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Liesa L. Richter
Associate Professor of Law
University of Oklahoma College of Law
300 Timberdell Road
Norman, OK 73019
(405) 325-4799; liesarichter@ou.edu

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Via E-mail: Rules_Comments@ao.uscourts.gov

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

Dear Mr. McCabe:

I write to comment on proposed Federal Rule of Evidence 502. Specifically, I add my thoughts regarding subsection (c), which governs selective waiver of attorney-client privilege and work product protection. I have followed the rule-making process for this proposal closely over the past year and will submit an article on the subject for publication next month. Most recently, I attended the public hearing on the proposed rule in New York City, and I submit this comment because I am troubled by an apparently growing chorus of voices opposing the selective waiver proposal. It is my view that the proposed amendment represents a salutary change to waiver doctrine: one that will simultaneously protect corporations cooperating with the federal government from the damaging effects of third party waivers *and* serve the public interest in the effective oversight of business entities. When the heated rhetoric and political posturing that crowd the center of this debate are stripped away, the merit of the proposed selective waiver rule becomes clear.

A. There is a Lasting Need for Selective Waiver: Federal Oversight of Corporate Entities Will Continue to Rely Upon a Partnership Model that Requires Corporate Waivers

First, the opposition to the provision largely rests upon the unrealistic premise that federal law enforcement can and should operate in the twenty-first century without seeking privileged and protected information from corporate targets of investigation. Many commentators oppose the proposed selective waiver rule by presenting a false choice between (1) a federal enforcement

universe with no governmental requests for corporate waivers (and no selective waiver protection, either) and (2) a universe that wholeheartedly embraces current government policies that generate corporate waivers, but with the protection of selective waiver.

The first universe represents a fundamental shift in current federal practice and is the obvious preference for opponents of selective waiver. The fervent attacks on current government policies have been the focus of the debate on selective waiver and threaten to undermine the valuable proposal embodied in FRE 502(c). Even the Tenth Circuit Court of Appeals, in its recent opinion rejecting selective waiver in Qwest Communications, suggested that current government policies that generate corporate waivers could be a passing phenomenon not warranting the alteration of traditional waiver principles.[1]

To the contrary, these policies are no passing fancy. Federal law enforcement policies that encourage and reward corporate self-evaluation combined with disclosures to the government have a long tradition within numerous federal departments and agencies and have been used as tools to improve corporate oversight and the health of the American market for over three decades.[2] The method that they employ has been long accepted in the context of individual prosecution, where leniency has routinely been exchanged for assistance that involves the waiver of important rights. These time-honored techniques simply have been translated to the corporate context in the form of current cooperation policies. Because of their successful track record and the public interests imperiled by inefficient and ineffective corporate oversight, these policies have been implemented more broadly and, to some degree, more aggressively over time. Given the mounting expense and complexity of corporate investigation, such cooperation and voluntary disclosure programs have become an indispensable part of the fabric of federal corporate investigations.[3] In short, we neither can nor should turn back the clock to the "circle the wagons" days of corporate defense. Thus, the first choice suggested by opponents of selective waiver –

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[1] In re Qwest Communications Int., 450 F.3d 1179, 1200 (10th Cir. 2006) ("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.").

[2] See Christopher A. Wray and Robert K. Hurr, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1107-1132 (Summer 2006) (describing in detail the multiple cooperation policies throughout the federal government that reward the sharing of protected information with lenient treatment).

[3] See e.g., James Bandler and Kara Scannell, *In Options Probes, Private Law Firms Play Crucial Role: As More Than 130 Companies Come Under Scrutiny, Government Relies on Help*, Wall Street Journal Article (October 28, 2006)(explaining that federal regulators would be incapable of identifying and correcting the recent wave of improprieties connected to the back-dating of stock options without the help of outside corporate counsel "feeding" the government information).

where corporations are never encouraged to share their privileged information – is unattainable if the public intends to continue taking white collar crime seriously.

This does not mean that the second optional universe posited by critics of selective waiver is the only alternative. Even if we accept that sharing of privileged corporate information in exchange for leniency is a valuable technique that serves the public interest, we need not embrace overly aggressive applications of the technique that could ultimately undermine the goal of effective corporate oversight. Indeed, the recent outcry against federal law enforcement practices has served an important purpose in ensuring that prosecutors execute their duties with caution and proper regard for the public interests they serve. For example, it has forced federal law enforcement to re-examine their practices and to adopt more rigorous controls over individual prosecutors.[4]

There is a third option for cooperating corporations and the constituencies they serve: federal law enforcement policies that encourage and reward cooperative disclosures in a measured and systematic manner that serves the public interest combined with protection from damaging disclosures to civil adversaries through FRE 502(c). If the proposal's opponents are successful, they are most likely to perpetuate the universe in which we currently operate for their clients -- namely, the continuation of federal policies that generate privileged disclosures to the government with no selective waiver protection to provide cover for corporations faced with massive civil exposure.

B. Public Policy Supports Selective Waiver Protection for Corporations that Cooperate with Federal Entities

Once we recognize the ongoing need for privileged corporate disclosures as a part of effective corporate oversight, it becomes clear that adding selective waiver protection can only advance the public and corporate interest. By eliminating the most costly collateral consequence of disclosures to the government, selective waiver will necessarily increase corporate cooperation

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[4] See Memorandum from Deputy Attorney General Paul J. McNulty to Heads of Department Components and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations* (December 12, 2006)(requiring a "legitimate need" for the request for privileged corporate information and developing a "step-by-step" approach to requests for such information that seeks the protected impressions of counsel only in "rare" cases). It appears that the SEC may follow the lead of the Department of Justice in revising its current waiver policy as well. See Ashby Jones, *Waiver: Will the SEC Follow Deputy AG McNulty's Lead?*, Wall St. J. Law Blog (February 9, 2007)(describing comments of SEC Commissioner Paul Atkins that the SEC should consider "tightening its policies" to ensure that companies aren't pressured into waiving basic legal privileges).

with federal investigators.[5] Courts that have suggested that there is no need for selective waiver to encourage cooperation given the significant cooperation already occurring ignore the varying contexts in which cooperation occurs. A health care provider faced with exclusion from Medicare and Medicaid programs absent full disclosures and cooperation is unlikely to need the protection of selective waiver as an incentive. A corporate entity facing multi-million dollar exposure in a securities fraud class action suit may, however, need such protection to secure its cooperative disclosures.[6]

While increasing cooperation is one benefit of selective waiver protection, it is not the only one. Selective waiver will also preserve the integrity of corporate internal investigations, about which many have expressed concern, by giving companies meaningful control over the ultimate destination of information disclosed to the government. Under proposed FRE 502(c), corporate entities will be free to perform internal investigations thoroughly and completely and share their results with the government when it is in their best interests to do so without uncertainty regarding the costs of downstream dissemination of that information to civil litigants. It is the current uncertainty for disclosing corporations about the ultimate destination of the information that they share with the government that creates dangerous incentives to limit the documentation of potentially damaging information. Finally, there is no unfairness to civil litigants in requiring them to build cases from otherwise discoverable information without the benefit of their corporate adversary's privileged information. Waiver to a disclosing company's civil adversaries following government cooperation serves no legitimate public interest and, in fact, can only undermine it. Therefore, the selective waiver protection envisioned by proposed FRE 502(c) represents a beneficial change from the standpoint of public policy.

C. Modern Privilege and Waiver Doctrine Can Accommodate Selective Waiver

Many courts have suggested that selective waiver protection cannot be adopted because it is fundamentally inconsistent with traditional notions of privilege and waiver. First and foremost, the law of privilege has always been driven by notions of public policy. The public policy of enhancing the efficiency and effectiveness of corporate oversight to protect the American market and the multiple constituencies served by the contemporary corporation is the impetus behind the proposed change. It is difficult to imagine a public policy more in keeping with the traditional purpose of privilege protection.

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[5] See In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 309 (Boggs, J. dissenting)(noting this "uncontroversial behavioral prediction.").

[6] Wray & Hurr at 1174 (counseling corporate caution in providing the government with privileged material due to the specter of third party waiver and noting that "disclosure of such information could result in breathtaking [civil] judgments or settlements, far in excess of any criminal penalties levied by the government.").

Further, a doctrine of selective waiver to federal entities can fit comfortably within the evolving flexible view of privilege and waiver recognized in the case law and academic commentary. Modern courts and commentators recognize that privilege protection and waiver should be governed more by notions of fairness and party control over information than by arcane notions of complete confidentiality.[7] The joint defense or common interest privilege has long allowed sharing of attorney-client privileged information outside the charmed attorney-client circle without a corresponding waiver.

Nowhere is this flexible view of waiver and privilege more apparent than in the remaining provisions of proposed FRE 502. In light of the inefficiencies associated with the massive discovery often involved in contemporary civil litigation, the proposed rule would provide parties with greater protection from inadvertent waivers and broad subject matter waivers when their privileged information gets disclosed to an adversary. Subsection (d) of the proposed rule would allow parties to engage in "claw back" and "quick peek" discovery with an adversary under the protection of a court order binding in both the state and federal courts. If the preservation of private litigation resources is a sufficient justification for permitting knowing and purposeful exchanges of confidential information without consequence to privilege, the public interest in effective law enforcement and the preservation of public investigatory resources is certainly sufficient to justify selective waiver to government officials. Where all of waiver doctrine is being adjusted to permit greater flexibility and less rigid adherence to common law confidentiality requirements, it would be both counterintuitive and counterproductive to tell private litigants that they may share with their allies, they may share with their private adversaries, but they will be punished for sharing with the federal government in the pursuit of its law enforcement responsibility. Such a disfavored status for cooperation with government investigations does not serve the public interest any more than the needless waste of private resources to review millions of documents for privileged communications.

D. Federal Legislation

The legislation that is the ultimate goal of the current rule-making process is ideal to achieve comprehensive corporate protection that will best serve the public interests in fair and effective law enforcement. Although there has been a preference for common law development of privilege and waiver doctrine in the federal arena, common law development is ill-suited to provide selective waiver protection, as the Tenth Circuit Court of Appeals recently noted in

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[7] See e.g., Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1607 (1986)(opining that waiver determinations ought not turn on the purposes of the attorney-client privilege or lost confidentiality, but rather should focus on "the unfairness flowing from the act on which the waiver is premised."); Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished,* 47 Duke L.J. 853, 882 (March 1998)("Judicial practices have made secrecy a non-essential element to the privilege's continuation – suggesting that there is little justification for imposing it in the first instance as a condition for the privilege's creation.").

Qwest Communications.[8] Recognition in one circuit will do little to protect companies amenable to suit in multiple jurisdictions. In addition, legislation is necessary to provide protection against findings of waiver in state courts. Common law protections full of uncertainties and gaps will not accomplish the objectives of proposed FRE 502(c).

It is true that the proposed rule would itself provide imperfect protection for cooperating corporations, allowing governmental disclosures of corporate information "as otherwise required by law." For example, the federal government would be required to divulge privileged corporate information to individual defendants consistent with its obligations under Federal Rule of Criminal Procedure 16 and Brady v. Maryland. On rare occasions, the government might use protected information in a public trial, making further protection of that information difficult and potentially unfair.[9] Still, the proposed amendment closes a wide gap in current protection by foreclosing the argument seen throughout the federal courts today that a company has waived privilege and work product protection with respect to everything given to federal investigators simply by virtue of the disclosure. The rare exceptional circumstance in which protected corporate information could continue to leak should not foreclose the meaningful and needed protection that companies currently lack. It is also true that the proposed provision provides no protection from findings of waiver based upon corporate disclosures to State government entities. Again, this necessary gap in protection does little to undermine the ameliorative effects of the proposal in the context of federal cooperation. The Federal Rules of Evidence have played a crucial role in guiding the states regarding best practices throughout their history. This provision, if adopted, could serve as a valuable model for state jurisdictions contemplating similar protections.[10]

E. Confidentiality Agreements Between the Government and the Privilege Holder

Finally, while I agree with the Committee's concerns regarding the requirement of a confidentiality agreement in the proposed rule, I continue to have reservations about the absence of any mutual decision regarding the need for selective waiver protection between the government and a privilege holder in a given case. If the proposed rule is designed to encourage protected disclosures to the government in cases where such disclosures will significantly

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[8] Qwest, 450 F.3d at 1192 ("the rule Qwest advocates would be a leap, not a natural incremental next step in the common law development of privileges and protections.").

[9] See Id. at 1194 (noting that Qwest's documents had been "introduced into evidence in a criminal trial, produced as discovery in three separate criminal proceedings, and used as exhibits to SEC investigative testimony.").

[10] See Testimony of Peter Pope, Deputy Attorney General of the State of New York at Hearing on Proposal 502, pp. 57-60 (April 24, 2006)(discussing investigation and prosecution of white collar crime at state level and efforts to obtain "a similar common law exception in New York State.").

advance the efficiency and efficacy of a particular investigation, it seems that the government ought to have some continuing role in defining the class of cases where such disclosures are imperative and thus where waiver protection is warranted. Further, if the proposal is to tread on established doctrine only as narrowly as is necessary, it seems that some pre-disclosure agreement between the privilege holder and the government would demonstrate the holder's genuine *ex ante* concern over downstream dissemination in a manner most consistent with traditional concepts of privilege and waiver. While requiring a confidentiality agreement as part of the rule is unworkable for the reasons advanced by the Committee, the proposed rule could require some pre-disclosure "mutual selection" of full selective waiver protection. This would eliminate judicial autopsies of specific agreements that threaten to undermine the protection promised by the proposed amendment, but allow for continuing mutuality between federal entities and privilege holders on a case by case basis.

In sum, I believe that the Committee's work on proposed FRE 502(c) represents a valuable contribution that is consistent with modern evolution of privilege and waiver and which will best serve the public interest in policing the contemporary corporate entity in the twenty-first century. For these reasons, I write in support of the proposed amendment.

Respectfully Submitted,

Liesa L. Richter
Associate Professor of Law