I. INTRODUCTION

The marketing division of a company is at a trade show cocktail party in Kansas City. After five martinis, a representative of Company 1 lets it slip that his company is planning on dropping out of one market and raising prices in another. Also intoxicated, a representative of Company 2 says, “Well, if you do that…our company will likely drop the market in which you are raising prices, and will probably increase prices where you are withdrawing. It just makes sense…” Five months later after each company has withdrawn from one market and increased prices in the other, Company 1 launches a routine, internal self-audit conducted by counsel. During the investigation, the marketing employee mentions to counsel that he got a little tipsy at the last trade show and mentioned to his friends that the company would be withdrawing from market A and increasing prices in market B. The lawyer later discovers that the competitor company has increased their prices in market A, and withdrawn from market B, exactly as discussed at the trade show. Shortly thereafter, the Federal Trade Commission (FTC) launches an investigation on the loss of competition and the increase of prices in both markets. The corporation the attorney represents has strong internal ethics policies and wishes to disclose its findings to the FTC, but fears that disclosing such information to the government will result in litigation brought by the distributors who buy the corporation’s products. Can the lawyer make the disclosure to the FTC without waiving the attorney-client privilege that adheres to his communications with the marketing representative if such communications are sought by the distributors?

This answer depends on which side of State Line Road the lawyer’s company operates. If his company is in Missouri, and subject to Eighth Circuit law, the corporation may disclose the information to the FTC without fearing

* Caroline Zuschek graduated in 2013 from the University of Missouri-Kansas City School of Law and was admitted to practice law in Kansas this past fall. She currently works as a research attorney at the Kansas Court of Appeals in Topeka, Kansas.
how the disclosures may be used against the corporation in future litigation.\textsuperscript{1} If however, the company operates in Kansas, governed by Tenth Circuit law, disclosing information to the FTC that would otherwise be privileged will result in an absolute loss of the attorney-client privilege.\textsuperscript{2} Distributors will subsequently be able to use the information disclosed to the FTC in fashioning their own litigation, even if the FTC contractually agreed to keep the disclosed information confidential.\textsuperscript{3} Thus, if both Company 1 and Company 2 had launched internal audits and had come to the same conclusion, but operated on different sides of the Kansas/Missouri border, their choice to disclose would have dramatically different repercussions. This note will examine the attorney-client privilege and waiver in Part II, the Eighth Circuit’s adoption of selective waiver in Part III, and the Tenth Circuit’s vehement rejection of selective waiver in Part IV. Part V will analyze the arguments for and against selective waiver. Part VI will conclude that selective waiver encourages corporate responsibility, decreases litigation, facilitates truthful communication between clients, attorneys, and the government, and should be adopted nationwide.

\section*{II. ATTORNEY-CLIENT PRIVILEGE AND HOW IT IS WAIVED}

The Federal Rules of Evidence broadly state that “privileges shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience.”\textsuperscript{4} Thus, while attorney-client privilege is not codified within the Federal Rules, it nevertheless remains present as it is “the oldest of the privileges for confidential communications known to the common law.”\textsuperscript{5} The privilege exists to promote honest communication between lawyers and their clients, which ultimately fosters the administration of justice as the ability of a lawyer to provide advocacy or advice turns on the lawyer’s knowledge of the client’s affairs.\textsuperscript{6} The Supreme Court has long maintained that the attorney-client privilege is “founded upon the necessity...of the aid of persons having knowledge of the law...[whose] assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”\textsuperscript{7} This privilege applies to corporations as well as individuals.\textsuperscript{8}

The privilege applies where “legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.”\textsuperscript{9} Because confidentiality is key to the privilege, “[t]he attorney-

\begin{itemize}
\item \textsuperscript{1} See Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 604 n.1 (8th Cir. 1978) (en banc).
\item \textsuperscript{2} See In re Qwest Commc’ns Int’l, Inc., 450 F.3d 1179, 1186 - 1201 (10th Cir. 2006).
\item \textsuperscript{3} Id.
\item \textsuperscript{4} Fed. R. Evid. 501 advisory committee’s note.
\item \textsuperscript{5} Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing J. WIGMORE, EVIDENCE § 2290 (McNaughton revision 1961)).
\item \textsuperscript{6} Id.
\item \textsuperscript{7} Hunt v. Blackburn, 128 U.S. 464, 470 (1888).
\item \textsuperscript{8} Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 348 (1985) (citing Upjohn Co. v. United States, 499 U.S. 383 (1981)).
\item \textsuperscript{9} Meredith, 572 F.2d at 602 (quoting Wonneman v. Stratford Securities Co., 23 F.R.D. 281, 285 (S.D.N.Y. 1959)).
\end{itemize}
client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party.”

As a result, “courts will grant no greater protection to those who assert the privilege than their own precautions warrant.” Thus, “[a]ny voluntary disclosure by the client is inconsistent with the attorney-client relationship and waives the privilege.”

However, because the Federal Rules of Evidence have not codified the privilege or how it is waived, but have left determinations of privilege instead to the “reason and experience” of judges, privilege is not static, and can be adjusted to fit changing needs. Still, courts are reluctant to recognize new privileges, and tend to strictly construe established privileges, absent a showing that “excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”

III. ADOPTION OF SELECTIVE WAIVER IN THE EIGHTH CIRCUIT

The Eighth Circuit Court of Appeals is the sole circuit court to allow for a selective waiver of privilege that allows corporations to disclose confidential information to government agencies in government investigations, but to retain the right to refuse to disclose that same information in suits by third parties. In the seminal Eighth Circuit case, Diversified Industries sought to keep confidential a memo prepared by a law firm that reported the results of an internal investigation that was spurred by allegations in previous litigation that Diversified’s employees were bribing employees of other companies to accept inferior products than were ordered at the same price.

The SEC later investigated Diversified and subpoenaed the internal memorandum prepared by the law firm regarding Diversified’s practices. Diversified complied with the subpoena and was subsequently sued by a third party. The third party then sought to compel disclosure of the information given to the SEC on the grounds that it was no longer confidential because by voluntarily disclosing it to the SEC, Diversified waived the attorney-client privilege. However, the court found that because the disclosure was made in a separate and nonpublic SEC investigation, that only a limited waiver of the privilege had occurred. The Court reasoned that if corporate disclosures to government agencies completely obliterated attorney-client privilege, future litigation would dissuade corporations from employing outside counsel for the

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10 United States v. Ryans, 903 F.2d 731, 741 n.13 (10th Cir. 1990).
11 Id. (quoting In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989)).
12 United States v. Bernard, 877 F.2d 1463, 1465 (10th Cir. 1989).
13 Qwest, 450 F.3d at 1184 (citing Advisory Committee Notes to the Federal Rules of Evidence 501 that notes that the rule “reflect[s] the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.”).
14 Id. at 1197.
16 See Meredith, 572 F.2d at 611.
17 Id. at 607-08.
18 Id. at 611.
19 Id.
20 Id. at 599.
21 Id. at 611.
purpose of investigating them and advising them on how to “protect stockholders, potential stockholders and customers.”

The Court further noted that this did not preclude future litigants against Diversified from obtaining the same information through other non-privileged sources such as business documents, depositions of corporate employees, and financial records. Therefore, it stands to reason, under Eighth Circuit law, Corporation 1 may comply with a subpoena or make a disclosure to a government agency in the course of an investigation without forfeiting the right to keep attorney-client communications confidential in future litigation potentially brought by its distributors.

IV. REJECTION OF SELECTIVE WAIVER IN THE TENTH CIRCUIT

However, despite close geographic proximity, the Tenth Circuit Court of Appeals vehemently declined to apply selective waiver of attorney-client privilege to corporations making disclosures to government agencies. Drawing a hard line, the court maintained that even where the agencies promised the corporation that the disclosures would remain confidential it allowed all disclosed information to be discoverable in subsequent litigation. In so doing, the Tenth Circuit joined the majority of other circuits to consider this question. At issue in the Tenth Circuit case was whether attorney-client communications, totaling over 220,000 pages, which Qwest Communications International, Inc. disclosed to the SEC and the DOJ during two concurrent investigations into Qwest’s business practices should be discoverable by third-party litigants or protected by attorney-client privilege under a theory of selective waiver. Despite finding that Qwest had entered into confidentiality agreements with the DOJ and the SEC, the court found these protections were weak because the agreements simultaneously enabled the agencies to use the information gathered from Qwest in the performance of their legal duties.

The Court found the possible dissemination of the information in the government arena could potentially have been broad, thus weighing against a finding that Qwest did not intend to publicly disclose the information. Thus, the Tenth Circuit found that the confidentiality agreements could not reasonably have been relied on to preserve privilege. Further, because Qwest disclosed the information prior to a finding that it would be kept confidential, the court maintained that its compliance with the investigations was in no way based on

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22 Id.
23 Id.
24 Id.
25 Qwest, 450 F.3d at 1201. It is worthy of note, however, that there is a possibility that this case’s central findings have been over exaggerated by other courts. In fact, the opinion is specifically limited to “the record before [the court],” which could be evidence of the Tenth Circuit’s intent to keep its holding narrow. Id. at 1181.
26 Id. at 1196.
27 Id. at 1181.
28 See id. at 1191-92.
29 Id.
30 Id. at 1192-93.
the notion of a selective waiver. Because the court did not find that selective waiver would enhance investigatory compliance, and because it did not believe the notion of a selective waiver was premised on the purpose of the attorney-client privilege (to foster open communication between clients and their counsel), the court compelled Qwest to disclose the 220,000 pages it previously shared with government agencies to the third-party litigants.

Dismissing Qwest’s arguments that the privilege would facilitate cooperation with law enforcement and would result in unfairness to cooperative corporations, the Qwest court declined to adopt a doctrine of selective waiver or to adopt a new privilege protecting disclosures made in government investigations. Therefore, Company 2 in the hypothetical example provided above would not be able to disclose the suspected wrongdoing of its marketing representative to the FTC without exposing themselves to litigation from its distributors.

V. WHY THE EIGHTH CIRCUIT GOT IT RIGHT

A. Arguments for Selective Waiver

1. Self-Policing & Internal Legal Audits

The Eighth Circuit’s primary motivation for adopting a theory of selective waiver for corporate compliance with government investigations was the fear that “[t]o 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.” Agreeing with the Eighth Circuit, the Southern District of New York similarly found that “the public policy concern of encouraging cooperation with law enforcement militates in favor” of adopting selective waiver. This logic is sound because it stands to reason that if a corporation fears its employees are acting outside the law and it wants to discover this fact to remedy it, the corporation will need counsel to do an internal audit. If the corporation does an internal audit and criminal behavior or fraud is revealed, the corporation can then correct the problem. However, if the corporation is then investigated by a government agency, say the SEC, it will then be asked to disclose the results of its internal investigations. Without selective waiver, the disclosure of this information will subject the corporation not only to the penalties levied against them by the government, but also to a flood of third-party litigation from those who were impacted by the corrupt practices of the corporation’s employees.

While this may seem like the corporation’s just desserts, the reasonable corporation will simply avoid conducting internal investigations. Then, it may still receive leniency for cooperating with the SEC because it simply will not

31 Id. at 1193.
32 Qwest, 450 F.3d at 1201.
33 Id. at 1195, 1197.
34 Meredith, 572 F.2d at 611.
have anything to disclose, and third-party litigants will be unable to piggy back
off the corporation’s efforts to self-police. To preclude the application of
selective waiver is to encourage ostrich behavior. Why would any reasonable
corporation remove its head from the sand if doing so would result in litigation
by the government and other third parties?

2. Cooperation with Law Enforcement

Similarly, selective waiver facilitates cooperation between corporations
and law enforcement. Where selective waiver is adopted, corporations are
incentivized to comply with government investigations both because they are
granted some leniency in penalties for their compliance, and because they can
ensure a resolution that leaves them with some defenses against third-party
litigants. However, without selective waiver, it is in a corporation’s best interest
to assert privilege when internal documents prepared by counsel are subpoenaed,
or to refrain from gathering internal intelligence. This benefits no one.

Lack of cooperation with government agencies increases the costs
associated with pursuing an investigation both in terms of the time and the
resources required. Because the time and money required to complete an
external investigation without internal help are burdensome, it follows fewer
investigations will result in successful completion, and less malfeasance will be
brought to light. Further, because government agencies are funded by the
public, the public incurs the extra costs of the investigation into a noncompliant
corporation in the form of increased taxes, and also bears the burden of
unprosecuted corporate wrongdoing in the form of increased costs at the
marketplace.

3. Flood of Litigation

If information will not be kept confidential from third-party plaintiffs,
then corporations will have little incentive to provide government agencies with
the information, particularly where doing so would invite government fines and
lawsuits as well as map lawsuits for third parties. As a result, increased litigation
over what is privileged will inevitably occur. The government will always take
the position that the information sought is not privileged, and the corporation will
always claim privilege because it is in its best interest to do so. Thus, instead
of fostering a culture of cooperation between socially responsible corporations
and informed government agencies, the court instead creates a hotly litigious
issue that ultimately prevents productive government regulation of corporations
and increases government litigation costs in cases where the information sought
may or may not be helpful to the government’s investigation.

37 Id.
39 See McNally, supra note 36, at 853-54.
B. WHY ARGUMENTS AGAINST SELECTIVE WAIVER ARE UNPERSUASIVE

1. It is NOT Unfair

Critics of selective waiver of attorney-client privilege argue that allowing corporations to selectively disclose information to government agencies results in manifest unfairness to third-party litigants. Their reasoning is simply that third-party, private litigants to whom disclosures are not made will be disadvantaged when compared to government agency litigants. However, while there is some truth to this—government agencies will have information that private litigants do not—this critique is based on the assumption that corporations will make disclosures of their own wrongdoing to government agencies without the protection of selective waiver.

Though some corporations have complied with government investigations in absence of the selective waiver protections, “the degree of specificity provided within those disclosures is unclear.” Further, the majority of voluntary disclosures made in the absence of selective waiver provisions occurred shortly after the Eighth Circuit’s ruling in Diversified, and before other Circuit Courts had explicitly denied the extension of the attorney-client privilege. Indeed, it is unlikely that all corporations who could cooperate with government investigations would cooperate if their cooperation meant providing all of their potential civil opponents with information that could be used against them. In fact, the criminal penalties corporations might face for not complying, or for the underlying action without the leniency provided for cooperating, are often times far less than the civil liabilities that may result from the disclosure of otherwise privileged information. Thus, it is more likely than not that without selective waiver, corporations will not fully cooperate with government investigations by disclosing the results of internal investigations. Therefore, the government will lack the information to proceed with an expeditious investigation, and the third-party, private plaintiff will still not have access to the privileged information. In this probable scenario, third-party litigants are in the same position they would have been if selective waiver were adopted: without confidential information provided by the corporation.

42 McNally, supra note 36, at 853.
43 Id.
45 See McNally, supra note 36, at 824-25.
Further, the SEC has noted that third-party litigants often benefit from a successfully completed investigation and enforcement action. 46 This is because as a result of the enforcement action, private information about the company often becomes public through the enforcement action. 47 Third-party litigants are not precluded from using this public information, and no claims of privilege can be made by the corporation with regards to this information. Ultimately, then, selective waiver merely delays the information third-party litigants would get if the company would have complied with the government investigation even absent a waiver provision. Moreover, it actually increases the amount of information that will eventually be available to third-party litigants if the government agency finds evidence of actionable crimes or frauds by giving the enforcing agency information it might not otherwise have obtained. Indeed, “[t]here is some evidence provided by privileged information for which there is no non-privileged substitute or to which there is no path without the privileged evidence.” 48

In sum, the disadvantage to third-party, private litigants is all but imagined. Comparing private litigants with government agencies is problematic to begin with—as the two potential litigants seek to achieve vastly different ends through litigation. 49 Though selective waiver would result in government litigants possessing information private litigants do not, abandoning selective waiver does not result in private litigants obtaining such information. The end result is the lack of information across all litigants—which benefits no one. Ultimately, the adoption of selective waiver has no impact at all on private litigants who will not be able to access privileged corporate information either with or without selective waiver. As Justice Boggs noted in his dissenting opinion, “[r]ealistically speaking, the choice... is not between narrower and wider disclosure, but between a disclosure only to government officials and no disclosure at all.” 50

2. Government Litigants and Private Litigants are Not Similarly Situated

Further, even if there is some unfairness that inures to third-party litigants as a result of one group of litigants having access to information while the other group of litigants does not, public policy justifies this disparate treatment. First, “[t]he government’s investigations are generally more important.” 51 Because government agencies have less money to pursue litigation, and have no personal monetary stake in the outcome, agency litigation is more selective than private litigation. 52 Therefore, the investigations pursued

47 Id.
49 Smith, supra note 40, at 620-22; see also In re Columbia, 293 F.3d at 312 (Boggs, J., dissenting).
50 In re Columbia, 292 F.3d at 307 (Boggs, J., dissenting).
51 Id. at 312.
52 Id.
by government agencies are more likely to favor the public’s interest because the government has no personal motivations for pursuing less relevant investigations or higher dollar investigations that impact fewer people. Second, the remedies available to government agencies and third-party litigants are dissimilar. While the government may seek imprisonment and punitive fines, private litigants are limited to civil remedies. This is important because the end game changes depending on whether the litigation is civil or criminal: in criminal litigation the primary goal is to deter, and in some cases punish, illegal behavior. On the other hand, the ultimate priority for private litigants is to win the greatest amount of money possible. While monetary payouts inarguably deter corporate misbehavior to some extent, the discrepancy in litigation goals suggests a basis for differential treatment with regard to privileged material.

Third, government agencies start at a “tactical disadvantage” when compared to private, third-party litigants. Partially, this is because private litigants have more money (in many cases) to spend on discovery and litigation preparation. However, this is also the reality of the differences between criminal and civil litigation. Criminal defendants are protected from self-incrimination, and the burden of proof that a criminal prosecutor must meet is higher than a plaintiff must meet in a civil suit. Because of these discrepancies, a rule that allows for government compliance would seem to be justified, even if it results in disparate treatment between civil and criminal litigants.

Yet, the Sixth Circuit majority dismissed such an argument, arguing instead that “[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.” While a qui tam or shareholder derivative plaintiff inarguably does contribute to the truth-finding function of our justice system to the same degree as an SEC investigator, unless the SEC or another government agency has already investigated the corporation and the corporation has opted to disclose internal audit information to that agency, these plaintiffs are completely unaffected by selective waiver. If such information has been previously disclosed to a government agency and the plaintiffs seek to compel that information and cannot, because of selective waiver, they are still no worse off than if the waiver had never existed. Further, the qui tam plaintiff will be barred from bringing a suit if the allegations made by the plaintiff have been previously disclosed to the public, such as through an SEC enforcement action, making qui tam plaintiffs unlikely beneficiaries of confidential information already in the hands of government agencies.

VI. CONCLUSION

53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
58 In re Columbia, 293 F.3d at 303.
Inarguably, as critics of selective waiver have pointed out, the attorney-client privilege was not designed to protect conversations between a client and the government, but rather conversations between a client and his attorney. However to end the discussion there would be to stick to the letter of the privilege, and to discount its intent. The net impact of denying corporations the opportunity to avail themselves of selective waiver is essentially to say “attorney client privilege means attorney client” without considering the reason for the privilege (to insure frank communications between attorneys and clients in need of legal advice) or the primary objection to the privilege and the reason for its narrow construction: we as a society believe that truth-finding in the justice system is of the utmost importance. If the expansion of the privilege serves the greater good “transcending the normally predominant principle of utilizing all rational means for ascertaining truth,” then the privilege should be expanded. Because allowing for selective waiver of attorney client privilege for corporations who wish to comply with government investigations actually “furthers the ‘truth finding process,’” and results in “[c]onsiderable savings” to the government and the public and likely increases the number of corporations who will self-policing and internally audit behavior, the ultimate result is a more compliant corporate climate. This benefits consumers, and even potential third-party litigants, by potentially eradicating the need for third-party suits by preemptively discouraging corporate noncompliance and encouraging quick resolution of unethical corporate behaviors.

In light of these results, it is difficult to see how denying the application of this narrow waiver of privilege benefits anyone. If the sole reason the privilege is to be construed narrowly is that it belies the truth-finding function, but this waiver actually increases truth finding, narrow construction seems unnecessary. Likewise, if the sole reason for not expanding the privilege is because it isn’t strictly between attorney and client then courts are simply opting to comply with a phrase’s semantics at the expense of its meaning. To limit the privilege in the way suggested by the majority of courts is nonsensical, especially in light of the fact that the privilege itself is not even codified. Rather, the privilege is a creature of common law that judges have the authority to expand or contract based on a specific test: whether the benefit to the public of the privilege is greater than the loss to truth-finding. Here, where truth-finding is actually enhanced, it is clear the balancing test weighs in favor of the adoption of selective-waiver.

With the current “economic border war” uniquely impacting businesses located in Kansas City, selective waiver doctrine should be a consideration for businesses seeking to jump the state line and take advantage of Kansas subsidies, which between 2009 and 2011 resulted in 118 million dollars in subsidies for a

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60 See Upjohn, 449 U.S. at 389; In re Columbia, 293 F.3d at 302.
62 In re Columbia, 293 F.3d at 303.
63 See Trammel, 445 U.S. at 47-53.
mere four high profile corporations. While these subsidies are obviously alluring, selective waiver doctrine applies only on the Missouri side of the state line divide and should be seen as an incentive to CEOs who have strong internal-ethics policies as Eighth Circuit law will allow for internal policing and cooperation with government agencies without lawsuit mapping for third-party litigants, and Tenth Circuit law will not.
