attorney-client privilege as:

(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.³⁹

In sum, there must be a confidential communication made between privileged parties “for the purpose of seeking, obtaining, or providing legal assistance to the client.”⁴⁰

Both communications by the client and the attorney are protected by the privilege.⁴¹ The attorney-client privilege is absolute and shields the attorney and client from being compelled to disclose relevant privileged communications in judicial proceedings.⁴² As a result, courts construe the privilege narrowly and strictly apply certain parameters.⁴³ The Supreme

to the notion that the protection of privacy and autonomy is another social benefit fostered by the privilege. The privacy argument, in turn, may require some degree of utilitarian analysis to justify extension of an evidentiary privilege to the attorney-client relationship while denying it to other relationships that are more intimate in nature.

Id.

³⁷ 8 WIGMORE, *supra* note 1, § 2290, at 542.

³⁸ *See id.* at 542–43. Originally, the attorney-client privilege was upheld as a matter of honor, rather than to bolster the attorney-client relationship. *See id.* at 543.

³⁹ 8 WIGMORE, *supra* note 1, § 2292, at 554. A simplified version of this definition provides four essential elements: “(1) A communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.” 1 EPSTEIN, *supra* note 11, at 65.

⁴⁰ 1 EPSTEIN, *supra* note 11, at 65.

⁴¹ *See* Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN ST. L. REV. 381, 385–86 (2005).

⁴² *See* Janet L. Hall, *Limited Waiver of Protection Afforded by the Attorney-Client Privilege and the Work-Product Doctrine*, 1993 U. ILL. L. REV. 981, 985 (1993).

⁴³ *See id.* at 985. “[W]e construe the scope of privileges narrowly. We are reluctant to recognize a privilege or read an existing one expansively unless to do so will serve a ‘public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.’” *Swidler & Berlin v. United States*, 524 U.S. 399, 411–12 (1998) (O’Connor, J., dissenting) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

Court has utilized the instrumental theory to justify the privilege by emphasizing “without the privilege, the client may not have made such communications in the first place.”⁴⁴

In *Upjohn Co. v. United States*,⁴⁵ the Supreme Court recognized a corporate attorney-client privilege while also clarifying the overall purpose of the attorney-client privilege.⁴⁶ “Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”⁴⁷ While the Court refused to set specific rules for the privilege in the context of corporations,⁴⁸ it held that communications made by lower level employees to the company’s counsel were protected under the privilege.⁴⁹

At the same time, the Court reiterated that only disclosures of communications, not the “underlying facts,” were protected.⁵⁰ The Court described how a “‘client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of fact into his communication to his attorney.’”⁵¹ Consequently, the privilege did not “immunize” the facts from being revealed by some means other than the privileged communication.⁵²

This demonstrates that the attorney-client privilege does not automatically attach to every communication made between the attorney and the client.⁵³ The privilege only belongs to the client⁵⁴ and must be affirmatively raised either by the client or on the client’s behalf.⁵⁵ Certain information communicated during the relationship ordinarily does not constitute “privileged”

⁴⁴ *Swidler*, 524 U.S. at 408.

⁴⁵ 449 U.S. 383 (1981).

⁴⁶ *See id.* at 389–90.

⁴⁷ *Id.* at 389.

⁴⁸ *See id.* at 396 (“Any such approach would violate the spirit of Federal Rule of Evidence 501.”).

⁴⁹ *Id.* at 397.

⁵⁰ *Id.* at 395–96.

⁵¹ *Id.* at 396 (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

⁵² *See In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984) (“[T]he privilege does not impede disclosure of information except to the extent that the disclosure would reveal confidential communications.”).

⁵³ *See* 1 EPSTEIN, *supra* note 11, at 66–86; *see also supra* note 51.

⁵⁴ *See* *Richmond*, *supra* note 41, at 386.

⁵⁵ 1 EPSTEIN, *supra* note 11, at 19.

communications.⁵⁶ Examples of non-privileged information are the fact that the relationship exists, the client's purpose for hiring the attorney, and fee or billing arrangements.⁵⁷ Other communications fall within "exceptions" to the attorney-client privilege.⁵⁸ An exception nullifies the protection of the privilege although each element of the attorney-client privilege may be present because of reasons such as public policy concerns.⁵⁹ Exceptions to the attorney-client privilege include a fiduciary exception,⁶⁰ crime or fraud exception,⁶¹ and attorney-client dispute exception.⁶²

As stated by Professor Wigmore, confidentiality provides the backbone for the attorney-client privilege.⁶³ This statement is true when using either the instrumental theory or the privacy rationale to justify the privilege.⁶⁴ Confidentiality supports the policy of enabling free communication between the client and attorney, which aids both the establishment and growth of the relationship.⁶⁵ Thus, the attorney-client privilege may be later waived or destroyed by the loss of the necessary element of confidentiality.⁶⁶ This can be done by (1) either the client or

⁵⁶ See *id.* at 88–133 (providing examples of communications “not encompassed within the privilege”).

⁵⁷ See *id.* at 88–103 (outlining examples of non-privileged information).

⁵⁸ See *id.* at 637 (“The courts have recognized certain contexts in which the attorney-client privilege might be expected to exist but can be invaded by other interested parties.”).

⁵⁹ *Id.*

⁶⁰ See *id.* at 638–39 (defining the Garner Doctrine as the court's recognition of a company's shareholders' ability to “pierce” the company's privilege in corporate derivative actions).

⁶¹ See *United States v. Zolin*, 491 U.S. 554, 562–63 (1989) (explaining that the attorney-client privilege does not encompass communications between attorney and client regarding future criminal acts); *Clark v. United States*, 289 U.S. 1, 15 (1933); *In re Richard Roe, Inc.*, 168 F.3d 69, 71 (2d Cir. 1999); see also 8 WIGMORE, *supra* note 1, § 2298, at 572 (“It has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with the attorney a *crime . . .*”).

⁶² See 1 EPSTEIN, *supra* note 11, at 552–65 (discussing an attorney's ability to breach the attorney-client privilege in attorney self-defense and compensation claims against the client).

⁶³ See 8 WIGMORE, *supra* note 1, § 2311, at 599; see also Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 37 (1997) (“Confidentiality is the key element of the attorney-client privilege . . .”).

⁶⁴ See *supra* notes 16–36 and accompanying text.

⁶⁵ See 8 WIGMORE, *supra* note 1, § 2291, at 545; Burke, *supra* note 63, at 36–37.

⁶⁶ See 1 EPSTEIN, *supra* note 11, at 390. The following examples constitute waiver: purposeful disclosure, partial disclosure, compelled disclosure, failure to

attorney testifying as to the communication, (2) putting the communication into issue in litigation, (3) voluntary disclosure to a third party, or (4) inadvertent waiver.⁶⁷ Additionally, the presence of third parties at the time of the communication generally destroys the privilege *ab initio*.⁶⁸ For example, communications between attorney and client in a crowded room are not confidential as to the third parties in the room; thus, the privilege never applies to those communications.⁶⁹ Therefore, the privilege can only be maintained if the communication is confidential and the attorney and the client maintain that confidentiality.

C. *Federal Rule of Evidence 501*

In 1975, Congress adopted Rule 501 of the Federal Rules of Evidence.⁷⁰ Rule 501 states:

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 courts of the United States *in the light of reason and experience*.⁷¹

This general rule left privileges in the domain of the common law to be governed by court interpretations based on “reason and experience.”⁷²

Originally, the Supreme Court proposed thirteen specific rules of privilege.⁷³ These privileges included a general rule of

object to disclosure, accidental disclosure by the client, and inadvertent disclosure. *See id.* at 398–470.

⁶⁷ *See* GIANNELLI, *supra* note 1, at 588–91.

⁶⁸ *See* 8 WIGMORE, *supra* note 1, § 2311, at 601–03. An exception to this rule allows third parties, such as secretaries or paralegals, to be involved in aiding the litigation without destroying the privilege. *See* GIANNELLI, *supra* note 1, at 578.

⁶⁹ *See* GIANNELLI, *supra* note 1, at 578. However, eavesdroppers do not destroy the privilege. *Id.* at 578–79.

⁷⁰ David P. Leonard, *Federal Privileges in the 21st Century: Introduction*, 38 LOY. L.A. L. REV. 515, 515 (2004).

⁷¹ FED. R. EVID. 501 (emphasis added).

⁷² *See id.*; *see also* *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Trammel v. United States*, 445 U.S. 40, 47 (1980).

⁷³ *See* GIANNELLI, *supra* note 1, at 559; Jeffrey J. Lauderdale, *A New Trend in the Law of Privilege: The Federal Settlement Privilege and the Proper Use of Federal Rule of Evidence 501 for the Recognition of New Privileges*, 35 U. MEM. L. REV. 255, 273 (2005); Leonard, *supra* note 70, at 515 (“Thirty years after the adoption of the

privilege, nine specific privileges, and three procedural rules of privilege.⁷⁴ The Supreme Court's proposed rules of privilege almost halted the codification of the entire Federal Rules of Evidence and were quite controversial.⁷⁵ Concerned that the Court's proposed rules of privilege lacked flexibility,⁷⁶ Congress directed the Court to create one common law rule.⁷⁷ As a result, Rule 501 was created to allow for flexibility within the judiciary by examining each privilege on a case-by-case basis, thus avoiding future "freezing" of the laws of privilege into one formation.⁷⁸

II. THE SELECTIVE WAIVER DOCTRINE AND ITS PRECARIOUS EXISTENCE

A. *The Selective Waiver Cases*

Generally, voluntary disclosure of privileged communications to a third party outside of the attorney-client relationship waives the attorney-client privilege.⁷⁹ The selective waiver doctrine acts as an exception to this rule of waiver by allowing voluntary disclosure of privileged communications by clients to government investigatory agencies, while maintaining the privilege as to

Federal Rules of Evidence, privileges remain uncodedified.”).

⁷⁴ GIANNELLI, *supra* note 1, at 559. The proposed specific privilege rules included “required reports” (502); attorney-client (503); psychotherapist-patient (504); husband-wife (505); clergy-penitent (506); political vote (507); trade secrets (508); state secrets (509); and informant’s privilege (510). *Id.* n.4. For a further discussion about the Supreme Court’s 1972 Proposed Federal Rules of Evidence, see generally Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61 (1974).

⁷⁵ GIANNELLI, *supra* note 1, at 559-60. The controversy delayed enactment of the Rules for two years. *Id.* at 559; see also Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking,”* 53 HASTINGS L.J. 843, 854 (2002) (describing the proposed rules of privilege as “the subject of intense lobbying”).

⁷⁶ See GIANNELLI, *supra* note 1, at 560; Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 126 (1974) (“Congress believed that an evidence code would affect fundamental matters of civil and criminal justice that reach beyond technical courtroom conduct and into the lives of citizens.”).

⁷⁷ See GIANNELLI, *supra* note 1, at 560; Comm. on Comm’n’s & Media Law, *The Federal Common Law of Journalists’ Privilege: A Position Paper*, 60 THE REC. (N.Y. City Bar) 214, 215 (2005) (explaining how Congress found the draft rules to “limit the flexibility of the courts”).

⁷⁸ *Trammel v. United States*, 445 U.S. 40, 47 (1980); see also *Lauderdale*, *supra* note 73, at 258.

⁷⁹ See *supra* notes 66–69.

other non-government third parties.⁸⁰ The utilization of this doctrine by corporations that turn documents over to government agencies has caused a split in the circuit courts of appeals.⁸¹

1. *Diversified Industries, Inc. v. Meredith*

In 1978, the Eighth Circuit became the only circuit court of appeals to recognize the selective waiver doctrine in *Diversified Industries, Inc. v. Meredith*.⁸² After deciding that a report prepared by attorneys for Diversified Industries, Inc. ("Diversified") regarding a proxy fight litigation was protected under the attorney-client privilege,⁸³ the court tackled the question of whether the company waived this privilege by voluntarily providing the privileged document to the Securities and Exchange Commission ("SEC") pursuant to an agency subpoena.⁸⁴ The court concluded that Diversified's disclosure was only a "limited waiver" because the SEC's investigation was "separate and nonpublic."⁸⁵ The court stated, "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."⁸⁶ The court attempted to minimize the effect of allowing Diversified to maintain its attorney-client privilege as to the documents it disclosed to the SEC by noting that third party litigants would still be able to obtain the same information through other means.⁸⁷

In *Diversified*, the Eighth Circuit did not analyze the effect of the selective waiver doctrine on the attorney-client privilege or compare the doctrine to the purpose of the attorney-client privilege.⁸⁸ Instead, the court based its acceptance of the

⁸⁰ See 1 EPSTEIN, *supra* note 11, at 495.

⁸¹ See *infra* notes 82–122 and accompanying text.

⁸² 572 F.2d 596 (8th Cir. 1978) (en banc).

⁸³ See *id.* at 611.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *id.* The court stated that litigants would still have other means available to obtain the same information, such as "examine business documents, depose corporate employees and interview nonemployees, obtain preexisting documents and financial records not prepared by Diversified for the purpose of communications with the law firm in confidence." *Id.*

⁸⁸ The court briefly addressed the issue of whether this constituted a waiver as to other third parties in two short paragraphs. See *id.*

selective waiver doctrine on public policy concerns regarding the importance of cooperation by companies during government investigations.⁸⁹ Since *Diversified*, every other circuit court faced with the issue of whether to recognize the selective waiver doctrine has rejected the doctrine and its public policy justification.⁹⁰

2. *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*

The Sixth Circuit provided the most complete analysis of the selective waiver doctrine in *In re Columbia/Healthcare Corp. Billing Practices Litigation*.⁹¹ In that case, Columbia/HCA challenged a district court's order to produce documents that it had previously disclosed during a Department of Justice ("DOJ") investigation by claiming the attorney-client privilege.⁹² After performing an internal audit, Columbia/HCA agreed to disclose these documents to the DOJ in accordance with a strict confidentiality agreement that would maintain the privileged nature of the documents.⁹³ As a result of the investigation,

⁸⁹ *See id.*

⁹⁰ *See infra* notes 105, 107–13 and accompanying text.

⁹¹ 293 F.3d 289, 295–04 (6th Cir. 2002). In addition to the Sixth Circuit, every other circuit confronted with the selective waiver doctrine has rejected it. *See In re Qwest Commc'ns Int'l Inc., Sec. Litig.*, 450 F.3d 1179, 1192 (10th Cir. 2006); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 291 (6th Cir. 2002); *United States v. MIT*, 129 F.3d 681, 686 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1425–26 (3d Cir. 1991) (rejecting formation of new privilege created by selective waiver); *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982).

⁹² *See Columbia/HCA*, 293 F.3d at 293. The DOJ had previously investigated Columbia/HCA for Medicare and Medicaid fraud. *Id.* at 291. As a result of Columbia/HCA's knowledge of the pending investigation, the company performed an internal audit of its billing practices. *Id.* at 291–92. Initially, when the DOJ requested copies of the internal audit, Columbia/HCA denied the request claiming both attorney-client privilege and work-product doctrine. *Id.* at 292.

⁹³ *See id.* The agreement stated:

[T]he disclosure of any report, document, or information by one party to the other does not constitute a waiver of any applicable privilege or claim . . .

Both parties to the agreement reserve the right to contest the assertion of any privilege by the other party to the agreement, but will not argue that the disclosing party, by virtue of the disclosures it makes pursuant to this agreement, has waived any applicable privilege or work product doctrine claim.

Id. In addition, the agreement allowed the DOJ to transfer any information to other government agencies or congressional committees. *See id.* n.2. Therefore, if the investigation had revealed any wrongdoing on the part of Columbia/HCA,

Columbia/HCA settled with the DOJ and paid a fine for overcharging Medicare via miscoding of Medicare patients.⁹⁴

Once the settlement became public, private insurance companies initiated litigation against Columbia/HCA claiming that the company had also overcharged them.⁹⁵ The litigants demanded access to the audit report that had been disclosed to the DOJ.⁹⁶ Columbia/HCA claimed attorney-client privilege and work product doctrine to preclude disclosure as to those litigants.⁹⁷ Relying on *Diversified*, the company argued that disclosure to the government did not waive the privilege.⁹⁸ Additionally, Columbia/HCA argued that its confidentiality agreement with the DOJ precluded disclosure.⁹⁹ The district court rejected these arguments and followed other circuits' strict construction of the attorney-client privilege.¹⁰⁰ Columbia/HCA appealed the district court's opinion that any third party disclosure of privileged documents waived that privilege.¹⁰¹

The Sixth Circuit affirmed the lower court's rejection of the selective waiver doctrine.¹⁰² After sifting through the "state of 'hopeless confusion'"¹⁰³ of case law on this issue, the court found that other courts had adopted three positions on the selective waiver doctrine. First, some lower courts followed *Diversified* and found the selective waiver doctrine permissible.¹⁰⁴ Second, other courts held the doctrine as never permissible.¹⁰⁵ Finally,

prosecution of the illegal action would have included the documents in question.

⁹⁴ See *id.* at 292.

⁹⁵ See *id.*

⁹⁶ See *id.* at 293.

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² *Id.* at 291.

¹⁰³ *Id.* at 295.

¹⁰⁴ See *id.* at 299. The court discussed the Eighth Circuit in *Diversified* as the only circuit court holding the selective waiver doctrine wholly permissible. The Sixth Circuit then cited district courts that followed *Diversified* in the name of advancing the public's interest in corporate cooperation with government investigations. See *id.* As a side note, the court also alluded to the fact that in a later decision, the Eighth Circuit questioned its decision in *Diversified*, in *In re Grand Jury Proceedings Subpoena*, 841 F.2d 230, 234 (8th Cir. 1988). See *Columbia/HCA*, 293 F.3d at 298 n.15. The Sixth Circuit quoted the Eighth Circuit in *Grand Jury Proceedings* as stating: "[V]oluntary disclosure is inconsistent with the confidential attorney-client relationship and waives the privilege . . ." *Id.*

¹⁰⁵ See *Columbia/HCA*, 293 F.3d. at 295. The court's discussion focused on

courts have held that the selective waiver doctrine is permissible when the third party is the government and disclosure is made pursuant to an agreed upon confidentiality order.¹⁰⁶

After a careful analysis of all three positions, the Sixth Circuit joined the District of Columbia Circuit,¹⁰⁷ First Circuit,¹⁰⁸ Second Circuit,¹⁰⁹ Third Circuit,¹¹⁰ Fourth Circuit,¹¹¹ and the Federal Circuit¹¹² in rejecting the selective waiver doctrine in all circumstances.¹¹³ Utilizing the purpose of the attorney-client privilege provided by the Supreme Court in *Upjohn*, the court found that the doctrine failed to aid the “fostering [of] frank communication between a client and his or her attorney.”¹¹⁴ The court stated that the selective waiver doctrine merely encouraged disclosure of privileged communications to the government that

other circuit courts’ findings that the selective waiver doctrine had no connection with the purpose of the attorney-client privilege, thereby extending the privilege beyond its intended purpose. *See id.* at 297. Additionally, courts found this to allow companies to “pick and choose” among those to whom they want to disclose. *Id.* at 296. Courts also rejected *Diversified’s* basis that companies needed incentive to disclose privileged documents. *See id.* at 297. (“[A] third party . . . has an incentive to do so, whether for gain or to avoid disadvantage.”).

¹⁰⁶ *See id.* at 299–302. Some courts have allowed the non-waiver of privileged documents after disclosure to government agencies only if the disclosure was pursuant to a confidentiality agreement. *See id.*

¹⁰⁷ *Permian Corp. v. United States*, 665 F.2d 1214, 1220 (D.C. Cir. 1981). The D.C. Circuit found that even with a confidentiality agreement, the selective waiver doctrine had “little to do with this confidential link between the client and his legal advisor.” *Columbia/HCA*, 293 F.3d at 296 (quoting *Permian*, 665 F.2d at 1220–21). In *Permian*, the court found that the selective waiver doctrine allows clients to “pick and choose” who the privilege can be used against and “as to communications whose confidentiality he has already compromised for his own benefit.” *Id.*

¹⁰⁸ *United States v. MIT*, 129 F.3d 681, 686 (1st Cir. 1997). The First Circuit found that there would be no logical stopping point for courts applying the selective waiver doctrine. *See Columbia/HCA*, 293 F.3d at 297–98 (citing *MIT*, 129 F.3d at 686).

¹⁰⁹ *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982); *see also Columbia/HCA*, 293 F.3d at 296 n.9.

¹¹⁰ *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1425 (3d Cir. 1991). The Third Circuit held that the attorney-client privilege would be extended beyond its original purpose of “encouraging full disclosure” between client and attorney. *Columbia/HCA*, 293 F.3d at 297 (quoting *Westinghouse*, 951 F.2d at 1425).

¹¹¹ *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988).

¹¹² *Genentech, Inc. v. U.S. Int’l Trade Comm’n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997).

¹¹³ *Columbia/HCA*, 293 F.3d at 302. Since this decision, the Tenth Circuit has also rejected the selective waiver doctrine in *In re Qwest Commc’ns Int’l Inc., Sec. Litig.*, 450 F.3d 1179, 1201 (10th Cir. 2006).

¹¹⁴ *Columbia/HCA*, 293 F.3d at 302.

had *already* been communicated between the client and the attorney.¹¹⁵ Thus, the purpose of the attorney-client privilege had been fulfilled prior to the disclosure of privileged communications to the government.¹¹⁶ Additionally, the court reasoned that the use of the selective waiver doctrine could turn the attorney-client privilege into a strategic weapon for the client's use.¹¹⁷

The court also dismissed the idea of confidentiality agreements as a means to uphold the selective waiver doctrine.¹¹⁸ The attorney-client privilege "is not a creature of contract, arranged between parties to suit the whim of the moment."¹¹⁹ The rejection of the use of confidentiality agreements allowed the court to provide litigants with "certainty," which would have been an impossibility if the court was asked to "line draw" which disclosures were and were not privileged in different circumstances.¹²⁰ Included in its reasoning, the court questioned the integrity of the government when entering into confidentiality agreements with corporations that could "assist wrongdoers in concealing the information from the public domain."¹²¹ The court explained, "The investigatory agencies of the Government should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain."¹²² Therefore, the Sixth Circuit, like most other circuit courts of appeals, rejected the selective waiver doctrine in any form.

¹¹⁵ *See id.* at 302–03.

¹¹⁶ *See id.* ("Nowhere amongst these reasons is the ability to 'talk candidly with the Government.'").

¹¹⁷ *See id.* The court additionally maintained that "any form of selective waiver . . . transforms the attorney-client privilege into 'merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage.'" *Id.* at 302 (quoting *Steinhardt Partners v. Steinhardt Partners*, 9 F.3d 230, 235 (2d Cir. 1993)).

¹¹⁸ *See id.* at 302–03. The court analyzed decisions by lower courts and dicta from the Second Circuit that allowed the selective waiver doctrine when the government and the client had a confidentiality agreement as to other third parties prior to the disclosure of privileged communications. *See id.* at 299–302.

¹¹⁹ *Id.* at 303.

¹²⁰ *See id.* at 304.

¹²¹ *Id.* at 303.

¹²² *Id.*

B. Proposed Federal Rule of Evidence 502

In the wake of the uncertainty created by the state of the selective waiver doctrine in the judicial system, the Standing Committee on the Supreme Court's Judicial Conference approved for publication and comments Proposed Federal Rule of Evidence 502 in June of 2006.¹²³ If approved, Rule 502 would codify the selective waiver doctrine for federal actions.¹²⁴ The section on "selective waiver" in proposed Rule 502 states:

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.¹²⁵

The committee notes outlined the overall purpose of Rule 502 as (1) a resolution of splits among the courts and (2) a tool in the reduction of the cost of litigation.¹²⁶

Although the committee admitted that most courts have rejected the selective waiver doctrine, it expressly cited the public policy rationale relied upon by the Eighth Circuit in *Diversified* and the dissent in *Columbia/HCA* to support the inclusion of the selective waiver doctrine in Rule 502.¹²⁷ The advisory committee's notes were silent as to how the selective

¹²³ See Memorandum from Hon. Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 3 (rev. June 30, 2006) [hereinafter Smith Memo], http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf.

¹²⁴ See FED. R. EVID. 502(c) (Proposed Draft 2006), available at http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf.

¹²⁵ *Id.* Although this section was provided for public comment and approved by the Standing Committee and the Advisory Committee in April of 2006, the actual text of this selection was placed within brackets to demonstrate that the committee has not decided as of yet whether this section will be sent to Congress. *Id.* All rules regarding privileges must be enacted by Congress. 28 U.S.C. § 2074(b) (2000).

¹²⁶ Smith Memo, *supra* note 123, at 8 (Advisory Committee Note). Specifically, the selective waiver provision was included because of the dispute in the courts.

¹²⁷ See *id.*

waiver doctrine related to the attorney-client privilege and its purpose.¹²⁸ Instead, the committee's explanation for inclusion of the doctrine focused on the public policy concerns of private entities cooperating with the government.¹²⁹ "A rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations."¹³⁰ The committee also rejected inclusion of the need for confidentiality agreements between corporations and the government due to the possibility of additional litigation over the sufficiency of the agreements.¹³¹ Therefore, the reasoning for the inclusion of selective waiver in Proposed Rule 502 mirrors the Eighth Circuit's "public policy" rationale, which stands alone among all of the other circuit courts' decisions rejecting the selective waiver doctrine.

III. THE SELECTIVE WAIVER DOCTRINE AND THE CREATION OF A NEW AND UNJUSTIFIABLE PRIVILEGE

A. *A New Government-Investigatory Privilege Cloaked as the Selective Waiver Doctrine*

Courts have correctly proposed that the divergence in purposes behind the attorney-client privilege and selective waiver doctrine creates a new privilege, a government-investigatory privilege, rather than a mere exception or modification to the long-standing attorney-client privilege.¹³² The selective waiver doctrine encompasses more than an exception to the waiver rule of the attorney-client privilege. The attorney-client privilege's purpose has been defined as the promotion of open and frank conversation between the attorney and client.¹³³ This facilitates the *private relationship* between the attorney and client that will serve the public's interest by

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *Id.* (citing *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting)).

¹³¹ *Id.*

¹³² *See In re Qwest Commc'ns Int'l Inc., Sec. Litig.*, 450 F.3d 1179, (10th Cir. 2006); *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1424-26 (3d Cir. 1991).

¹³³ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

creating a just legal system.¹³⁴ Yet on the other end of the spectrum, the selective waiver doctrine's purpose is purely based on the public's need for cooperation between corporations and the government.¹³⁵ This does not take into account the private relationship of the attorney and client, but rather this purpose only focuses on the government and client, which is a different relationship altogether from the attorney-client privilege's purpose.

Neither the same instrumental theory nor the privacy rationale that supports the attorney-client privilege can also justify the selective waiver doctrine. The Supreme Court recognized an instrumental justification for the attorney-client privilege.¹³⁶ The Court reasoned that the client would never have disclosed the privileged communications to the attorney in the first place without the knowledge of the existence of the attorney-client privilege.¹³⁷ Alternatively, if utilizing the privacy rationale to justify the attorney-client privilege, the trusting and open relationship between the attorney and client fosters the existence of a privileged communication.¹³⁸ Quite plainly, both the instrumental theory and privacy rationale are based on the creation or growth of "full and frank" communications between the attorney and client.¹³⁹ However, disclosure of information to the government by the client "has little to do with" the open and frank conversation justification for the attorney-client privilege.¹⁴⁰

¹³⁴ See *id.* ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.")

¹³⁵ See *supra* note 88 and accompanying text.

¹³⁶ See *supra* notes 43–44 and accompanying text.

¹³⁷ See discussion on instrumental theory *supra* notes 20–24 and accompanying text.

¹³⁸ See discussion on privacy *supra* notes 25–31. It is important to realize that neither justification need be exclusively used.

¹³⁹ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

¹⁴⁰ *Permian Corp. v. United States*, 665 F.2d 1214, 1220–21 (D.C. Cir. 1981). It is interesting to compare this with the fact that "exceptions" to the attorney-client privilege lose the protection of the privilege due to their adverse purpose from the attorney-client privilege. See *supra* notes 58–62 and accompanying text. "Whereas confidentiality of communications and work product facilitates the rendering of sound legal advice, advice in furtherance of a fraudulent or unlawful goal cannot be considered 'sound.'" *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032, 1038 (2d Cir. 1984); see also *Garner v. Wolfenbarger*, 430 F.2d 1093, 1102–04 (5th Cir. 1970) (likening the shareholder doctrine to the crime-fraud exception and joint representation exception).

First, the selective waiver doctrine has no effect on the initial conversation between attorney and client.¹⁴¹ In reality, the client would have already openly and frankly communicated with the attorney prior to disclosure of any information to the government.¹⁴² “If clients themselves divulge such information to third parties, chances are that they would also have divulged it to their attorneys, even without the protection of the privilege. Thus, once a client has revealed privileged information to a third party, the basic justification for the privilege no longer applies”¹⁴³ Therefore, the selective waiver doctrine only applies after the client has openly and frankly discussed the matter with the attorney. Thus, the attorney-client privilege and the selective waiver doctrine cannot be justified on the same grounds.

Additionally, the selective waiver doctrine is not like other “exceptions” to the general rule that disclosure to a third party waives the attorney-client privilege.¹⁴⁴ Other exceptions “are consistent with the goal underlying the privilege because each type of disclosure is sometimes necessary for the client to obtain informed legal advice.”¹⁴⁵ Examples of these “exceptions” are the presence of interpreters, secretaries, or paralegals during communications between the attorney and the client.¹⁴⁶ In contrast, the government is in no way a necessary third party for the client to obtain legal advice or the attorney to render legal advice.¹⁴⁷ Therefore, selective waiver fails to qualify as an

¹⁴¹ See *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1425 (3d Cir. 1991).

¹⁴² See *id.* at 1424.

¹⁴³ *Id.*

¹⁴⁴ “The generally recognized exceptions already in place tend to serve the purposes of the particular privilege or protection. When disclosure is necessary to accomplish the consultation or assist with the representation, as in the case of an interpreter, translator, or secretary, an exception to waiver preserves the privilege.” *In re Qwest Commc’ns Int’l Inc., Sec. Litig.*, 450 F.3d 1179, 1195 (10th Cir. 2006).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ All of the corporations involved in litigation over the issue have already provided the government with privileged documents without the known protection of the selective waiver doctrine.

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 . . . in the face of almost unanimous circuit-court rejection of selective waiver

exception to the third party general waiver rule because the selective waiver doctrine's promotion of allowing the government "in" on the communication does not further the privilege's purpose of "open and frank" communication.

In fact, the doctrine could even undermine the purpose of the attorney-client privilege by inhibiting communication between the attorney and client. This may happen when an employee of the client does not divulge information because he or she knows that the employer has no further risk of third party liability due to the disclosed privileged communications whereas the employee still may be at risk, thus, creating a divide between the concerns of the employee and the employer.¹⁴⁸ Additionally, even though the selective waiver doctrine will allow corporations to maintain their privilege as to third parties, it will not protect them from the government passing documents from agency to agency.¹⁴⁹ With this knowledge on hand, further inhibition of the corporate attorney-client relationship may occur.¹⁵⁰

The doctrine may be masked as a simple exception to the rule of waiver of the attorney-client privilege, but in fact, the doctrine creates a new privilege between the government and corporations.¹⁵¹ The purpose of the selective waiver doctrine goes beyond the intended purpose of the attorney-client privilege and does not model any prior justifications or exceptions to the waiver rule of the privilege.¹⁵² Therefore, the selective waiver doctrine in effect creates a new government-investigatory privilege.¹⁵³

Id. at 1193.

¹⁴⁸ See *id.* at 1195.

¹⁴⁹ See FED. R. EVID. 502(c) (Proposed Draft 2006) available at <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>.

¹⁵⁰ "In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law,' particularly since compliance with the law in this area is hardly an instinctive matter." Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1726-27 (2005) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981)).

¹⁵¹ See *Qwest*, 450 F.3d at 1197; *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1425 (3d Cir. 1991).

¹⁵² *Westinghouse*, 951 F.2d at 1425. "Westinghouse argues that the selective waiver rule encourages corporations to conduct internal investigations and to cooperate with federal investigative agencies In our view, to go beyond the policies underlying the attorney-client privilege on the rationale offered by Westinghouse would be to create an entirely new privilege." *Id.*

¹⁵³ See *Qwest*, 450 F.3d at 1198 (rejecting formation of new "government-

B. A Government-Investigatory Privilege Lacks Justification

The selective waiver doctrine cannot stand as a separate government-investigatory privilege. It cannot be justified by either the instrumental theory or the privacy rationale.¹⁵⁴ The instrumental theory relies on a “but-for” causation between the privilege and the ensuing relationship.¹⁵⁵ Yet, a relationship between a corporation and the government is not necessarily based on the existence of the privilege.¹⁵⁶ In fact, the government inserts itself daily into the practices of corporations by other means and has created agencies such as the SEC for this purpose.¹⁵⁷ Therefore, the government’s present involvement with corporations already creates a type of relationship that does not need the judicial aid of a privilege.

In addition, the privacy rationale cannot support a government-investigatory privilege.¹⁵⁸ Corporations do not need privacy to “consult” with the government because the corporations regularly comply with requests from the government.¹⁵⁹ Furthermore, the government does not have the societal fear of sanctions or public outcry due to its “advice” given to any corporation.¹⁶⁰ In fact, the government’s necessity of “privacy” from the public would oppose the very public foundation the government is built upon.¹⁶¹ Therefore, the privacy argument must also fail.

Some argue that the selective waiver doctrine would promote further cooperation by corporations with the government, thereby creating an even more “open” relationship.¹⁶² This

investigation privilege”).

¹⁵⁴ See *supra* notes 16–36 and accompanying text.

¹⁵⁵ See *supra* note 20 and accompanying text.

¹⁵⁶ See Holder Memo, *supra* note 9, § VI.

¹⁵⁷ The very existence of certain government agencies, such as the Securities and Exchange Commission, provides proof that corporations have very little choice in forming a relationship with the government. See Jody E. Okrzesik, Note, *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, 159–62 (2003) (discussing government interaction with corporations through agencies and legislation).

¹⁵⁸ See *supra* notes 25–33, 35–36 and accompanying text.

¹⁵⁹ See *supra* text accompanying note 27.

¹⁶⁰ See *supra* note 30 and accompanying text.

¹⁶¹ The U.S. government is a representative of its citizens. The U.S. Constitution begins with the phrase “We the People” as a symbol of the people’s power in government.

¹⁶² See *In re Qwest Commc’ns Int’l Inc.*, Sec. Litig., 450 F.3d 1179, 1192–93

argument lacks reason. First, it bases a doctrine cloaked as an exception to the waiver rule of the attorney-client privilege on the government-corporation relationship rather than the attorney-client. Second, it ignores the fact that corporations currently provide thousands of privileged documents to the government with prior knowledge that they are waiving the privilege as to those documents.¹⁶³ Due to government incentives for cooperation by private entities, corporations seek to cooperate with the government.¹⁶⁴ Although some may view this as “involuntary cooperation,”¹⁶⁵ the selective waiver doctrine is not a viable alternative. The government should not be allowed to aid the cover-up of possibly criminal or civil wrongdoing by corporations via use of a government-investigatory privilege that could lead other litigants to justice.¹⁶⁶

In addition, a government-investigatory privilege would fail the same judicial scrutiny used to examine new privileges. In *Jaffee v. Redmond*,¹⁶⁷ the Supreme Court analyzed the elements required to recognize the psychotherapist-patient privilege as a new privilege.¹⁶⁸ The Court stated that the relationship between the psychotherapist and patient depended upon trust and confidentiality.¹⁶⁹ In contrast, a government-investigatory

(10th Cir. 2006).

¹⁶³ See *supra* note 147.

¹⁶⁴ The DOJ instituted a policy that allows prosecutors to consider the cooperation by the corporations and their voluntary disclosure of wrongdoing when charging a corporation. See Thompson Memo, *supra* note 9, § VI. Specifically, corporations could be granted “immunity or amnesty or pretrial diversion.” *Id.* “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 . . .” *Id.* Although the DOJ considered this a “critical” component of assessing a corporation’s voluntary disclosure, the waiver of protection was not considered an absolute requirement, but only one assessment factor. See *id.*; see also Holder Memo, *supra* note 9, § VI.

¹⁶⁵ See Michael H. Dore, *A Matter of Fairness: The Need for a New Look at Selective Waiver in SEC Investigations*, 89 MARQ. L. REV. 761, 783–84 (2006) (“[F]or men and women facing the threat of imprisonment, the effective end of their professional careers and financial well-being, and the weight of lining up against the United States Government, it is not much of a choice.”); Okrzesik, *supra* note 157, at 160 (describing corporations as being placed in a “thorny dilemma” by the Holder Memo).

¹⁶⁶ *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002) (stating that the government should not “assist wrongdoers in concealing the information from the public domain”).

¹⁶⁷ 518 U.S. 1 (1996).

¹⁶⁸ See *id.* at 18.

¹⁶⁹ See *id.* at 10.

privilege would hardly instill trust in a relationship between the government and corporations. Since the government would not be prevented from prosecuting corporations because of their disclosed criminal wrongdoings, a remarkably reduced level of “trust” would occur in a government-corporation relationship than like the psychotherapist-patient relationship in *Jaffee*.¹⁷⁰

The decision in *Jaffee* also focused on the evidentiary benefit lost as to third parties if the psychotherapist-patient privilege were to be invoked.¹⁷¹ The Court found that “the likely evidentiary benefit [to the public] that would result from the denial of the privilege is modest.”¹⁷² Conversely, the denial of a government-investigatory privilege would probably have little effect on “the likely evidentiary benefit” it could provide the government due to the amount of information already accessible to the government.¹⁷³

In addition, all fifty states and the District of Columbia had enacted legislation pertaining to the psychotherapist-patient privilege at the time the Court decided *Jaffee*.¹⁷⁴ The Court found this significant in supporting the recognition of the new privilege.¹⁷⁵ Yet as of June of 2006, a government investigatory privilege or selective waiver doctrine lacked any similar type of legislative recognition.¹⁷⁶ “As a practical matter, clients and attorneys who disclose confidential information to government agencies in adversarial roles should expect that their disclosures waive the attorney-client privilege and work product immunity.”¹⁷⁷ Therefore, the selective waiver doctrine or government-investigatory privilege also lacks this essential element of *Jaffee*.

¹⁷⁰ See *supra* note 124 and accompanying text.

¹⁷¹ See *Jaffee*, 518 U.S. at 11.

¹⁷² *Id.* People may not seek help for fear of being exposed to the public. The benefit of people receiving psychological help was found to far outweigh the instances where the information would be necessary in a trial.

¹⁷³ See *supra* note 144.

¹⁷⁴ See *Jaffee*, 518 U.S. at 12.

¹⁷⁵ See *id.* at 12–13 (“We have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one.”).

¹⁷⁶ See *In re Qwest Commc'ns Int'l Inc.*, Sec. Litig., 450 F.3d 1179, 1198–99 & n.8 (10th Cir. 2006) (describing the lack of legislation supporting a new government-investigatory privilege).

¹⁷⁷ Richmond, *supra* note 41, at 412.

In the context of the government-investigatory privilege, the focus should remain on the fairness of allowing the government access to privileged documents while denying other third party litigants the same evidentiary benefit.¹⁷⁸ The Eighth Circuit in *Diversified* did not explain why the government should be treated differently than the ordinary, private litigant.¹⁷⁹ The court only stated that the selective waiver doctrine promotes cooperation by corporations with government investigations, thereby creating a potential loss of information useful for investigations.¹⁸⁰ Reasons for the selective waiver doctrine, including the increase in efficiency of investigations¹⁸¹ and the decrease in costs to the government,¹⁸² fail to provide a reason for the disparate treatment of the private litigant from the government.¹⁸³

The fairness of a government-investigatory privilege also comes into question because of the difference in results between private litigation and government prosecutions. Although criminal sanctions may be imposed on companies or its officers by the government, losses to investors or employees cannot be recouped in this manner.¹⁸⁴ Instead, private litigants must use civil litigation to gain back any of their losses. It has been noted: “In these circumstances, civil litigation is by any objective measure ‘more important’ than an associated government inquiry. As for subjective considerations, such as deterrence, large judgments and settlements in civil cases deter other potential offenders just as well as regulatory penalties or criminal fines.”¹⁸⁵

A government-investigatory privilege would also unfairly deny private litigants access to privileged documents previously

¹⁷⁸ See Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1638–40 (1986).

¹⁷⁹ See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).

¹⁸⁰ See *id.*

¹⁸¹ Zach Dostart, Comment, *Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine*, 33 PEPP. L. REV. 723, 731–32 (2006).

¹⁸² See *id.* at 741.

¹⁸³ See Richmond, *supra* note 41, at 411 (noting that the selective waiver doctrine cannot be justified on the ground that “government investigations are ‘generally more important’ than civil litigation arising out of the same set of facts”).

¹⁸⁴ See *id.* at 411–12 (noting that while the government may extract a large fine from the corporation, such a fine does nothing to lessen the financial harm to the corporation’s investors and employees).

¹⁸⁵ *Id.* at 412.

disclosed to the government.¹⁸⁶ Proponents of the selective waiver doctrine, however, have argued that if the documents had not been disclosed, then the litigant would not have had access to the documents anyway.¹⁸⁷ Arguably, this is why the courts so infrequently recognize new privileges and abhor extending existing ones.¹⁸⁸ The Supreme Court has stated, “[W]e start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.”¹⁸⁹ Therefore, selective denial of “every man’s evidence” should be narrowly construed.¹⁹⁰ Furthermore, the government has the same tools to access information from corporations as any private citizen—if not more.¹⁹¹ Thus, in addition to a lack of justification and necessary elements of other privileges, the advent of a government-investigatory privilege would unfairly advantage one party by the hand of the judicial system itself.

C Proposed Federal Rule of Evidence 502 Ignores the Common-Law History of Privileges

The Federal Advisory Committee has attempted to circumvent the common law process by including the selective waiver doctrine in Proposed Federal Rule of Evidence 502. Prior to the proposal of Rule 502, the selective waiver doctrine had been rejected by most circuit courts.¹⁹² At a hearing on the proposed rule, a representative from the Association of Trial Lawyers of America argued, “[T]his committee seems to be telling

¹⁸⁶ See Tiffany Seeman, Comment, *Safeguarding the Attorney-Client Privilege in the Face of Federal Securities Regulations*, 4 DEPAUL BUS. & COM. L.J. 309, 337–38 (2006) (noting the Sixth Circuit’s argument that the selective waiver rule is unfair to private litigants who would be barred from information selectively released to the government).

¹⁸⁷ See *id.* at 338 (“Thus, the private plaintiff is in no worse position than if no disclosure had been made.”).

¹⁸⁸ See *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996).

¹⁸⁹ *Id.* at 9 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

¹⁹⁰ See *id.*

¹⁹¹ The Eighth Circuit explained the ways in which litigants can gain information from companies. See *Diversified Indus., Inc., v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc). Due to the daunting task of securing information from corporate settings, see Alexander, *supra* note 16, at 228–32, the government probably has a greater chance of obtaining information when employing the same tactics as private litigants because of its vast resources.

¹⁹² See discussion *supra* Part II.A.

24 federal appellate judges from eight different circuits that their decisions were wrong. With all due respect, it's not the committee's place, nor should the committee be trying to undermine well settled law."¹⁹³ Additionally, a closer look at the other provisions of Proposed Rule 502 reveals that their underlying purposes promote the attorney-client privilege, which is not also reflected by the selective waiver doctrine's purpose.¹⁹⁴

Most importantly, the recognition of a government-investigatory privilege or the selective waiver provision of Proposed Rule 502 would distort the purpose and the historically narrow construction of the attorney-client privilege. Instead of allowing corporations to cooperate with the government, this so-called privilege would allow guilty parties to ameliorate their criminal sanctions from the government while escaping possible exposure to liability from innocent third parties—a “having their cake and eating it too” effect—by using the attorney-client privilege to the corporations' advantage inside and outside the courtroom.

Additionally, far from the concrete protection of the attorney-client privilege, a government-investigatory privilege would create no logical stopping point as to what the government could request from corporations.¹⁹⁵ Fishing expeditions by the government into corporations would be unstoppable without the certainty of the attorney-client privilege.¹⁹⁶ As a result, hundreds of years of strict construction of the attorney-client privilege would become distorted. One attendee of the Federal Advisory Committee meeting on Proposed Rule 502 noted that he could not

¹⁹³ Advisory Comm. on Evidence Rules: Hearing on Proposal 502, at 49 (Apr. 24, 2006), http://www.lexisnexis.com/applieddiscovery/lawlibrary/EV_hearing_April_2006.pdf [hereinafter Hearing] (transcript from hearing at Fordham University School of Law).

¹⁹⁴ The other provisions support the purpose of the attorney-client privilege by promoting “open and frank” conversation between client and attorney, which further nurtures the relationship. In the least, the other provisions deal specifically with the direct attorney-client relationship. These provisions include: scope of waiver; inadvertent disclosure; controlling effect of court orders; controlling effect of party agreements; and included privilege and protection. FED. R. EVID. 502 (Proposed Draft 2006), available at <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>.

¹⁹⁵ See Hearing, *supra* note 193, at 15. “Any pretense of request for waiver [by the government] being infrequent would be lost, and such requests would become item one in the play book of regulators and enforcement agencies . . . [which] would be impossible to resist . . .” *Id.*

¹⁹⁶ See *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (stating that the attorney-client privilege must be certain and predictable to those involved).

“conceive of a set of circumstances where an American corporation could ever effectively resist the government’s request or suggestion that waiver must be accommodated.”¹⁹⁷ In essence, the attorney-client privilege would become both a weapon in litigation and a useless form of protection for corporations in the face of requests for privileged communications by the government.

CONCLUSION

The attorney-client privilege’s steely protection of privileged communication morphs into nothing more than a symbolic gesture for corporations’ misuse when faced with the selective waiver doctrine. Courts recognize few privileges because of their drastic exclusion of evidence from the truth-seeking process. The privileges that are recognized must be firmly upheld and narrowly construed to provide certainty and predictability to all litigants. Yet, the very word “selective” opposes this very basic principle. And when a corporation “selectively waives” its attorney-client privilege, the corporation throws the law of privileges into chaos by using the privilege as a weapon, not a common right. Although the attorney-client privilege protects qualified communications from disclosure, it is either an all-or-none proposition.

Furthermore, the public policy rationale of the selective waiver doctrine cannot be squared with the purpose of the attorney-client privilege. In fact, as a separate government-investigatory privilege, the selective waiver doctrine does not meet the qualifications of past privileges. All circuit courts of appeals except for one faced with the issue of recognizing selective waiver have rejected the doctrine. And, common law has always ruled privileges. Therefore, the courts and Congress should not recognize the doctrine in common law or the Federal Rules of Evidence because it distorts the basis of not only privileges, but also the judicial system. In the end, the judiciary is based on seeking the truth for all—not just the government.

¹⁹⁷ See Hearing, *supra* note 193, at 41.