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The Struggle Over Selective Waiver and the Production of Confidential Information to the Government

John M. O'Driscoll
Tressler, Soderstrom, Maloney & Priess, LLP
Chicago

Charmagne Topacio
Tressler, Soderstrom, Maloney & Priess, LLP
Chicago

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Introduction

Adelphia. AIG. Arthur Andersen. Dennis Kozlowski. Eliot Spitzer. Enron. Halliburton. HealthSouth. Homestore.com. Marsh & McLennan. Martha Stewart. Merrill Lynch. Tyco. Worldcom. In reaction to public furor over corporate scandals, Congress introduced the Sarbanes-Oxley Act, and numerous regulatory agencies implemented aggressive tactics to restore public confidence in the system and the perception of accountability. When a corporate client suddenly appears on the radar of the federal or state government, counsel can have a profound effect on the future of the company. It is corporate counsel's responsibility to determine the ramifications of compliance, partial compliance or non-compliance with a governmental demand for information when it is accompanied by a request for waiver. A company must carefully weigh its options in deciding how to respond to the waiver request and the manner in which to assert privilege over sensitive materials. Corporate counsel must help determine whether protections, such as the attorney-client privilege and work product doctrine, must be sacrificed to enable an appropriate disclosure of relevant information and the extent of that sacrifice.

Competing goals create a complicated equation. On one hand, governmental investigators seek information – protected and otherwise – purportedly for the public good. In theory, investigators are to ferret out corruption and enforce the standards and integrity of the system. The SEC, for instance, has taken the position that obtaining the information it typically seeks, including privileged information, "serves the public interest because it significantly enhances the Commission's ability to conduct expeditious investigations and, where appropriate, to obtain relief for investors."[1] When a company cooperates with the SEC's investigation by disclosing all requested information, this allows the government to achieve "considerable savings in time and fiscal expenditure, and encourages both self-policing by companies and settlement of disputes."[2]

The company, on the other hand, seeks to preserve a positive public image and establish credibility with investigators by cooperating with government demands. This must be evenly balanced against the company's goals of minimizing disruption to business operations, allowing the decision makers to have freedom to explore options and safeguarding information from potential civil litigants. Importantly, like any litigant, the company seeks to achieve these ends while preserving its attorney-client privilege on the matters being investigated.

The difficulty surrounding this equation has led to much wrestling in the courts and Congress. An emerging issue among courts and the legislative branch is the extent to which a corporation may assert a "selective waiver" over privileged information. Under this doctrine, the disclosure of privileged information would waive the privilege only selectively — to the government — and not to any other party. Selective waiver has proven to be very controversial, and the prospect of a uniform acceptance of the doctrine in the near future looks slim, particularly with the recent cogitations of a selective

About the Authors

John M. O'Driscoll is a partner in the Chicago office of *Tressler, Soderstrom, Maloney & Priess, LLP* where his practice includes commercial cases, product liability, professional liability, construction, toxic torts and complex litigation. He has taught at the Illinois Institute for Continuing Legal Education, and was named a "2008 Rising Star" by *Illinois SuperLawyers Magazine*, "Rising Stars" edition. John is admitted to practice in Illinois and before the U.S. District Courts for Southern, Central and Northern Illinois. In 2001, John was admitted to practice before the U.S. Supreme Court. He is a member of the American, Illinois State, and Chicago Bar Associations, as well as the Defense Research Institute. John is an active member of the Illinois Association of Defense Trial Counsel (IDC). He has been involved in the following professional committees: ISBA Committee for Membership and Bar Activities; Co-Chair IDC Young Lawyers Committee; IDC Spring Seminar Committee; DRI's Medical Liability and Healthcare Law Committee; IDC Long Range Planning Committee; Chicago Bar Association's Judicial Evaluation Committee, Investigation Division; DRI's Commercial Litigation Committee and Professional Liability Committee. John is co-chair of the IDC's Commercial Litigation Committee.

Charmagne Topacio is an associate at the Chicago office of *Tressler, Soderstrom, Maloney & Priess, LLP* where she focuses her practice in commercial litigation, corporate defense and directors' and officers' liability. Ms. Topacio received her undergraduate degree from Loyola University Chicago where she was a member of the Honors Program and her juris doctorate from Chicago-Kent College of Law where she was Editor-in-Chief of the Journal of Intellectual Property. Prior to joining the firm, Ms. Topacio served as a judicial extern for former Chief Judge Marvin E. Aspen and Judge Joan H. Lefkow of the U.S. District Court for the Northern District of Illinois.

waiver provision in the proposed Federal Rule of Evidence 502.

This article provides a background overview of selective waiver, including an analysis of the current climate behind government investigations, key concepts behind the attorney-client privilege and work product exemption doctrine, judicial discussion of the impact of confidentiality agreements on selective waiver, legislation concerning selective waiver and the current status of FRE 502.

The Driving Force Behind Waiver

Governmental agencies have increasingly spent more time and energy over the years to investigate corporate wrongdoing, including such acts as self-dealing by insiders, the falsification of financial information, corporate accounting schemes and the obstruction of justice. In fiscal year 2007 alone, the U.S. Securities Exchange Commission (SEC) initiated 776 investigations, covering a wide range of issues of financial fraud and insider trading.[3] While investigations by the U.S. Department of Justice (DOJ) and the SEC are the most common, the number of investigations by the Federal Bureau of Investigation and the states' attorneys general has been on the rise.[4] During fiscal year 2006, the FBI investigated 490 corporate fraud cases, which resulted in 171 indictments and 124 convictions of corporate criminals.[5]

Waiver and the attorney-client privilege remain in heavily litigated terrain. Most courts have continued to regard disclosures of confidential information to third parties as a waiver of privilege. Yet, federal agencies have continued to push companies to disclose all information they have relevant to their investigations. The SEC, for instance, considers the level of a company's cooperation during its investigation in determining whether, and to what extent, it would impose financial penalties on it. According to the SEC's January 2006 "Statement Concerning Financial Penalties," "[t]he degree to which a corporation has self-reported an offense, or otherwise cooperated with the investigation and remediation of the offense, is a factor that the Commission will consider in determining the propriety of a corporate penalty."[6]

In March 2006, a coalition of organizations conducted a survey of in-house and outside corporate counsel and their experiences handling government investigations under the policies in place at that time.[7] Almost 75% of the respondents agreed that a "culture of waiver" has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections.[8] Over 50% of the respondents noted a marked increase in waiver requests as a condition of cooperation, and roughly half of all investigations or other inquiries they experienced resulted in privilege waivers.[9] Further, of those whose clients had been subject to investigation in the last five years, over 30% of the respondents stated that the government expected them to waive privilege in order to engage in bargaining or to be eligible to receive more favorable treatment.[10]

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The top three types of materials requested by the government which the respondents generally believed to be protected by privilege were: 1) written reports of an internal investigation, 2) files and work papers that supported an internal investigation, and 3) lawyer's interview notes or memos or transcripts of interviews with employees who were targets.[11] These types of materials can generally assist the government by providing valuable and reliable information regarding key witnesses and documents relevant to the government's investigation.

Corporations that face a threat of indictment have become increasingly willing to enter into deferred prosecution agreements with the government, as well.[12] Corporations must often agree to stipulate to certain incriminating statements of fact and waive the attorney-client privilege prior to receiving the opportunity to enter into a prosecution deferral.[13] Oftentimes, the admissions increase the corporation's exposure to civil liability and the privilege waivers are applied to extend beyond the context of a criminal investigation and into the context of a civil lawsuits by third parties.

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General Background on the Attorney-Client Privilege, Work Product Exemption Doctrine and Waiver

The fundamental principal behind the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[14] Because the attorney-client privilege exists for the benefit of the client, the client holds the privilege.[15] Since the privilege is "in derogation for the search for truth" by preventing disclosure of potentially relevant information, it is narrowly construed and limited to those instances where it is necessary to achieve its purposes.[16] The party invoking the attorney-client privilege has the burden of establishing the applicability of such privilege and protection.[17]

Although the attorney-client privilege applies in a corporate setting, courts have noted that it is more difficult to define the scope of the privilege when the communication is made to in-house counsel because in-house counsel often play multiple roles in a corporation, including purely business roles.

Federal Rule of Evidence Rule 501 sets forth the factors that federal courts consider to determine whether the privilege exists when federal claims are at issue. FRE 501, however, provides that when state law applies to claims, federal courts are to consider privilege in accordance with state law.[18] Under federal common law, the elements of the attorney-client privilege are: (1) where legal advice of any kind is sought (2) from a professional legal advisor 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 advisor, (8) except if the protection be waived.[19]

It is well-settled that the attorney-client privilege applies to corporations.[20] Although the client is a fictitious legal entity that cannot speak, it is personified by employees who represent its interests and speak on its behalf.[21] In general, the privilege belongs to the corporation and may be asserted or waived only by those with authority to do so, typically its directors and officers.[22]

Although the attorney-client privilege applies in a corporate setting, courts have noted that it is more difficult to define the scope of the privilege when the communication is made to in-house counsel because in-house counsel often play multiple roles in a corporation, including purely business roles.[23] In-house counsel not only participate in legal tasks and procedures but also in the day-to-day operations of the corporation.[24] Although the attorney-client privilege attaches only to communications made for the purpose of giving or obtaining legal advice and not with respect to business advice, some courts have held that the privilege was waived where the role of the attorney was unclear at the time certain communications were made.[25]

Upjohn Co. v. United States continues to be the leading federal case on the attorney-client privilege in the corporate setting.[26] In *Upjohn*, the Supreme Court refused to adopt a bright-line rule for determining the extent that the privilege applies to communications between the corporation's attorney and its employees. The Court stated that "the recognition of a privilege based on a confidential relationship should be determined on a case-by-case basis."[27] However, the Court generally observed that confidential communications between a corporate employee and corporate counsel will generally be privileged if the communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned for the purpose of enabling the attorney to provide legal advice to the corporation.[28]

The Court refused to limit the attorney-client privilege to those within the "control group" of the corporation and allowed the privilege to extend to other employees who possessed information needed by the corporate counsel.[29] As noted by the Supreme Court: "In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group . . . who will possess the information needed by the corporation's lawyers."[30] Courts have also extended the protection afforded by the attorney-client privilege to encompass communications between an attorney for a par-

ent corporation and the employees of its subsidiary.[31]

Communications shared between in-house and outside corporate counsel have generally been regarded as privileged where the attorneys represent the same company for the same purpose.[32] As representatives of the same client, both sets of counsel must refrain from sharing any such communications with any third-parties in order to protect the privilege.

For instance, in *Velsicol Chem. Corp. v. Parsons*, the Seventh Circuit Court of Appeals held that an in-house attorney waived the attorney-client privilege when he testified about his communications with outside counsel before a grand jury, even where the corporation did not intend to waive the privilege.[33] The U.S. Attorney's office for the Northern District of Illinois initiated an investigation of possible corporate misconduct within the legal department of Velsicol Chemical Corporation. The in-house attorney appeared before government counsel and the grand jury on a number of occasions and testified to numerous communications, including conversations he had on several subjects with attorneys at an outside firm. The government filed a motion to compel against the corporation to obtain additional information that had been exchanged between the in-house attorney and outside counsel. The government asserted that the corporation waived the attorney-client privilege through its in-house attorney's testimony and that the government should, therefore, be allowed access to the information. The corporation, in turn, argued that it did not intend to waive the privilege, as it did not provide its in-house attorney with the authority to waive it.

The Seventh Circuit Court of Appeals disagreed with the corporation, holding that the corporation waived its privilege where its in-house attorney, by virtue of his position, was a corporate agent with waiver authority.[34] The court's decision was further supported by the fact the corporation "had never produced a corporate resolution or written document purporting to formalize its purported limited waiver of the privilege with regard to its own lawyers or outside counsel."[35] Therefore, the court concluded that the in-house attorney's testimony before the jury was "of such a nature as to effect a waiver of [the corporation]'s attorney-client privilege as to outside counsel."[36]

The work product exemption doctrine is distinct from and broader than the attorney-client privilege, and it exists to protect attorneys' mental impressions, opinions, and/or legal theories concerning litigation.[37] The doctrine shields documents and tangible things "prepared in anticipation of litigation or for trial by and for another party or by or for that other party's representative."[38] The protection exists because "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."[39] The burden of establishing the applicability of the work product doctrine rests with the party's attorney who is claiming the protection.

The work product doctrine has its origins in the seminal case of *Hickman v. Taylor*[40] and was subsequently codified in Federal Rule of Civil Procedure 26(b)(3).[41] Unlike FRE 501, Rule 26(b)(3) does not require federal courts in diversity suits to apply the privilege law of the state in which the federal court sits.[42] State law applies to the rules governing the attorney-client privilege in federal cases, while the work-product exemption doctrine is applied per federal law rather than state law, even in diversity cases.[43]

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Protection for work product is not absolute; courts have described the work product doctrine more accurately as a "limited immunity" rather than a privilege.[44] Rule 26(b)(3) expressly provides that a party may obtain discovery of documents and tangible things prepared in anticipation of litigation, including attorney work product, only upon a showing of substantial need and a showing that the materials are not otherwise obtainable without undue hardship.[45]

Work product protection is broader than the attorney-client privilege, as it "applies to documents prepared by either the client or attorney 'prepared in anticipation of litigation or for trial.'"[46] However, merely factual information may not be withheld under the umbrella of work product.[47] Work product is typically divided into two categories when determining whether such information may be protected from disclosure: "fact work product" and "opinion work product."[48] "[F]act work product may encompass factual material, including the result of a factual investigation. In contrast, opinion work product reveals the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative,' and is entitled to greater protection than fact work

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product."[49] Courts, therefore, afford more scrupulous protection over opinion work product than fact work product.[50]

It is generally well-settled that the attorney-client privilege or work product doctrine may be "waived" by disclosing confidential information to third parties. Whether or not the privilege has actually been waived depends largely on whether the waiver was intentional or unintentional. Most courts have held that an unintentional disclosure of privileged documents or information to a third party does not waive the attorney-client privilege.[51] Under the Federal Rules of Civil Procedure, as amended in 2006, if a party discovers that it unintentionally produced privileged electronic information, the producing party is permitted to demand, or "claw back," its return.[52] What remains uncertain are the ramifications of an intentional disclosure, such as in the instance where a corporation voluntarily discloses privileged information to a federal agency pursuant to subpoena or official demand.

Varying Approaches by the Federal Appellate Courts Toward Selective Waiver

Generally, a voluntary disclosure of confidential information by a client waives any privilege that normally attaches to such material.[53] An exception to this general rule is the "selective waiver" exception recognized by some courts.

The doctrine of selective waiver was first introduced in 1978 by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*.[54] In *Meredith*, the Eighth Circuit upheld the protection for attorney-client communications previously disclosed to the SEC, such that the information remained shielded from discovery and use by other third parties. The court noted that "only a limited waiver of the privilege occurred" where the company disclosed certain materials to the SEC, pursuant to an agency subpoena and non-public SEC investigation, even in the absence of a confidentiality agreement.[55] In that regard, the court found by virtue of its limited disclosure, the company waived the privilege with respect to the SEC alone, and the court declined to allow a civil litigant to obtain discovery of the disclosed materials. The court refused to allow the disclosure to constitute a general waiver as to all parties, explaining that a complete waiver "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."[56] Thus far, the Eighth Circuit is the only federal appellate court that has expressly adopted this concept of "selective waiver" of the attorney-client privilege.

With respect to work product protection, only the Fourth Circuit has adopted the notion of a selective waiver.[57] Although the court found no waiver in relation to the attorney-client privilege communications and fact work product, the court held that waiver did occur with respect to opinion work product. In *In re Martin Marietta Corp.*, the Fourth Circuit held that a company's disclosure to the government of materials from an internal investigation waived the attorney-client and non-opinion work-product privileges when an employee of the company sought to compel disclosure of the documents for use in his defense in a related criminal case.[58] The court reasoned that the company waived such privileges when it made certain disclosures of information to the government, an adversary, in order to induce the government to settle and where the company had promised the government that its disclosures were complete."[59]

The court, however, refused to extend waiver to opinion work product. The court's refusal was based on two reasons. First, the court recognized:

> Opinion work product is to be accorded great protection by the courts and is not subject to discovery. While certainly actual disclosure of pure mental impressions may be deemed waiver, and while conceivably there may be indirect waiver in extreme circumstances, we think generally such work product is not subject to discovery. [60]

The court reasoned that its observation was based on the plain language of Rule 26(b)(3) which suggests "especial protection" for opinion work product since it expressly states that courts are to protect against the disclosure of mental impressions and opinions.[61] Second, the court believed that protecting lawyers from not having to disclose their pure mental impressions and legal theories will "strengthen[] the adversary process, and, unlike the selective disclosure of evidence, may ultimately and ideally further the search for truth."[62] The court, therefore, ruled that "pure expressions of legal theory or mental impressions" would be protected from disclosure.[63]

As stated, the majority of federal appellate courts have rejected selective waiver.[64] The doctrine is not favored as courts have taken the position that privileges inhibit the truth seeking process and should, therefore, be strictly construed and judiciously applied.[65] The Tenth Circuit, citing the D.C. Circuit, explained its rejection of the waiver by stating:

> The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to ob-

> struct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit . . . It is apparent that [the selective waiver] doctrine would enable litigants to pick and choose among regulatory agencies in disclosing and withholding communications of tarnished confidentiality for their own purposes. We believe that the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality.[66]

Some of the federal appellate courts have refused to recognize selective waiver even in the presence of a confidentiality agreement. In *Westinghouse Elec. Corp. v. Republic of the Philippines*, the Third Circuit held that a corporation's voluntary disclosure of documents regarding an internal investigation to both the SEC and the DOJ waived both the attorney-client privilege and the work product doctrine with respect to those documents.[67] The court found that the existence of a nondisclosure and/or confidentiality agreement did not negate the fact that the corporation "deliberately disclosed" work product to two of its "adversaries," the two government agencies investigating allegations against it.[68] The court emphasized that "under traditional waiver doctrine a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else."[69]

The court, therefore, found that the waiver extended to all of the corporation's other adversaries, including the plaintiffs who sought to discover the documents in an unrelated civil proceeding.[70] The court also noted that the theory of selective waiver comprises an unnecessary expansion of the attorney-client privilege. The court explained, "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose."[71]

The Sixth Circuit in *In re Columbia/HCA Healthcare* held that a corporation's voluntary disclosure of internal audit reports to the DOJ waived the attorney-client privilege and work product doctrine over the reports in a subsequent lawsuit, notwithstanding a confidentiality agreement.[72] The court stated that it "rejected the concept of selective waiver, in any of its various forms," and added, "once the privilege is waived, waiver is complete and final."[73] The court reasoned, in part, that "the form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into 'merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage.'"[74]

Most recently, in *In re Qwest Communications, Int'l Sec. Litigation*, the Tenth Circuit refused to adopt the selective waiver doctrine as an exception to the general rules of waiver.[75] The court held that corporation waived its attorney-client privilege by voluntarily producing documents to the SEC and DOJ, despite the existence of a confidentiality agreement among the parties. It reasoned that "[b]ecause exceptions to the waiver rules necessarily broaden the reach of the privilege or protection, selective waiver must be viewed with caution."[76] The court characterized the selective waiver exception as one that constitutes "a leap, not a natural, incremental next step in the common law development of privileges and protections."[77] On November 13, 2006, the Supreme Court denied certiorari of the Tenth Circuit's decision.[78]

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Certain federal appellate courts have yet to expressly reject or accept the selective waiver doctrine and have left a door open to selective waiver conditioned on the presence of a confidentiality agreement. The Seventh Circuit has hinted that it may adopt the concept of selective waiver where the disclosing party reaches a non-disclosure agreement with the party to which it will disclose confidential information.[79] In *Dellwood Farms, Inc. v. Cargill, Inc.*, civil plaintiffs in an antitrust action sought the FBI's audio and video tapes from the DOJ, which held the materials for use in a criminal law investigation of one of the corporate defendants.[80] In an effort to elicit a guilty plea from the corporation, the DOJ played the FBI's tapes to the law firm representing the corporation and the defense attorneys took notes of what they heard on

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the tapes.[81] The DOJ withheld the tapes under the law enforcement investigatory privilege and the Seventh Circuit upheld the privilege claim, despite the fact that the DOJ had not "impos[ed] any restriction on the use that the lawyers might make of the information they gleaned from the tapes."[82] The court found that "no rights of the plaintiffs were invaded by the government's assertion of its law enforcement investigatory privilege," and that "even if there was harm to [the] plaintiffs from the government's failing [*sic*] to obtain a confidentiality agreement or protective order, it would not be a sufficient harm to warrant a finding of forfeiture."[83] In doing so, the court seemed to suggest that it would observe the doctrine of selective waiver if a protective order or confidentiality agreement forbidding further disclosure of the information was in place.[84]

Following *Dellwood*, recent district courts within the Seventh Circuit have inclined toward applying the selective waiver doctrine where an appropriate confidentiality agreement is in place protecting the information. For instance, in *Lawrence E. Jaffe Pension Plan v. Household Intern, Inc.*, the U.S. District Court for the Northern District of Illinois held that the corporate defendant had not waived the work-product doctrine with respect to documents produced to the SEC because it had entered into a sufficient confidentiality agreement with the SEC and "there [was] no evidence that 'any restrictions on the [the documents'] use [as contained in the confidentiality agreement] were loose in practice.'"[85] The confidentiality agreement stated that the corporation did not "intend to waive the protections of the attorney work product doctrine, attorney-client privilege, or any other privilege applicable as to third parties."[86] The agreement also stated that the SEC was only allowed to disclose confidential information "to the extent that the Staff determines that disclosure is otherwise required by law or would be in furtherance of the [SEC's] discharge of its duties and responsibilities."[87] The court found that this language sufficiently limited the SEC's use of disclosed documents in order to uphold the confidential nature of the documents.

Similar to the Seventh Circuit, the Second Circuit in *In re Steinhardt Partners*, declined to adopt a *per se* rule that all voluntary disclosures to the government waived work product protection.[88] While noting that "[c]rafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis," the court observed that an explicit confidentiality agreement with the government would be a means to avoid a complete waiver over the disclosed materials.[89]

Following *In re Steinhardt Partners*, a district court observed in the very recent case of *In re Initial Pub. Offering Sec. Litig.* that despite the reasonableness of taking a case-by-case approach, there should be a "strong presumption" against a finding of selective waiver, and such a waiver should not be permitted "absent special circumstances."[90] In the case, a corporation retained outside counsel to conduct an internal investigation of potential misconduct relating to the allocation of shares during initial public offerings. Outside counsel interviewed company employees regarding their allocation practices and prepared factual summaries of those interviews in memoranda. The corporation subsequently produced the memoranda to U.S. Attorney's Office and the SEC pursuant to letter agreements that contained promises of confidentiality. The corporation later disclosed the memoranda to officers of the National Association of Securities Dealers Regulations, Inc. and former employees that were involved in a separate lawsuit with the company. The court found that the corporation waived work product protection through its voluntary disclosure of the memoranda to adversarial parties, the agencies, despite the existence of a confidentiality agreement. The court found that special circumstances did not exist to warrant a selective waiver in the case where the company did not show that it "zealously maintain[ed]" the confidentiality of the work product from its adversaries.[91]

Legislative Efforts and Agency Memoranda in Support of Selective Waiver

Government agencies have over the years issued memoranda or reports to their respective personnel and attorney staff setting forth the criteria to follow in deciding whether to prosecute a corporation. The DOJ's initial policies and guidelines to its attorneys were issued in 1999 within a memorandum by Deputy Attorney General Eric H. Holder, Jr., entitled "Bringing Criminal Charges Against Corporations" (hereinafter "the Holder Memorandum").[92] The Holder Memorandum suggested that prosecutors "may" consider, as a factor in determining whether to bring charges, "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." Two years later, the SEC issued similar guidelines within a report commonly referred to as the "Seaboard Report."[93] The Seaboard Report also appeared to suggest that a company's willingness to waive privilege would be taken into consideration when evaluating cooperation, which could affect the course of the investigation, prosecution or sentencing of the company.

In 2003, Deputy Attorney General Larry D. Thompson issued a follow-up memorandum to the U.S. attorneys en-

titled "Principles of Federal Prosecution of Business Organizations" (hereinafter "the Thompson Memorandum").[94] Unlike the Holder Memorandum, the Thompson Memorandum was expressly binding on federal prosecutors.[95] The Thompson Memorandum stated that the willingness of a corporation to "disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges" when necessary was a mandatory factor that prosecutors were to consider in evaluating a corporation's cooperation with the DOJ's investigation.

The Thompson Memorandum, which also listed the advancement of litigation costs by the company to indicted individual directors or officers as one factor for prosecutors to consider, elicited strong criticism.[96] In *United States v. Stein*, the U.S. District Court for the Southern District of New York held that the federal prosecutor's use of the Thompson Memorandum was an unconstitutional attempt to pressure a corporation to deny advancement of litigation costs to former employees under indictment in connection with allegedly illegal and abusive tax shelters.[97]

Following the Holder and Thompson Memoranda, in November 2004, the U.S. Sentencing Commission adopted certain amendments to its sentencing guidelines, which provided that corporations could qualify for lenient treatment in exchange for privilege waivers. The commentary to the amendments stated, "Waiver of attorney-client privilege and of work privilege protections is not a prerequisite to a reduction in culpability score [for cooperation with the government] unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[98] In 2005, the Supreme Court clarified that the guidelines were not mandatory but should be considered advisory in nature.[99]

In response to the push toward waiver, Senator Arlen Specter introduced a bill to the Senate in December 2006 to preclude federal agents and attorneys from requesting that an organization waive its privilege. The bill also barred prosecutors from considering a corporation's decision to advance legal fees to employees when measuring cooperation. This bill, known as the Attorney-Client Privilege Protection Act (ACPPA), was later re-introduced into the House in January 2007 with a few revisions. The bill passed the House in November 2007, and as of early 2008, the proposed legislation is pending before the Senate Judiciary Committee for consideration.[100]

Days after the ACPPA was initially introduced in December 2006, Deputy Attorney General Paul McNulty released a memorandum ("the McNulty Memorandum") to replace the Thompson Memorandum in an attempt to appease critics.[101] Similar to the Thompson Memorandum, the McNulty Memorandum outlines the factors that prosecutors are to consider in deciding whether to indict a corporation. The McNulty Memorandum states, in pertinent part, that "waiver of the attorney-client and work product protections is not a prerequisite to a finding that the company has cooperated in the government's investigation." It provides that prosecutors may only request "the least intrusive waiver" of these protections "where there is a legitimate need for the privileged information to fulfill their law enforcement obligations," and sets forth a balancing test for determining whether there is such a need.

The McNulty Memorandum assumes that there is a "legitimate need" for requesting a privilege waiver, and therefore sets forth a step-by-step approach that the government must follow in doing so, depending on whether the information is considered factual or non-factual.

The McNulty Memorandum assumes that there is a "legitimate need" for requesting a privilege waiver, and therefore sets forth a step-by-step approach that the government must follow in doing so, depending on whether the information is considered factual or non-factual. Purely factual information about the underlying misconduct is considered "Category I" information. Legal advice and non-factual attorney work product is considered "Category II" information. When making a charging decision, the prosecutor may consider a corporation's refusal to waive privilege for Category I information, but may not consider such a refusal for Category II information.

The American Bar Association issued a statement in December 2006, which regarded the McNulty Memorandum as "fall[ing] far short" from "preventing further erosion of

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fundamental attorney-client privilege, work product, and employee protections during government investigations."[102] Although the ABA characterized the McNulty Memorandum's requirement of high-level department approval prior to a waiver request an "improvement" over the Thompson Memorandum, it found that more comprehensive and effective remedies were needed.[103] The ABA has, therefore, urged Congress to promptly consider and pass the Specter Bill, which it believes contains those remedies.[104]

In 2006, the Advisory Committee on Evidence Rules (the Committee) recommended adopting a proposed federal rule of evidence that would include a provision on selective waiver — proposed Federal Rule of Evidence 502.[105] Subdivision (c) of the proposed rule initially read:[106]

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

The Committee's notes to the proposed rule explained that despite the proposed language, it had not yet taken a position on the merits of the selective waiver provision as public comment was "especially important to the Committee's [ultimate] determination."[107] Nevertheless, the Committee provided the following rationale, in part, to the proposed selective waiver provision:[108]

> The rule rectifies [the courts'] conflict [regarding selective waiver] by providing that disclosure of protected information to a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court. 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.

Despite this acknowledgement, the Committee subsequently decided to drop the selective waiver provision from that proposed rule.[109] After extensive public review and hearing, the provision proved to be very controversial. At an April 24, 2006 hearing on the proposed rule, a member of the ABA Presidential Task Force on the Attorney-Client Privilege gave the following remarks in opposition to the selective waiver provision and to explain why any purported protection under the provision would be illusory given the evolution of the "culture of waiver:"

> [T]he procedure contemplated in [the proposed selective waiver provision] continues an alarming trend threatening the viability of the corporate attorney-client privilege. Since the mid-1990s and continuing to date, the principle law enforcement and regulatory authorities in the United States have developed policies and guidelines that are designed to induce corporations and other business entities to waive or not assert applicable attorney-client and work product privileges and protections. There are a variety of reasons why such authorities adopted such policies. . .
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> Regardless of the reasons proffered, the result that the Department of Justice, the SEC, the CFTC, and other regulatory and self-regulatory agencies, as well as many state attorneys' general offices and state regulatory agencies, has been a remarked increase in the compelled or requested or suggested or pragmatically inevitable "voluntary" waivers of the privilege and work product doctrine in order to further enhance the likelihood that the company will avoid significant prosecution or regulatory action. The surge in such waivers has been well documented.
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> After more than half a decade of increased pressure – explicit and implicit – on companies to waive the attorney client privilege and work product protections, there has emerged what has been referred to in the survey as "a culture of waiver" in which government agencies expect a company under investi-

gation to waive legal privileges, and many companies do so – most without even being asked any longer, but knowing there is no practical alternative to doing so. [The proposed selective waiver provision] would have the effect of continuing this trend toward waiver and would exacerbate it.

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As the Supreme Court has stated, impairment of these privileges and protections would not only make it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem, but also threaten to limit the valuable efforts of corporate counsel to ensure their clients' compliance with the law. But it is precisely those confidential communications between corporate attorneys and the employees of the corporate client that are imperiled when the attorney-client privilege or work product doctrine is undermined. Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations. Without meaningful privilege protections, lawyers are more likely to be excluded from operating in a preventive rather than reactive manner. And it is not only corporate employees who will curtail and have curtailed the extent of their confidential communications with counsel to seek legal advice on business programs and strategies.

It is our personal experiences that company legal counsel – internal and outside – are curtailing their own activities, such as taking extensive notes at business meetings, for fear that if the subject of the business meetings were ever implicated in a governmental inquiry, whether their company might not even be the target, such counsel's notes would be turned over when the company waived the privilege, and the counsel would be converted into a potential adverse witness against the company as client. Even outside counsel retained to conduct internal investigations are having to be sensitive to procedures that might result in their becoming involuntary adverse witnesses. Those pressures create a potential conflict of interest between attorney and client that the privilege otherwise helps to prevent.

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"As the Supreme Court has stated, impairment of these privileges and protections would not only make it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem, but also threaten to limit the valuable efforts of corporate counsel to ensure their clients' compliance with the law."

But in modern day post-Enron corporate America, the historic policies in favor of protecting privilege and work product are being crowded by the policies of promoting cooperation with governmental agencies and maximizing the effectiveness and efficiency of governmental investigations. Companies formerly expected that the work product their counsel prepared as a result for example of an internal investigation that advice given as a result of such investigation will be protected. They have come to learn that upon the initiation of a governmental inquiry, whether formal or informal, whether the company is a target or not, such expectations of confidentiality are illusory. Internal investigations conducted by and at the direction of legal counsel are still a critical tool by which companies and their boards learn about violations of law, breaches of duty, and other misconduct that may expose the company to liability and damages. They are an essential predicate to enabling companies to take remedial action and to formulate defenses where appropriate. But internal investigations no longer have clear and predictable protections of confidentiality in the culture of waiver environment. Privileged information and work product are routinely expected to be made available to governmental authorities – sometimes at the

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> authority's request on a day-to-day basis during the internal investigations. Under current governmental policies, companies do not realistically have the option to preserve the confidentiality upon which an effective attorney-client relationship is so heavily dependent and otherwise protected by the privilege and doctrine, or they run a considerable risk of being deemed uncooperative by the governmental authority – a characterization that can be and has been a virtual corporate death sentence, or at least extraordinarily financially punitive. Putting it another way, if the government decides a company is not being cooperative, in essence the government can and does act as prosecutor, judge, jury, and executioner. None of this is subject to court review.[110]

A representative of the Association of Trial Lawyers of America further added in opposition to the selective waiver provision that the provision would ultimately force non-parties to become bound to confidentiality agreements or orders that they did not agree to:

> The proposed rule achieves the remarkable result of codifying the selective waiver doctrine, even in cases in which the sole rationale for the doctrine, which is that it encourages corporations to cooperate with government investigations doesn't even exist. . . [T]he Federal Courts of Appeals [have] rejected the selective waiver doctrine, even when the disclosure was being made to the government. To permit selective waiver when the disclosure is between private litigants would severely undermine the attorney client privilege and work product doctrines.
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> [It also] forces terms of confidentiality orders in one case onto parties in a different case. Of course every plaintiff and every defendant has the right to decide whether to enter into a confidentiality order if it makes sense or if it's necessary in that particular case. . . Confidentiality orders, by definition, prevent information from being shared freely. Put another way, they limit the scope of the truth finding process. Sometimes such limitations on the flow of information are necessary to permit parties in a particular case to litigate their case.
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> A court should not be in the business of obfuscating the truth finding process by enforcing confidentiality orders against entities who never had an opportunity to speak to whether or not the production of the privileged materials in question should have resulted in a waiver. Of course this issue arises on when a document is produced or protected by the attorney client privilege or the work product doctrine. Most documents that are covered by confidentiality orders in civil litigation are neither privileged nor work product, and therefore their continued confidentiality is not at risk.
>
> A confidentiality order cannot protect a defendant from waiver of protection when a defendant voluntarily chooses to disclose protected materials to an adversary. This is just another way that the proposed rule improperly attempts to codify the selective waiver doctrine, and the committee should modify [the selective waiver provision] to limit the effect of court approved party agreements and confidentiality orders to the parties in the case before the court.[111]

In addition to such remarks, the Advisory Committee ultimately observed as a rule-making matter, that the doctrine of selective waiver raised issues different from those addressed in the rest of Proposed Rule 502.[112] The Committee stated, "The basic goal of Rule 502 is to limit the costs of discovery (especially electronic discovery), whereas selective waiver, if implemented intended to limit the costs of government investigations, independently of any discovery costs. Thus, the selective waiver provision was outside the central, discovery-related focus of the rest of the rule."[113] The Committee, therefore, opted, instead to submit a separate report to Congress on selective waiver which set forth arguments both in favor and against the doctrine and explained its decision to take no position on the merits of the waiver.[114] The Committee also prepared proposed language for a selective waiver provision should Congress decide to proceed with adopting independent legislation in the future.[115] The Committee prepared the language based on derivations of the Financial Services Regulatory Relief Act and suggestions it received during the public comment period on Rule 502.[116] The draft language stated the following:

Statutory language on selective waiver

> **(a) Selective waiver.** — In a federal [or state] proceeding, the disclosure of a communication or information protected by the attorney client privilege

or as work product — when made for any purpose to a federal office or agency in the course of any regulatory, investigative, or enforcement process — does not waive the privilege or work-product protection in favor of any person or entity other than a [the] federal office or agency.

(b) Rule of construction. — This rule does not:

1) limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law; or

2) limit any protection against waiver provided in any other Act of Congress.

(c) Definitions. — In this Act:

1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

2) "work-product protection" means the protection that applicable law provides for tangible material or its tangible equivalent, prepared in anticipation of litigation or for trial.[117]

On February 28, 2008, the Senate unanimously approved a bill adding Rule 502 into the Federal Rules of Evidence. However, as of the time of the preparation of this article, Congress has not provided any indications as to whether it will entertain the proposed legislative language on selective waiver. Until Congress chooses to do so, corporate counsel must continue to engage in the balancing act of cooperating with the government's demands while safeguarding the company's information from disclosure to other parties. Although courts have not uniformly determined whether a confidentiality agreement entered into by both sides will sufficiently protect against waiver, there may be an instance where a carefully tailored and enforced agreement may help minimize the chance for disclosure.

(Endnotes)

[1] Transcript of Advisory Committee on Evidence Rules: Hearing on Proposal 502: April 24, 2006, at 55.

[2] *Id*.

[3] *See* U.S. SEC, 2007 Performance and Accountability Report, at 25, http://www.sec/gov/about/secpar2007.shtml.

[4] *See, e.g.*, FBI, Financial Crimes Report To The Public, Fiscal Year 2006, http://www.fbi.gov/publications/financial/fcs_report2006/financial_crime_2006.htm, providing chart which reflects an increase in the number of cases between FY 2002 and 2006.

[5] *Id*.

[6] SEC Statement Concerning Financial Penalties (Jan. 4, 2006), http://www.sec.gov/news/press/2006-4.htm.

[7] *See The Decline of the Attorney-Client Privilege in the Corporate Context*, prepared by a Coalition of Business Groups, including, in part, the Association of Corporate Counsel and Business Civil Liberties, Inc. (March 2006), at 3. This survey was taken while the guidelines under the Thompson Memorandum were still in place prior to the DOJ's release of the McNulty Memorandum, discussed below. Therefore, the statistics cited herein may potentially be outdated.

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] *Id*. at 4.

[12] *See* Lawrence D. Finder and Ryan D. McConnell, *Annual Corporate Pre-Trial Agreement Update-2007*, 22nd National Institute on White Collar Crime (March 2008), available at http://ssrn.com/abstract=1080263.

[13] *See, e.g., United States v. Stein*, No S1 05 Crim. 0888, 2006 WL 1063295 (S.D.N.Y. April 5, 2006).

[14] *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677 (1981).

[15] *See, e.g., Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986 (1985).

[16] *United States v. Nixon*, 418 U.S. 683, 710 (1974), *cert. denied*, 449 U.S. 994 (1980).

[17] *United States v. Stern*, 511 F.2d 1364, 1367 (2nd Cir. 1975).

[18] *See, e.g., Caremark, Inc. v. Affiliated Computer Servs, Inc.*, 192 F.R.D. 263, 267 (N.D. Ill. 2000) (applying the "control group test" under Illinois law and holding that communications between outside counsel and a consultant, who was effectively part of client's control group, were privileged).

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[19] *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (*quoting* 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2292 (John T. McNaughton rev. 1961)).

[20] *See Upjohn Co.*, 449 U.S. at 390.

[21] *Weintraub*, 471 U.S. at 348; *In Re Vioxx Prods. Liab. Litig.*, 501 F.Supp.2d 789, 796 (E.D. La. 2007).

[22] *Weintraub*, 471 U.S. at 348-49; *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996).

[23] *See, e.g., United States Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994).

[24] *See Upjohn Co.*, 449 U.S. at 391-2.

[25] 6 James Wm. Moore et al., *Moore's Federal Practice* § 26.49 (3d ed. 2007); *In re Grand Jury Proceedings*, 156 F.3d 1038, 1042 (10th Cir. 1998).

[26] *Upjohn Co.*, 449 U.S. 383, 101 S.Ct. 677 (1981); *United States v. Edwards*, 39 F.Supp.2d 716, 730 (M.D. La. 1999) (noting that *Upjohn* is one of the leading cases on the scope of the attorney-client privilege in the case of corporate representation).

[27] *Upjohn Co.*, 449 U.S. at 396.

[28] *Id.* at 394.

[29] *Id.* at 391.

[30] *Id.*

[31] *See, e.g., Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 472-73 (W.D. Mich. 1997) ("The universal rule of law, expressed in a variety of contexts, is that the parent and subsidiary share a community of interest, such that the parent (as well as the subsidiary) is the 'client' for purposes of the attorney-client privilege."); *Medcom Holding Co. v. Baxter Travenol Labs.*, Inc., 689 F. Supp. 841, 842-44 (N.D. Ill. 1988).

[32] *United States v. Evans*, 113 F.3d 1457, 1464 (7th Cir. 1997).

[33] *Velsicol Chem. Corp. v.Parsons*, 561 F.2d 671, 675 (7th Cir. 1977).

[34] *Velsicol*, 561 F.2d at 675.

[35] *Id.*

[36] *Id.* at 675-76.

[37] *In re Special September 1978 Grand Jury* (II), 640 F.2d 49, 61-63 (7th Cir. 1980).

[38] Fed. R. Civ. P. 26(b)(3).

[39] *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S.Ct. 685 (1947).

[40] *Hickman*, 329 U.S. 495, 67 S.Ct. 685 (1947).

[41] *Long v. Anderson Univ.*, 204 F.R.D. 129, 136 (S.D. Ind. 2001).

[42] *See Abbott Labs v. Alpha Therapeutic Corp.*, 200 F.R.D. 401, 405 (N.D. Ill. 2005).

[43] *Abbott Labs*, 200 F.R.D. at 405.

[44] *See, e.g., Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 658 (S.D. Ind. 1991).

[45] Fed.R.Civ.P. 26(b)(3).

[46] *Abbott Labs*, 200 F.R.D. at 405 (citing *In re Air Crash Disaster at Sioux City, Iowa On July 19, 1989*, 133 F.R.D. 515, 519 (N.D.Ill.1990); Fed.R.Civ.P. 26(b)(3)).

[47] *Smithkline Beecham Corp. v. Apotex. Corp.*, 193 F.R.D. 530 (N.D. Ill. 2000).

[48] *Caremark, Inc. v. Affiliated Computer Servs, Inc.*, 195 F.R.D. 610, 616 (N.D. Ill. 2000).

[49] *United States v. Adlman*, 134 F.3d 1194, 1196 (2nd Cir. 1998).

[50] *In Re Grand Jury Proceedings*, 33 F.3d 342, 348 (4th Cir. 1994).

[51] *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1126 (7th Cir. 1997); *see also Fed. R. Civ. P. 26(b)(5); Gray v. Bicknell*, 86 F.3d 1472 (8th Cir. 1996) (discussing the various approaches that courts have taken to determining whether an inadvertent disclosure of privileged documents by an attorney or client constitutes a waiver of privilege).

[52] *See* Fed. R. Civ. P. 26(b)(5).

[53] *See United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989).

[54] *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978).

[55] *Meredith*, 572 F.2d at 611.

[56] *Id.*

[57] *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1998).

[58] *In re Martin Marietta Corp.*, 856 F.2d at 624-626.

[59] *Id.* at 625.

[60] *Id.* at 626.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *See In re Qwest Communc'n Int'l Inc. Sec. Lit.*, 450 F.3d 1179, 1186 (10th Cir. 2006) (citing decisions from the D.C. Circuit and the First, Second, Third, Fourth and Sixth Circuits which found that "[t]here is almost unanimous rejection of selective waiver."); *United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681, 684-86 (1st Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234-36 (2nd Cir. 1993); *Permian Corp. v. United States*, 665 F.2d 1214, 1220-22 (D.C.

Cir. 1981); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1415-18 (Fed. Cir. 1997).

[65] *See In re Qwest Communc'n Int'l Inc Sec. Lit.*, 450 F.3d at 1185.

[66] *Id*. (citing *Permian Corp*., 665 F.2d at 1221-1222).

[67] *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991).

[68] *Westinghouse*, 951 F.2d at 1427, 1431.

[69] *Id*. at 1427.

[70] *Id*.

[71] *Id*. at 1425.

[72] *In re Columbia/HCA Healthcare*, 293 F.3d 289, 302 (6th Cir. 2002).

[73] *In re Columbia/HCA Healthcare*, 293 F.3d at 302, 307.

[74] *Id*. at 302 (internal citation omitted).

[75] *In re Qwest Communc'n Int'l Inc. Sec. Lit.*, 450 F.3d 1179, 1192 (10th Cir. 2006).

[76] *In re Qwest Communc'n Int'l Inc. Sec. Lit.*, 450 F.3d at 1192.

[77] *Id*.

[78] *Qwest Communc'n Int'l. v. New England HealthCare Employees Pension Fund*, 127 S.Ct. 584, 166 L.Ed.2d 429 (2006).

[79] *Dellwood Farms, Inc. v. Cargill, Inc*., 128 F.3d 1122 (7th Cir. 1997).

[80] *Dellwood Farms, Inc*., 128 F.3d at 1124.

[81] *Id*.

[82] *Id*.

[83] *Id*. at 1126, 1128.

[84] *Id*. at 1127.

[85] *Lawrence E. Jaffe Pension Plan*, 244 F.R.D. 412 (N.D. Ill. 2006) (*citing In re Qwest Communc'n Int'l Inc. Sec. Lit.*, 450 F.3d at 1194).

[86] *Id*.

[87] *Id*.

[88] *In re Steinhardt Partners*, 9 F.3d 230, 236 (2nd Cir. 1993).

[89] *In re Steinhardt Partners*, 9 F.3d 230 at 236. *See also In re Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274, 284 (S.D.N.Y. 1995) (stating that disclosures "made pursuant to confidentiality agreements intended to preserve any privilege applicable to the disclosed documents" satisfied the standard set forth in *In re Steinhardt Partners*).

[90] *In re Initial Pub. Offering Sec. Litig.*, No. 21-MC-92(SAS), 2008 WL 400933, at *6 (S.D.N.Y. Feb. 14, 2008).

[91] *In re Initial Pub. Offering Sec. Litig*., 2008 WL 400844 at *8.

[92] *See* Eric H. Holder, Jr., Deputy Attorney General, *Bringing Criminal Charges Against Corporations* (June 16, 1999), available at http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html.

[93] SEC, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Oct. 23, 2001), available at http://www.sec.gov/litigation/investreport/34-44969.htm.

[94] *See generally* Larry D. Thompson, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations* (January 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

[95] *See* U.S. Dep't of Justice, Criminal Resource Manual §163 (2005).

[96] Larry D. Thompson, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations* (January 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; *See, e.g., Unites States v. Stein*, No S1 05 Crim. 0888, 2006 WL 1735260 (S.D.N.Y. June 26, 2006).

[97] *Stein*, No S1 05 Crim. 0888, 2006 WL 1735260 (S.D.N.Y. June 26, 2006).

[98] U.S. Sentencing Guidelines Manual §8C2.5(f), comment, n.12 (2004). The waiver language in Section 8C2.5 was subsequently deleted, effective November 1, 2006.

[99] *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005).

[100] *See* Attorney-Client Privilege Protection Act of 2007, H.R. 3013, S. 186, 110th Cong. 1st Sess. (2007).

[101] *See* Paul J. McNulty, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

[102] *See Statement By ABA President Karen J. Mathis Regarding Revisions To The Justice Department's Thompson Memorandum* (Dec. 12, 2006), available at http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59.

[103] *Id*.

[104] *Id*.

[105] *See Proposed Amendment to the Federal Rules of Evidence*, r. 502(c), at 2, attached to *Report of the Advisory Committee on Evidence Rules from the Advisory Committee on Evidence Rules To The Standing Committee on Rules of Practice and Procedure* (May 15, 2006), available at http://www.uscourts.gov/rules/Reports/EV05-2006.pdf.

[106] *Id*.

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[107] *Id*. at 6.

[108] *Report of the Advisory Committee on Evidence Rules from the Advisory Committee on Evidence Rules To The Standing Committee on Rules of Practice and Procedure,* at 9.

[109] *See Report of the Advisory Committee on Evidence Rules from the Advisory Committee on Evidence Rules To The Standing Committee on Rules of Practice and Procedure,* at 2-4 (May 15, 2007), available at http://www.uscourts.gov/rules/Reports/EV05-2007.pdf.

[110] Transcript of Advisory Committee on Evidence Rules: Hearing on Proposal 502: April 24, 2006, at 14-18.

[111] *Id*. at 52-53.

[112] *Id*., Draft of Cover Letter of Congress on Selective Waiver, attached to Report, at 3.

[113] *Id*.

[114] *Report of the Advisory Committee on Evidence Rules from the Advisory Committee on Evidence Rules To The Standing Committee on Rules of Practice and Procedure,* at 2-4 (May 15, 2007).

[115] *Id*.

[116] *Id*., Draft of Cover Letter of Congress on Selective Waiver, attached to Report, at 3.

[117] *Id*., Draft of Cover Letter of Congress on Selective Waiver, attached to Report, at 4.