Steven K. Hazen

06 - EV- 023
Testify

December 11, 2006

VIA EXPRESS MAIL

Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure,
Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, D.C. 20544

re Public Hearing of the Advisory Committee on Evidence Rules
Proposed Rule 502, Federal Rules of Evidence
January 12, 2007 -- Phoenix, AZ

Dear Mr. McCabe:

Pursuant to the Notice from your office to the Bench, Bar and Public dated August 10, 2006, this will serve as my formal request to testify at the above-referenced Public Hearing. My *curriculum vitae* is attached for your information and background, but it is not intended to be part of the record of the hearings or the proceedings of the Advisory Committee.

I have been invited to participate in meetings being held in Palm Springs, CA on January 11-13 in conjunction with a Planning Meeting of the State Bar of California Board of Governors. If you establish a schedule for persons providing testimony to the Public Hearing on proposed FRE 502 in Phoenix and can send it to me (hopefully by email), that will allow me to indicate to the State Bar staff when I would be available to participate during the Board of Governors meetings

Thank you very much for your attention to this matter.

Very truly yours,

Steven K Hazen

Steven K. Hazen

Enclosure

Testimony

BUSINESS LAW SECTION
THE STATE BAR OF CALIFORNIA

STATEMENT OF
STEVEN K. HAZEN[1]
EXECUTIVE COMMITTEE
STATE BAR OF CALIFORNIA BUSINESS LAW SECTION

before the

ADVISORY COMMITTEE ON EVIDENCE RULES
OF THE
STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUDICIAL CONFERENCE OF THE UNITED STATES

PHOENIX, ARIZONA
JANUARY 12, 2007

INTRODUCTION

Chairman Smith, Committee Members, and other members of the Bench in attendance. Good afternoon. My name is Steve Hazen. On behalf of the Executive Committee of the State Bar of California Business Law Section, of which I am a member and currently serve as its Secretary, I would like to like to thank the Committee for convening this hearing and for the opportunity to testify before it.

The State Bar of California is a unitary bar and is an agency of the Supreme Court of California. It activities are subject to the requirements set forth by the U.S. Supreme Court in *Keller v. State Bar*.[2] The Business Law Section is one of 16 sections of the State Bar created as advisory organizations of it under Article XIII of the Rules and Regulations of the State Bar, as approved by the Supreme Court of California. Membership in the Section is voluntary and funding for activities of it, including all legislative activities such as this, is obtained entirely from voluntary sources and not from mandatory dues of the State Bar. There are currently

1 (310) 377-4356, SKHazen@abanet.org. Prior to launching his current independent consulting services in Corporate Governance and Corporate Compliance in October 2006, the author practiced law for over 30 years in Los Angeles with Davis Wright Tremaine LLP; Kelley Drye & Warren LLP; Mayer Brown & Platt; Paul, Hastings, Janofsky & Walker; and O'Melveny & Myers. He currently serves as an Advisor to the ABA Presidential Task Force on Attorney-Client Privilege and was co-author with 3 other participants in the activities of that Task Force (including its Chair) of a comment letter dated April 19, 2006 submitted to the Committee in connection with earlier proceedings of it on FRE 502.

2 496 U.S. 1 (1990).

approximately 9,000 members of the State Bar who are members of the Section, each with a practice focusing on issues faced by business organizations. Positions set forth in this statement are only those of the Executive Committee of the Section. As such, they have not been adopted by the State Bar's Board of Governors, its overall membership, or the overall membership of the Section, and are not to be construed as representing the position of the State Bar of California.

EXECUTIVE SUMMARY

We applaud the activities of the Committee in seeking to establish clarity and uniformity as to inadvertent disclosure of confidential information and the impact that has on the vitality of attorney-client privilege. We have not taken a position on those provisions of proposed Rule 502 of the Federal Rules of Evidence, but support efforts that will preserve the privilege and the confidentiality of attorney-client communications protected by it.

The purposes of this Statement are to record the Executive Committee's opposition to the proposal to create a statutory basis[3] for "selective waiver" as contained in 502(c) of the proposed Rule and to invite your attention to the reasons why the creation of a selective waiver would be inconsistent with more than 400 years of judicial reasoning behind the protections of attorney-client privilege and attorney work product immunity. There may be other appropriate measures, but selective waiver fails under each of the standards addressed here. That failure alone would be fatal.

We believe that not including the proposed selective waiver provisions of FRE 502 would enhance the effort of the Committee in bolstering the attorney-client privilege and work product immunity through other provisions of the proposal. Those provisions are straight-forward and relatively non-controversial. It would be a shame if the attempt to legislate selective waiver impeded the fine work of the Committee on those provisions.

THE SECTION'S STAKE IN THIS ISSUE

The Section has been an active participant in the public dialogue about attorney-client confidentiality since 2002 when the SEC was considering proposed regulations pursuant to Section 307 of the Sarbanes-Oxley Act of 2002: the Part 205 Rules as they were ultimately adopted.[4] With the authorization of the Executive Committee and in conjunction with the State

3 We note that, while FRE 502 is being examined in the context of rulemaking under the authority of the U.S. Supreme Court, 28 U.S.C. 2071, it will take effect only if approved by Act of Congress. 28 U.S.C. 2074(b). As such, it would be a legislative process.

4 A joint letter from the Section and the Corporations Committee dated December 16, 2002 to the Securities and Exchange Commission is available at http://www.sec.gov/rules/proposed/s74502/tghoxiq1.htm and a follow-up joint letter dated April 7, 2003 is available at http://www.sec.gov/rules/proposed/s74502/tghoxie1.htm (both last visited on December 27, 2006).

Bar's Committee on Professional Responsibility and Conduct,[5] one of the Standing Committees of the Section, the Corporation Committee, issued an Ethics Alert in March 2004 to all California practitioners that following a purported safe harbor under the Part 205 Rules would be inconsistent with obligations of confidentiality specified under the State Bar Act.[6]

When the Section first started speaking out on this topic, the importance of the attorney-client privilege and work product immunity in California was seen in some circles as being unique to our state laws. Since then, three Resolutions adopted by the ABA House of Delegates have demonstrated that those positions are very much the mainstream. Analysis published in 2003 on the authorization of the Executive Committee as to the differences between the roles of auditor and lawyers were effectively recognized by the ABA with unanimous approval by the House of Delegates of Recommendation 302A in August 2006.[7]

With the authorization of the Executive Committee, the Corporations Committee recommended in May 2005 that the ABA go on record opposing any legislative attempt to recognize selective waiver. That recommendation has equal relevance to proceedings of the Committee. The purpose of this Statement is to set forth certain analytical bases for such conclusion and in the process support our recommendation that Rule 502(c) be deleted from the proposal.

EVALUATING SELECTIVE WAIVER

We invite the attention of the Committee to the following standards by which "selective waiver" needs to be evaluated: (1) the overwhelming weight of case law and principles articulated in it, (2) the impact on communications between attorney and client, (3) the impact on expectations of confidentiality, (4) the impartiality of the judicial system, (5) confidentiality as a commodity or bargaining chip, and (6) federalism. If the Committee elects to maintain FRE 502(c), as proposed, it is likely that these standards will serve as an obstacle to the larger goal of the Committee to strengthen privilege and work product by addressing issues of inadvertent

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5 The Committee of Professional Responsibility and Conduct ("COPRAC") is a committee of the State Bar itself, not of a Section. COPRAC played an active role in urging the United States Sentencing Commission to rescind changes to the "Organizational Sentencing Guidelines" that had made waiver of privilege one of the standards for determining applicable sentences for violation of federal law. See letter dated March 22, 2006, available at http://www.abanet.org/buslaw/attorneyclient/materials/stateandlocalbar/20060418000000.pdf (last visited on December 27, 2006).

6 Copy available at http://calbar.ca.gov/calbar/pdfs/SEC-ethics-alert.pdf (last visited on December 27, 2006).

7 A copy of Recommendation 302A setting forth the Resolutions adopted by the House of Delegates is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/0806_recommendation.pdf and the Report in support of them is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/0806_report.pdf (both last visited on December 27, 2006). The Public Commentary of the Corporations Committee on this topic dated November 18, 2003, authorized for publication by the Executive Committee, is available at http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/corporations/2003-11-18_public-commentary.pdf (last visited on December 27, 2006).

disclosure. The volitional nature of disclosure is elemental to selective waiver but is completely missing in the other provisions of FRE 502. Coupling selective waiver with those other provisions undermines the credibility of them.

A. Existing Case Law

The provisions of FRE 502(c) would have the effect of supplanting case law on the subject of selective waiver and reversing the overwhelming majority of it. As the 10th Circuit recently noted in *In re Qwest Communications Securities Litigation,*[8] however, the common law remains relevant to the deliberations of the Committee in deciding whether to recommend such legislation.[9] Indeed, the courts have essentially been the custodian of the attorney-client privilege and the attorney work product doctrine. As such, they have often been called upon to examine the benefits of those protections and apply the legal principles justifying them. That reservoir of analysis and experience should not be ignored as the courts themselves would have to apply the selective waiver concept if legislation is ultimately adopted.

Among other things, preserving those protections necessarily is a barrier to finding the "truth." For over 400 years, the uniform view of the common law judiciary has been that the benefits of attorney-client confidentiality and preservation of it (through the privilege and work product doctrine) to society and the administration of justice outweigh that obstacle to finding out the "truth." Of course, the States have historically legislated in this area and even the U.S. Congress has done so as relates to the federal judicial system.[10] Still, it is the courts that have the

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8 450 F.3d 1179 (10th Cir. 2006).

9 "Whether a rule-making or legislative venue is appropriate to address the issues raised by Qwest and amici is a question for the Standing Committee and Congress. The rule-making and legislative processes, however, need not proceed wholly independent of the common law. The accumulated experience of federal common law in the area of attorney-client privilege and work-product protection is but another source for the legislative and rule-making bodies to draw on to inform their deliberations concerning the need for and parameters of selective waiver or a new privilege." *Id.*, at 1201.

10 Most recently, the 109th Congress passed the Financial Services Regulatory Relief Act of 2006 and it was signed into law on October 13, 2006 (the "FSRRA"). Section 607 of it includes a provision recognizing selective waiver in the context of regulated financial services enterprises: "[S]ubmission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority." It should be noted, however, that the FSRRA addressed a situation in which the communications and documents covered by that provision and for which, by existing law and/or regulation, the regulated entities did not enjoy any confidentiality at all vis-à-vis the regulatory authorities so the pre-requisite for the privilege was missing from the start. By law and/or regulation, the results of the regulatory examination were protected from discovery by third parties. In addition, adoption of that selective waive provision would not encourage the regulators to have greater access than they currently had as that was essentially unbounded in theory and actually unbounded in practice. Thus, enactment of the FSRRA would not turn privilege into a commodity to be traded for some benefit as the regulators granted none in any event and did not need to do so in order to get everything they sought. The FSRRA provides no support for potential legislation along the lines of FRE 502(c).

final say on how such laws are applied and interpreted as well as how the common law principles surrounding the concepts impact on application of them.

The case law that has developed when courts have done just that will be a significant hurdle to overcome for those advocating legislation of a selective waiver provision -- insurmountable, I submit, unless those principles are simply ignored. In the federal area, the U.S. Supreme Court has yet to consider the issue. Among the Circuits, only one has recognized selective waiver: the Eighth Circuit in *Diversified Industries, Inc. v. Meredith.*[11] That decision has the following significant uncertainties, making it questionable as a meaningful analysis: (1) it was decided before the *Upjohn*[12] ruling was handed down and does not reflect the balancing set forth in it, (2) it arose in the context of then-unresolved conceptual struggles between "control group" and "subject matter" theories of privilege as applicable to corporate or other organizational clients[13], (3) it is long on conclusion and short on analysis, and (4) long after the D.C. Circuit in *Permian Corp. v. United States*[14] invoked the reasoning of *Upjohn* in casting serious doubt on the analysis used in *Diversified Industries*, the Eighth Circuit had occasion to consider the issue of selective waiver in the context of the attorney work product doctrine and ruled against it.[15]

Every other Circuit having addressed the issue has either specifically rejected the *Diversified Industries* holding or reached a decision inconsistent with it. When considering FRE 502(c), the Committee would properly keep well in mind the legal concepts and analysis set forth in those Court of Appeal decisions. For the convenience of the Committee, selected extracts from them are set forth on Attachment A to this Statement. Adoption of FRE 502(c) would be in conflict with the reasoning in all of them. The draft comment to FRE 502(c) leaves the impression of "conflict" among the Circuits on selective waiver but that exists only by virtue of the *Diversified Industries* case. FRE 502(c) would legislatively resolve that "conflict" in favor of the lone Court of Appeals decision in favor of selective waiver, one that spent no more than a few lines addressing the issue, in derogation of numerous other decisions that rigorously analyzed the matter in detail and uniformly rejected selective waiver as articulated in those few lines of a single case.

B. Impact on Communications

One of the most oft-quoted portions of the Supreme Court ruling in the *Upjohn* case is the one emphasizing the importance of unfettered communications between attorney and client:

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11 572 F.2d 596 (8th Cir. 1977).

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

13 The *Upjohn* decision did not, as a matter of precision, choose between the two but it did reject the "control group" analysis which occupied much of the focus of the *Diversified Industries* opinion. *Id.*, at 397.

14 665 F.2d 1214 (D.C. Cir. 1981).

15 *In re Chrysler Motors Corp.*, 860 F.2d 844 (8th Cir. 1988).

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. [citation omitted] 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. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[16]

While some may think it overly glib to cite such *dicta* or that doing so seeks to prove too much, the simple fact is that a fundamental component of the attorney-client privilege is the impact that would result on communications between attorney and client if the protections of the privilege did not exist. Any examination of selective waiver must, therefore, consider the impact of it on that communication.

I am aware that advocates of selective waiver have asserted that there is no significant impact on candor when confidentiality is not preserved, but I am not aware of any empirical studies conducted on this point. The Supreme Court recognized in *Upjohn* that attorneys need to be able to get information in order to form a meaningful judgment as to actions taken by the client and to form recommendations as to courses of action to be taken in light of them. It further recognized that the best way to do that was to limit access to internal communications such that they were shared only between the entity itself (including those acting on its behalf) and its attorney. More importantly, advance knowledge of the organizational representative providing such information that doing so would remain exclusively internal to the entity is an essential part of creating an environment in which such open communications would be encouraged.

Any proposal to adopt some procedures of selective waiver must address the impact that doing so would (or even could) have on that free exchange of information between attorney and client.[17] Inherent in the reasoning of the Court in *Upjohn* is that there *is* an impact and that it is *not* consistent with the goals for preservation of the openness of communication upon which that decision is based. To the extent there is a burden of proof requiring the existence of empirical data, it lies with the proponents of selective waiver, not with the defenders of the need to maintain openness of communications.

At the end of the day, the issue is put into clear perspective with a straight-forward question as to which representative of an entity client is more likely to be fully candid in providing information to its counsel:

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16 449 U.S. 383, 389 (1981).

17 Of course, the information itself is not protected, only the communication of it. Thus, information obtained through other permissible sources is not protected merely because it was communicated by a client to its lawyer. But the communication itself *as thus communicated* is, in fact, protected. Discussions that attempt to distinguish between information and communication must faithfully acknowledge that nexus.

(1) the one who knows that the entity has a strong incentive to preserve the information exclusively within the client and a strong incentive not to waive privilege, or

(2) the one who knows that the entity may find itself in a position where it has an strong incentive to disclose that information to enforcement and regulatory agencies seeking to exact punishment from someone and still be protected by selective waiver from disincentives to such disclosure?

The answer is simple: the representative will be much less willing to be candid with counsel to the entity when the latter does not have a self-interest in asserting privilege or work product immunity and may have a self-interest in waiving it. Selective waiver may or may not "fix" a "problem" but it will certainly create a serious one: it will inhibit the ability of a client to get useful information and will inhibit the ability of its counsel to give informed advice.

C. Impact on Expectation of Confidentiality

Another fundamental component of the protection afforded by privilege is that the party asserting it must have conducted itself in a manner demonstrating that it at all times had a reasonable expectation of confidentiality. By its nature, providing protected information to any person outside of the entity (other than the one with whom the communications have that protection: the attorney) materially diminishes confidentiality and thereby immutably diminishes credible expectation of it.

Beyond that threshold (critical though it be), it is also necessary to consider what obligations the recipient of information under a selective waiver regime has with respect to preserving the confidentiality of that information. If it is anything less predictable (or within the control of the client) than that applicable to the attorney,[18] the actual confidentiality of otherwise protected communications can only be seen as having been diminished by providing the selective waiver counterpart with access to it.

The expectation of confidentiality also plays a key role in whether an attorney actually can get the information needed in order to give good advice and make good judgments. Of course, the properly informed employee knows that the privilege, as to communications between that employee and the attorney for the corporation, is that of the corporation and not the employee. Still, knowledge by the employee that the corporation must maintain the confidentiality of the communication fully or lose it completely provides that employee a realistic basis for a separate expectation of confidentiality. To the extent that the employee's expectation is diminished by knowledge that the corporation may be able to barter the privilege or divulge the content of communications selectively, it serves as a strong disincentive for the employee to be candid and as a strong incentive to be more guarded. That would be true even if

18 While not the same, the "examiner privilege" provided under statute and regulation for bank examiners approximates the attorney-client privilege in many ways that are critical to the evaluation of impacts that result from the Financial Services Regulatory Relief Act of 2006. *See* footnote 10, *supra*.

that employee has no personal risk but believes complete confidentiality to be in the best interests of the corporation.

D. Impartiality of the Judicial System

Courts frequently note that the protections of attorney-client privilege and work product immunity cannot be used as a sword and a shield. Privilege and immunity can be used to protect against disclosure of protected communications and documents, but such communication or document cannot then be used to obtain a benefit with respect to the charges made. Conceptually, there is no meaningful distinction between that and asserting privilege selectively. Proponents of a selective waiver regime bear the burden of showing that the line has not been crossed with application of it. They have not done so, and for the most part have not even tried.

In that vein, one problem is that selective waiver allows the holder to assert it in a manner that is not transparent to all third parties. Those that get the information will be those from whom the client believes it can obtain a benefit in disclosing protected communications and documents; those that do not will be those with respect to whom the client believes that waiver will result in a detriment. It is unrealistic to see that as anything less than attempted simultaneous shield/sword usage. If that is accomplished legislatively, it is unrealistic to assume that the courts will necessarily resolve ambiguities in support of selective waiver instead of in support of the integrity of the judicial process whereby waiver is a binary evaluation: it has occurred or it has not.

By its nature, selective waiver creates two classes of potential adversaries to a holder of the privilege: those that get the protected information and are free to use it themselves in proceedings against the holder, and those that do not get such information at all. As a practical matter, the plaintiffs who get access to protected information under selective waiver will be those in a position to offer the holder some benefit for doing so. Advocates of selective waiver bear a burden (as will selective waiver itself) in demonstrating that unequal application of justice does not itself undermine the adversarial system of justice or even corrupt it. Even the legislative branch of government will be sensitive to this issue. Representatives of the plaintiffs' bar (representing the interest group most hampered by selective waiver and treated unequally by it) are at least as vocal as are representatives of the potential beneficiaries of a selective waiver system (government regulators in a position to grant a benefit for waiver).

This issue plays a very significant role in the *Permian* case. Statements by the D.C. Circuit Court of Appeal in it on that topic are widely quoted by Courts of Appeal in other Circuits rejecting selective waiver.[19]

19 *See* Attachment A.

E. Confidentiality as a Commodity

It is frequently noted that the courts themselves accept the obstacle to "truth" arising out of faithful implementation of attorney-client privilege and work product immunity only because the balancing that results in their implementation justifies doing so. But courts routinely note that the result of such balance is strict enforcement of the protection as narrowly as can be done while preserving the purpose of it.

The risk of selective waiver is that confidentiality itself (and the protections of it afforded by privilege and work product immunity) will become nothing more than a commodity to be traded for something. The most recent Court of Appeal decision rejecting selective waiver (*In re Qwest*) specifically highlighted the potential for privilege to become nothing more than an arrow in the quiver of litigation stratagem and, if it did, that the balance would no longer justify allowing privilege to be an obstacle to the judicial effort to ascertain "truth" and assess it fully.[20]

F. Federalism

1. Preemption

The Executive Committee has previously authorized publication of a Law Review article objecting to efforts of the federal government to take control over a matter historically reserved to the States as part of their police power.[21] Those views exist in large numbers within Congress, and especially within the Senate. Any effort to establish a system of selective waiver will be successful only if equally applicable in federal and state court.[22] As a practical matter, that could occur only if state law on this topic were preempted by federal law.

The scope of what is or is not authorized by the Supremacy Clause for Congress to preempt state law is much less certain than its frequent invocation by supporters of legislative imposition of selective waiver.[23] Congress may preempt state law on matters traditionally and historically regulated by the States but only if there is a clear demonstration that it intended to do so and the legislation includes express provisions that do so; the party advocating preemption

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20 "Allowing Quest to choose who among its opponents would be privy to the Waiver Documents is far from a universally perspective of fairness." *In re Qwest Communications Securities Litigation*, 450 F.3d 1179, 1196 (2006).

21 Corporations Committee of the State Bar of California Business Law Section, *Conflicting Currents: The Obligation to Maintain Inviolate Client Confidences and the New SEC Attorney Conduct Rules*, 32 PEPP. L. REV. 89 (2004) ["*Conflicting Currents*"; also available as of December 27, 2006 at http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/corporations/2005-01_conflicting-currents_sec-rules.pdf].

22 *See, e.g.*, the problems resulting in the McKesson HBOC securities litigation in which a state court held that McKesson had waived privilege when providing protected communications to the SEC and the *In re Bergonzi* proceedings in which the Ninth Circuit dismissed as moot a claim of selective waiver because the information had already been provided to the plaintiff in the state proceeding. *See* Attachment A.

23 *Conflicting Currents* (*see* footnote 21, *supra*), at 135-138, 144-148.

bears the burden of proving both. Congress cannot do even that with respect to matters regulated solely by the States pursuant to the Reserved Powers Clause of the Tenth Amendment of the Constitution. Licensing of attorneys and regulation of the relationship between them and clients falls at least in the first category and arguably also in the latter. Even legislation on this front would not bring certainty until the court challenges on these points had been resolved. That would, of course, occur in the very venue in which the balance of the protections and the integrity of the judicial process is measured and in which selective waiver is virtually uniformly rejected.[24]

2. Lowest Common Denominator

The existing tension between state and federal court rulings on privilege evidenced in the McKesson HBOC securities litigation[25] demonstrates that the only way a selective waiver regime would work is if it were uniformly applied. Confidentiality is very much a lowest common denominator matter: if protected information gets out anywhere, then it is a ready target everywhere. This was amply demonstrated in the *Philip Services Corp.* case[26] in which documents were provided to a company's auditors in Canada pursuant to legal requirement to do so. When the issue of confidential treatment of that information came up in the Southern District of New York, the information was treated as having lost its protected status when delivered to the auditor.[27]

The problem with even a preemption approach is that it would not apply to rules regarding confidentiality in other countries. If information disclosed under selective waiver provisions in the U.S. were subsequently obtained in legal proceedings in another county not recognizing it, the party would then be able to cite loss of confidentiality in that jurisdiction as a basis for asserting waiver of the privilege without upsetting the selective waiver protections

24 *See, U.S. v. Massachusetts Institute of Technology*, 129 F.3d 681, 685 (1st Cir. 1997): "We put to one side the interest of the government agency in obtaining voluntary disclosures; such agencies usually have means to secure the information they need and, if not, can seek legislation from Congress. By contrast, the safeguarding of the attorney-client relationship has largely been left to the courts, which have a comparative advantage in assessing consequences in this sphere."

25 *See*, text and note at footnote 22 *supra*.

26 *Philip Services Corp., (Receiver of) v. Ontario Securities Commission* [2005] O.J. No. 4418 (Div. Ct.), rev'g (2004), 27 O.S.C.B. 10003 (Ontario Securities Commission). Prior to that decision of the Divisional Court in the Province of Ontario, the rule in Ontario was that the statutory obligation of public companies to provide auditors access to communications covered by privilege resulted in full waiver of the privilege. *Cineplex Odeon Corporation v. Canada (Minister of National Revenue, Taxation)* (1994) 114 D.L.R. (4th) 141 (Ont. Gen. Div.). The decision in *Philip Services Corp.* was that a privileged document provided by a public company to its auditor for the purpose of the audit, the document remains protected by the privilege against any further disclosure.

27 *In re Philip Services Corp. Securities Litigation* (S.D.N.Y. 2005, 98 Civ. 0835 (MBM)). The ruling did not specifically reach the question of selective waiver as enunciated by the Ontario Divisional Court and instead rested on the lengthy delay of Philip Services Corp. to assert any privilege at all. The only reason that was relevant, however, was that the Magistrate ruled that (under FRE 501) U.S. law, not the laws of Ontario, governed the determination of waiver.

otherwise available in the U.S. In any event, those parties could be able to get actual access to that information in the other country, making it completely meaningless whether it was covered by selective waiver in the U.S. or not.

Confidentiality is like toothpaste. Once it out of the tube, it is out to stay. In that context, the jurisdiction providing the most strictly circumscribed protection of attorney-client communications based on absence of actual confidentiality of it sets the standard for all other jurisdictions if the issue is properly raised in that least-protective jurisdiction -- hence, a "lowest common denominator."

CONCLUSION

It is useful to remember the analytical bases that justify attorney-client privilege and attorney work product immunity from compulsory discovery. Both result from a deliberative balance of one fundamental goal to the judicial system (doing justice by finding "truth") and another (doing justice by insuring the integrity of the adversarial system).

For attorney-client privilege, the justification is the benefit to the system of justice that results from candid communications between lawyer and client. The benefit actually results before, during, and after judicial proceedings and each is important: (1) enabling the lawyer to assist a client in complying with legal obligations before an asserted failure to do so results in legal proceedings, (2) enabling the lawyer to mount an informed defense if legal proceedings are initiated, and (3) encouraging disclosure of information to a lawyer for use in a proceeding by preserving the confidentiality of it after the proceeding is over.[28]

For work product immunity, the justification is the commitment to even-handedness that court proceedings are to provide for all parties in order to assure fairness to each. In some jurisdictions but not all (California is one of the exceptions), that focuses on the legal proceeding itself and only applies to documents prepared in connection with or anticipation of a specific proceeding. The theory is that granting a litigant access to the thought processes and strategies of opposing counsel artificially tips the balance in favor of that litigant and thereby undermines the adversarial system. Fundamental to our adversarial system of justice is that the pursuit of "truth" and the justice it provides is best served by giving each party an equal opportunity to make the best case it can.

The proponents of "selective waiver" fail to acknowledge the implications of the very concepts that justify protection in the first place. The "confidentiality" component of privilege is a binary matter at two levels. First, either it has been preserved or it has not. Second, if it has not been, either that results from inadvertent actions that should not be penalized as they were

28 Avoidance of conflict of interest situations between lawyer and client has historically been a vital component of both privilege and immunity. We have not addressed that in this Statement but believe it could present a significant additional issue when examining the potential impact of selective waiver.

not volitional or it results from other actions which on their face demonstrate an absence of an expectation of actual confidentiality or reasonable care to preserve it. Selective waiver would arise when *both* standards have been violated: the information is no longer "confidential" once it is in the hands of a party that can use it against the party providing it; loss of confidentiality is the direct result of the volitional act of providing the information for purposes of gaining some other benefit.

The "fairness" component of work product immunity is also binary: it results in equal treatment of all similarly situated litigants or to the benefit of none of them. The selective waiver contained in FRE 502(c) would grant a benefit to an enforcement authority, and to the party providing it information, and in the process would deny equal treatment to all other litigants. By doing so, it violates the very premise on which the immunity is based: preserving the adversarial system by applying the procedures of it equally to all who come before the court.

The DC Circuit provides perspective on this that bears consideration by the Committee in determining whether to go forward with FRE 502(c):

> The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. *** In the present case, Occidental has been willing to sacrifice confidentiality in order to expedite approval of the exchange offer, and now asserts that the secrecy of the attorney-client relationship precludes disclosure of the same documents in other administrative litigation. *** The attorney-client privilege is not designed for such tactical employment.[29]

FRE 502(c) does not preserve the confidentiality of attorney-client communications on which compliance with laws and administration of them depends. It does not preserve the inherent standard of fairness in equal treatment of all parties on which our system of justice depends. We urge the Committee to reject FRE 502(c) and continue its efforts to bring clarity and certainty in the area of inadvertent disclosure. Intentional, unequal disclosure sticks out like the very sore thumb that selective waiver is.

29 *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (1981)

Attachment A

Selected Extracts from Key Cases
(conversions from PDF to Word may have lost some "em" dashes)

Cir.	Case	Holding/ Context
1	*U.S. v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997)	▪ Disclosure to a third party constitutes waive to all parties; no selective waiver. ▪ Privilege and work product.

An intent to maintain confidentiality is ordinarily necessary to continued protection, but it is not sufficient. [at 684]

Fairness is also a concern where a client is permitted to choose to disclose materials to one outsider while withholding them from another. *** But MIT, like any client, continues to control both the nature of its communications with counsel and the ultimate decision whether to disclose such communications to third parties. The only constraint imposed by the traditional rule here invoked by the government that disclosure to a third party waives the privilege is to limit selective disclosure, that is, the provision of otherwise privileged communications to one outsider while withholding them from another. MIT has provided no evidence that respecting this constraint will prevent it or anyone else from getting adequate legal advice. [at 685]

Anyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage. It would be perfectly possible to carve out some of those disclosures and say that, although the disclosure itself is not necessary to foster attorney-client communications, neither does it forfeit the privilege. With rare exceptions, courts have been unwilling to start down this path which has no logical terminus and we join in this reluctance. [at 686]

MIT's disclosure to the audit agency was a disclosure to a potential adversary. The disclosures did not take place in the context of a joint litigation where the parties shared a common legal interest. The audit agency was reviewing MIT's expense submissions. MIT doubtless hoped that there would be no actual controversy between it and the Department of Defense, but the potential for dispute and even litigation was certainly there. The cases treat this situation as one in which the work product protection is deemed forfeit. [at 687]

Cir.	Case	Holding/ Context
2	*In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2nd Cir. 1993)	▪ Selective waiver rejected on the basis of the facts in the case. ▪ Work product.

> We agree that selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage. [at 235]
>
> Petitioner alleges that a denial of the petition will present those in similar situations with a Hobson's choice between waiving work product protection through cooperation with investigatory authorities, or not cooperating with the authorities. Whether characterized as forcing a party in between a Scylla and Charybdis, a rock and a hard place, or some other tired but equally evocative metaphoric cliche, the "Hobson's choice" argument is unpersuasive given the facts of this case. An allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine. [at 236]
>
> At the time of the submission of the memorandum to the Enforcement Division, the SEC and Steinhardt stood in an adversarial position. Steinhardt's voluntary submission of the memorandum to the Enforcement Division waived the protections of the work product doctrine as to subsequent civil litigants seeking the memorandum from Steinhardt. [at 236]

3	*Westinghouse v. Republic of the Philippines*, 951 F.2d 1414 (3rd Cir. 1991)	▪ Rejects selective waiver. ▪ Privilege and work product.

> [S]elective 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. See Note, 36 Stan. L.Rev. at 804 (noting that selective waiver rule merely encourages disclosure to government agencies); Developments, 98 Harv.L.Rev. at 1645, 1647 (noting concern that selective waiver rule extends breadth of attorney-client privilege). Moreover, selective waiver does nothing to promote the attorney-client relationship; indeed, the unique role of the attorney, which led to the creation of the privilege, has little relevance to the selective waiver permitted in *Diversified.* [at 1425]
>
> Moreover, although a selective waiver rule might increase voluntary cooperation with government investigations, a new privilege must "promote[] sufficiently important interests to outweigh the need for probative evidence." *Trammel*, 445 U.S. at 50, 100 S.Ct. at 912 (cited in note 8). We do not question the importance of the public interest in voluntary cooperation with government investigations. We have little reason to believe, however, that this interest outweighs "the fundamental principle that 'the public . . . has a right to every man's evidence.' " *University of Pennsylvania*, 110

S.Ct. at 582 (citations omitted). [at 1425-1426]

In addition, we do not think that a new privilege is necessary to encourage voluntary cooperation with government investigations. [at 1426]

We need not find unfairness to the Republic in order to find waiver because we have concluded already that the attorney-client privilege protects only those disclosures necessary to encourage clients to seek informed legal advice and that Westinghouse's disclosures were not made for this purpose. [at 1426]

A disclosure to a third party waives the attorney-client privilege unless the disclosure is necessary to further the goal of enabling the client to seek informed legal assistance. Because the work-product doctrine serves instead to protect an attorney's work product from falling into the hands of an adversary, a disclosure to a third party does not necessarily waive the protection of the work-product doctrine. Most courts hold that to waive the protection of the work-product doctrine, the disclosure must enable an adversary to gain access to the information. [at 1428]

We hold that Westinghouse's disclosure of work product to the SEC and to the DOJ waived the work-product doctrine as against all other adversaries. As we explained at 1424, parties who have disclosed materials protected by the attorney-client privilege may preserve the privilege when the disclosure was necessary to further the goal underlying the privilege. We require the same showing of relationship to the underlying goal when a party discloses documents protected by the work-product doctrine. In other words, a party who discloses documents protected by the work-product doctrine may continue to assert the doctrine's protection only when the disclosure furthers the doctrine's underlying goal. [at 1429]

When a party discloses protected materials to a government agency investigating allegations against it, it uses those materials to forestall prosecution (if the charges are unfounded) or to obtain lenient treatment (in the case of well-founded allegations). These objectives, however rational, are foreign to the objectives underlying the work-product doctrine. Moreover, an exception for disclosures to government agencies is not necessary to further the doctrine's purpose; attorneys are still free to prepare their cases without fear of disclosure to an adversary as long as they and their clients refrain from making such disclosures themselves. Creating an exception for disclosures to government agencies may actually hinder the operation of the work-product doctrine. If internal investigations are undertaken with an eye to later disclosing the results to a government agency, the outside counsel conducting the investigation may hesitate to pursue unfavorable information or legal theories about the corporation. Thus, allowing a party to preserve the doctrine's protection while disclosing work product to a government agency could actually discourage attorneys from fully preparing their cases. [at 1429-1430]

We also reject Westinghouse's argument that it did not waive the work-product protection because it reasonably expected the agencies to keep the documents it disclosed to them confidential. Even if we had found that the agencies had made such an agreement, see discussion at 1427-1430, it would not change our conclusion. [at 1430]

Cir.	Case	Holding/ Context
4	*In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988)	▪ No selective waiver. ▪ Privilege and "non-opinion" work product. ▪ The Court reserved whether "opinion work product" would be treated differently.

The Fourth Circuit has not embraced the concept of limited waiver of the attorney-client privilege. It has held that if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as " 'the details underlying the data which was to be published' " will not enjoy the privilege. [citations omitted] [at 623]

[W]e note that the disclosures were made in a direct attempt to settle active controversies between Martin Marietta and the United States Attorney and the DOD. Not only was there not community of interest, the disclosures were made under promise of completeness to induce an adversary to settle. [citations omitted] *** Thus, Martin Marietta has impliedly waived the work-product privilege as to all non-opinion work-product on the same subject matter as that disclosed. The disclosure of Martin Marietta was made broad by its express assurance of completeness of its disclosure to the United States Attorney, so that the subject matter of the disclosure and the waiver is comprehensive, and includes all of the company's non-opinion work-product relating to the investigation that it conducted. [at 625]

On remand, it will of course be Martin Marietta's burden of proof to demonstrate that the documents included in the district court's order include opinion work product. Martin Marietta must provide specific and detailed indications of where such work product is located in the documents in order to enable the district court to conduct an expeditious review and redact pure legal theories, impressions, or opinions in those documents or portions thereof that Martin Marietta to the government or others. [at 626]

6	*In re Columbia/HCA Healthcare Corp.*, 293 F.3d 289 (6th Cir. 2002)	▪ No selective waiver. ▪ Privilege and work product.

[T]he uninhibited approach adopted out of wholecloth [footnote omitted] by the *Diversified* court has little, if any, relation to fostering frank communication between a client and his or her attorney. As pointed out by the Third Circuit in *Westinghouse*, the *Diversified* approach "merely encourages voluntary disclosure to government agencies." *Westinghouse*, 951 F.2d at 1425. The attorney-client privilege was never designed to protect conversations between a client and the Government -- i.e., an adverse party -- rather, it pertains only to conversations between the client and *his or her* attorney. [omitting references to *Upjohn* as to the purposes of the privilege] Nowhere amongst these reasons is the ability to "talk candidly with the Government." [at 302]

Without a doubt, disclosure of information to the Government in a cooperative manner encourages settlement of disputes and by encouraging cooperative exchange of

information, selective waiver would improve the ability of the Government and private parties to settle certain actions. *** However, this argument has several flaws. As noted by the First Circuit, it "has no logical terminus." *MIT*, 129 F.3d at 686. Insofar as the "truth-finding process" is concerned, a private litigant stands in nearly the same stead as the Government. This argument holds considerable weight in the numerous circumstances whereby litigants act as private attorneys general, and through their actions vindicate the public interest. A plaintiff in a shareholder derivative action or a qui tam action who exposes accounting and tax fraud provides as much service to the "truth finding process" as an SEC investigator. Recognizing this, a difficult and fretful linedrawing process begins, consuming immeasurable private and judicial resources in a vain attempt to distinguish one private litigant from the next. [at 303]

Again, like our discussion of the attorney-client privilege above, preserving the traditional confines of the rule affords both an ease of judicial administration as well as a reduction of uncertainty for parties faced with such a decision. These and other reasons "persuade us that the standard for waiving the work-product doctrine should be no more stringent [footnote omitted] than the standard for waiving the attorney-client privilege" once the privilege is waived, waiver is complete and final. *Westinghouse*, 951 F.2d at 1429. [at 306]

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

- "Law enforcement investigatory privilege" not waived by the governmental agency from playing portions of a tape to one of the targets of the investigation.
- Privilege (by analogy).
- This case does not actually address whether selective waiver was applicable in it. The text quoted below was apparently required to explain the holding actually made on a different issue.

The cases, however, generally reject a right of "selective" waiver, where, having voluntarily disclosed privileged information to one person, the party who made the disclosure asserts the privilege against another person who wants the information. *United States v. Hamilton*, 19 F.3d 350, 353 (7th Cir. 1994); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423-27 (3d Cir. 1991); Paul R. Rice, Attorney-Client Privilege in the United States sec. 9:27, pp. 9-55 to 9-56 (1993); *but see Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (authorizing selective waiver). And this is a selective-waiver case. Selective waiver must be distinguished from inadvertent disclosure, where a party mistakenly discloses information that it had intended to keep secret. ... *** What selective and inadvertent (also partial) disclosure have in common, however, is that neither is waiver in the standard sense in which the word is used in the law: the deliberate relinquishment of a right. [citations omitted] When "waiver" is found in either type of case, the inadvertent or the selective, it is in order to punish the privilege claimer for a mistake, rather than to prevent him from changing his mind and retracting a benefit

that he had consciously granted to the person from whom he wants to retract it. In the case of selective disclosure, the courts feel, reasonably enough, that the possessor of the privileged information should have been more careful, as by obtaining an agreement by the person to whom they made the disclosure not to spread it further. [citations omitted] [at 1126-1127]

8 *Diversified Industries, Inc., v. Meredith*, 572 F.2d 596 (8th Cir. 1977)

- Recognizes selective waiver ("limited waiver" in its terminology).
- Privilege only.
- Decided before *Upjohn*.

We finally address the issue of whether Diversified waived its attorney-client privilege with respect to the privileged material by voluntarily surrendering it to the SEC pursuant to an agency subpoena. As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred. *See Bucks County Bank and Trust Company v. Storck*, 297 F. Supp. 1122 (D.Haw. 1969). *Cf. United States v. Goodman*, 289 F.2d 256, 259 (4th Cir.), *vacated on other grounds*, 368 U.S. 14, 82 S.Ct. 127, 7 L.Ed.2d 75 (1961). To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers. [at 611]

To the extent that the court holds that Law Firm's report to Diversified's Board of Directors, dated December 5, 1975, or any other material related to that report is privileged from disclosure on the basis of the traditional attorney-client privilege, I respectfully dissent. [footnote omitted] In so doing I lay to one side what is to me the very serious question of whether or not this entire controversy has become moot due to the disclosures that have now been made by SEC by virtue of which Weatherhead and its attorneys have been able to obtain all of the information that they sought originally. [dissent of Henley, at 612]

8 *In re Chrysler Motors Corp.*, 860 F.2d 844 (8th Cir. 1988)

- Rejects selective waiver.
- Non-opinion work product.
- There is no apparent basis for distinguishing the outcome here from *Diversified*. Indeed that case is not referenced at all in connection with the substantive ruling and referenced only for comparative purposes with respect to whether mandamus is proper in connection with a production order.

[W]e agree with the district court that Chrysler waived any work product protection by voluntarily disclosing the computer tape to its adversaries, the class action plaintiffs, during the due diligence phase of the settlement negotiations. "Disclosure to an adversary waives the work product protection as to items actually disclosed, even

Cir.	Case	Holding/ Context
		where disclosure occurs in settlement." *Grumman Aerospace Corp. v. Titanium Metals Corp. of America,* 91 F.R.D. 84, 90 (E.D.N.Y. 1981); *see also Chubb Integrated Systems Ltd. v. National Bank,* 103 F.R.D. 52, 67 (D.D.C. 1984). The fact that Chrysler and the class action plaintiffs may have shared a common interest in settling claims arising out of the Overnight Evaluation Program does not neutralize the act of disclosure because that common interest always exists between opposing parties in any attempt at settlement. Nor does the agreement between Chrysler and co-liaison counsel for the class action plaintiffs not to disclose the computer tape to third-parties change the fact that the computer tape has not been kept confidential. "Confidentiality is the dispositive factor in deciding whether [material] is privileged." *Chubb Integrated Systems Ltd. v. National Bank,* 103 F.R.D. at 67 (citation omitted). [at 846-847]
9	*United States v. Bergonzi*, 403 F.3d 1048 (9th Cir. 2005)	▪ Allowing to stand (based on mootness) 216 F.R.D. 487 (N.D.Ca. 2003); mootness occurring as a result of disclosure of requested information in *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229 (1st Dist. 2004). ▪ Privilege and work product. ▪ The determination of mootness resulted from the fact that the information sought in federal proceedings had already been disclosed in state proceedings. In other words, actual confidentiality was required in order for there to be a live controversy before it. The "selective waiver" issue was as much still alive in this case as it had been in *Diversified.* If the court had been willing to adopt selective waiver as applicable to proceedings before it, it could easily have done so in this case. It pointedly did not. The state court decision was cited by the 10th Circuit in the *Qwest* case.
		Given our finding of mootness, we do not reach McKesson's argument that we should recognize a form of "selective" or "partial" waiver that would allow a corporation to disclose the results of an internal investigation to an investigating government agency without waiving attorney client privilege or work product protection as to the outside world. [footnote omitted] Whether the sort of selective waiver McKesson seeks is available in this Circuit is an open question. *See Bittaker v. Woodford,* 331 F.3d 715, 720 n.5 (9th Cir. 2003) (en banc) ("[T]he law [regarding selective waiver] is not . . . settled."). [at 1050]

Cir.	Case	Holding/ Context
10	*In re Qwest Communications Securities Litigation*, 450 F.3d 1179 (10th Cir. 2006)	▪ Rejecting selective waiver outright. ▪ Privilege and work product.

The record does not establish a need for a rule of selective waiver to assure cooperation with law enforcement, to further the purposes of the attorney-client privilege or work-product doctrine, or to avoid unfairness to the disclosing party. Rather than a mere exception to the general rules of waiver, one could argue that Qwest seeks the substantial equivalent of an entirely new privilege, i.e., a government-investigation privilege. [at 1192]

[I]f selective waiver were as essential to government operations as Qwest claims, it would seem the agencies would support Qwest's position. At the court's request, the DOJ responded to Qwest's petition. [footnote omitted] Rather than urging the adoption of selective waiver, though, it carefully took no position on the parties' dispute. Additionally, the DOJ declined an invitation to participate in oral argument. It would appear, then, that the government's interest is not as Qwest portrays it. [at 1194]

The record does not support reliance on the Qwest agreements with the SEC and the DOJ to justify selective waiver. The agreements do little to restrict the agencies' use of the materials they received from Qwest. The agencies are permitted to use the Waiver Documents as required by law and in furtherance of the discharge of their obligations. The DOJ is specifically permitted to share the Waiver Documents with other agencies, federal, state, and local, and make use of them in proceedings and investigations. In its brief, the DOJ illustrates just how far some of the documents may have traveled, stating that, at a minimum, Waiver Documents have been introduced into evidence in a criminal trial, produced as discovery in three separate criminal proceedings, and used as exhibits to SEC investigative testimony. [at 1194]

As Qwest has conceded, it is unknown how many or which of the Waiver Documents the agencies have used or disclosed, how those uses or disclosures occurred, who might have had access to the Waiver Documents, and the extent of continuing disclosures. It is therefore not inappropriate to conclude that some undetermined number of Waiver Documents have been widely disseminated and have thus become public information. [at 1194]

The generally recognized exceptions already in place tend to serve the purposes of the particular privilege or protection. ... *** The record in this case does not indicate that the proposed exception would promote the purposes of the attorney-client privilege or work-product doctrine. [footnote omitted] Rather than promoting exchange between attorney and client, selective waiver could have the opposite effect of inhibiting such communication. If officers and employees know their employer could disclose privileged information to the government without risking a further waiver of the attorney-client privilege, they may well choose not to engage the attorney or do so guardedly. Such reticence and caution could be heightened where, as here, further disclosures by the government mean that the information may be disclosed to countless others. [at 1195]

Cir.	Case	Holding/ Context

[T]he purpose of the work-product doctrine is to enable a case in privacy. As other circuits have indicated, selective waiver does little to further this purpose and in some cases, may instead encourage counsel to conduct investigations with an eye toward pleasing the government. *See Columbia/HCA Healthcare,* 293 F.3d at 306; *Westinghouse,* 951 F.2d at 1429-30; *Steinhardt Partners,* 9 F.3d at 235. [at 1195]

There is a principled position that the breadth of the selective waiver doctrine advocated by Qwest is the substantial equivalent of a new privilege. Qwest justifies its proposed new rule on a policy of cooperation with government investigations. It does not ground its advocacy on the purposes underlying the attorney-client privilege. At least one court has indicated that such justification is suggestive of a new privilege, rather than gloss on an ancient one. *See Westinghouse,* 951 F.2d at 1425. [at 1197]

At least to the degree exhorted by amici, "the culture of waiver" appears to be of relatively recent vintage. Whether the pressures facing corporations in federal investigations present a hardened, entrenched problem suitable for common-law intervention or merely a passing phenomenon that may soon be addressed in other venues is unclear. For example, [omitting references to the U.S. Sentencing Guidelines and Congressional hearings] ... the Advisory Committee on Evidence Rules recently voted to recommend publication of a proposed Rule 502, providing for selective waiver to the Committee on Rules of Practice and Procedure (the Standing Committee) of the Judicial Conference of the United States. [at 1200]

Whether a rule-making or legislative venue is appropriate to address the issues raised by Qwest and amici is a question for the Standing Committee and Congress. The rule-making and legislative processes, however, need not proceed wholly independent of the common law. The accumulated experience of federal common law in the area of attorney-client privilege and work-product protection is but another source for the legislative and rule-making bodies to draw on to inform their deliberations concerning the need for and parameters of selective waiver or a new privilege. [at 1201]

DC *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981)

- Reversal of District Court ruling that defendant had not waived attorney-client privilege by delivery of documents to the SEC.
- Only privilege was at issue, although the case also involved work product.

[W]e cannot see how the availability of a "limited waiver" would serve the interests underlying the common law privilege for confidential communications between attorney and client. [at 1220]

Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a "friendly" agency. [at 1221]

The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. [citations omitted] In the present case, Occidental has been willing to sacrifice confidentiality in order to expedite approval of the exchange offer, and now asserts that the secrecy of the attorney-client relationship precludes disclosure of the same documents in other administrative litigation. [footnote omitted] The attorney-client privilege is not designed for such tactical employment. [at 1221]

At least one district court has viewed the "limited waiver" doctrine as extending beyond SEC inquiries to Internal Revenue Service and grand jury investigations, *see In re Grand Jury Subpoena Dated July 13, 1979,* 478 F.Supp. 368 (E.D.Wis. 1979); we agree that the doctrine's rationale would dictate a wide scope of application for the "limited waiver." It is apparent that such a 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. [at 1221-1222]

DC *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984)

- Affirming order of District Court ordering delivery of documents covered by subpoena, rejecting argument of selective waiver.
- Privilege and work product.
- This case is particularly significant with respect to the obstacle of selective waiver resulting in favoritism of certain classes of litigants and loss of even-handedness in administration of the judicial system.

There is no meaningful distinction in the adventitious fact that only federal agencies were involved in *Permian.* For the purposes of the attorney-client privilege, there is nothing special about another federal agency in the role of potential adversary as compared to private party litigants acting as adversaries. Like Occidental in *Permian,* Tesoro willingly sacrificed its attorney-client confidentiality by voluntarily disclosing material in an effort to convince another entity, the SEC, that a formal investigation or enforcement action was not warranted. Having done so, appellants cannot now selectively assert protection of those same documents under the attorney-client privilege. A client cannot waive that privilege in circumstances where disclosure might be beneficial while maintaining it in other circumstances where nondisclosure would be beneficial. "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". *Permian,* 665 F.2d at 1222. To the same effect, *see United States v. American Telephone & Telegraph,* 642 F.2d 1285, 1299 (D.C.Cir. 1980). Having failed to maintain genuine confidentiality, appellants are precluded from properly relying on the attorney-client privilege. [at 1370]

Cir.	Case	Holding/ Context

the advantage that the appellants seek from their attempt selectively to disclose their work product is greater "than the law must provide to maintain a healthy adversary system." *Id.* Fairness and consistency require that appellants not be allowed to gain the substantial advantages accruing to voluntary disclosure of work product to one adversary - the SEC - while being able to maintain another advantage inherent in protecting that same work product from other adversaries. [at 1372]

Fed	*Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409 (Fed. Cir. 1997)	▪ Privilege and work product. ▪ The court upheld the determination by the ITC that a selective waiver theory would not cover disclosure of protected information.

Generally disclosure of confidential communications or attorney work product to a third party, such as an adversary in litigation, constitutes a waiver of privilege as to those items. [at 1415]

Genentech next contends that the interlocutory district court ruling only held that Genentech had waived the privilege as to the [protected] documents in that forum and that a waiver of privilege in one forum does not automatically waive privilege in others. Genentech also argues that the protective order entered into in the district court preserved the confidentiality of the documents as to other forums. [1416]

A small number of courts have recognized, in circumstances not present here, a limited waiver that enables the attorney-client privilege to survive certain breaches of confidentiality. *See, e.g., Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (finding that the surrender of privileged material to the SEC in an investigation pursuant to a subpoena was only a limited waiver of privilege); *Transamerica Computer Co. v. International Bus. Machs. Corp.*, 573 F.2d 646, 650-51 (9th Cir. 1978) (finding an inadvertent production of a limited number of privileged documents was not a waiver of privilege because the production was "compelled" as a result of the extraordinary circumstances of the accelerated discovery proceedings); *see generally* Rice, Attorney-Client Privilege Section(s) 9:85, at 9-295. *But see Permian Corp. v. United States*, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981) (rejecting the limited waiver theory of Diversified Industries and holding privilege waived as to documents turned over to the SEC); *In re Weiss*, 596 F.2d 1185, 1186 (4th Cir. 1979) (declining to extend limited waiver theory of Diversified Industries to grand jury proceedings following an SEC investigation). This court, however, has never recognized such a limited waiver. Moreover, Genentech has presented no compelling arguments as to why we should apply such a limited waiver theory in this case. [at 1417]