

No. \_\_\_\_

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IN THE  
**Supreme Court of the United States**

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QWEST COMMUNICATIONS INTERNATIONAL INC.,  
*Petitioner,*

v.

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLORADO *et al.*,  
*Respondents.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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September 6, 2006

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### **QUESTION PRESENTED**

Whether production of privileged documents to federal law enforcement authorities in the course of federal investigations and pursuant to written confidentiality agreements waives the attorney-client privilege and the protections afforded to attorney work product with respect to private litigants in separate proceedings.

**PARTIES TO PROCEEDINGS BELOW**

The parties to the litigation in the district court include Lead Plaintiffs New England Health Care Employees Pension Fund, Clifford Mosher, Tejinder Singh, and Satpal Singh, each suing as a putative representative of a class of shareholders who purchased securities of Qwest Communications International Inc. ("Qwest" or the "Company"). Defendants in the district court are Qwest, Arthur Andersen LLP, Philip F. Anschutz, Joseph P. Nacchio, Robin R. Szeliga, Robert S. Woodruff, Drake S. Tempest, James A. Smith, and Craig D. Slater.

Qwest was the only petitioner in the proceeding before the United States Court of Appeals for the Tenth Circuit that is the basis for this petition for writ of certiorari. Each of the Lead Plaintiffs in the district court was a respondent in the court of appeals.

**RULE 29.6 STATEMENT**

The securities of Qwest Communications International Inc. are publicly traded. Qwest believes that Legg Mason, Inc. (through various wholly owned subsidiaries) owns 10% or more of its securities.

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**OPINION BELOW**

The decision of the United States Court of Appeals for the Tenth Circuit is reported at 450 F.3d 1179, and is reproduced at App. 1a-40a. The decisions of the district court that are relevant to the issue presented by this petition—*see In re Qwest Commc'ns Int'l Inc. Sec. Litig.*, No. 1:01-CV-01451 REB-PAC, Docket No. 778 (D. Colo. Aug. 15, 2005) (order granting in part and denying in part Lead Plaintiffs' motion to compel), and *id.*, Docket No. 923 (D. Colo. Feb. 2, 2006) (order granting in part and denying in part Qwest's motion to reconsider and certify)—are not published. Those opinions are reproduced at App. 41a-50a and App. 51a-55a, respectively.

## JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its decision on June 19, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Tenth Circuit's decision on a writ of certiorari.

## STATUTORY PROVISIONS INVOLVED

This petition calls for the application of Rule 501 of the Federal Rules of Evidence, which provides:

Except as otherwise required by the Constitution of the United States or provided by an Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501.

Also relevant is Rule 26(b)(3) of the Federal Rules of Civil Procedure, which provides in pertinent part:

**Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's

case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3). Rule 26 of the Federal Rules of Civil Procedure is reproduced in its entirety at App. 56a-67a.

### STATEMENT OF THE CASE

#### **A. The Federal Investigations And Qwest's Disclosure Of Privileged Materials Pursuant To Written Confidentiality Agreements.**

In early 2002, the Securities and Exchange Commission ("SEC") began an informal investigation of Qwest's accounting practices and requested that Qwest produce specified categories of documents. The SEC converted its informal investigation into a formal investigation in early March of 2002 and began to issue subpoenas for documents. In early July of 2002, the Department of Justice ("DOJ") informed Qwest that it had begun an investigation as well.

By the time of these initial contacts from the SEC and DOJ, Qwest was embroiled in civil litigation that would ultimately involve many of the same issues that were the subjects of the government investigations. In July of 2001, a pension fund filed the first of numerous federal securities class action complaints against Qwest and certain individual defendants. *New England Health Care Employees Pension Fund v. Qwest Commc'ns Int'l Inc.*, No. 1:01-CV-01451 REB-PAC, Docket No. 1 (D. Colo. July 27, 2001). This case was later consolidated with subsequently filed putative class actions in the United States District Court for the District of Colorado and re-designated *In re Qwest Communications*

*International Inc. Securities Litigation. New England Health*, No. 1:01-CV-01451 REB-PAC, Docket No. 9 (D. Colo. Sept. 12, 2001) (order consolidating putative class actions).<sup>1</sup> Seven individual private securities cases were also filed against Qwest and others after the Company's announcement of the SEC and DOJ inquiries and six more in 2006, following the announcement of a partial settlement of the consolidated securities class action.<sup>2</sup>

Qwest initially declined to produce documents to the SEC and DOJ protected by the attorney-client privilege and the work product doctrine. However, in order to be viewed by the SEC and DOJ as cooperating in their investigations, the

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<sup>1</sup> Federal jurisdiction over the consolidated securities class action is conferred pursuant to § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and § 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a).

<sup>2</sup> On October 31, 2005, Lead Plaintiffs in the consolidated securities class action announced a settlement with Qwest and some of the defendants on behalf of the putative class in *In re Qwest*. After preliminarily approving that partial settlement, the Honorable Robert E. Blackburn of the United States District Court for the District of Colorado conducted a fairness hearing to consider the partial settlement, and his final decision on the proposed partial settlement is pending.

The district court's approval of the partial settlement in *In re Qwest* will not moot the issue presented by this Petition, since the Lead Plaintiffs have indicated that they will continue to seek production of the documents at issue for possible use in the continuing litigation against the non-settling defendants in that case. The Lead Plaintiffs agreed to an unopposed motion in the district court, seeking to stay production of any Limited Waiver Material (as defined on p. 5, *infra*) until proceedings in this Court conclude, however, and the Honorable Richard A. Kramer of the California Superior Court has deferred his consideration of a motion to compel the production of the Limited Waiver Material in a related case, *Cal. State Teachers Ret. Sys. v. Qwest Commc'ns Int'l Inc. et al.*, No. 415546 (Super. Ct. Cal.), pending the resolution of this Petition as well. As a result, Qwest has not produced any Limited Waiver Material in this or any related civil litigation.

Company eventually agreed to produce certain privileged material. It did so only after the SEC and DOJ separately agreed in writing that they would not disclose these documents except as required by law or in the discharge of their duties and responsibilities, and that they would not argue that Qwest's production of the documents formed the basis for a waiver as to any third party. See February 11, 2003 Letter from William R. McLucas to Randall J. Fons (App. 68a-69a); February 10, 2003 Letter from Harold A. Haddon to William J. Leone (App. 70a-72a).

Pursuant to these and subsequent written confidentiality agreements with the government, Qwest produced the documents (the "Limited Waiver Material") at issue in this Petition. Throughout these proceedings, no party has ever disputed that, but for the production to the government, the Limited Waiver Material is subject to valid claims of privilege, and the holdings of the district court and court of appeals do not question Qwest's valid claims of privilege absent its production of the Limited Waiver Material to the government.

#### **B. Summary Of Proceedings Leading To This Petition.**

On February 28, 2005, Lead Plaintiffs in *In re Qwest* moved to compel production of the Limited Waiver Material. After initially referring that motion to a United States Magistrate Judge, on August 15, 2005, the district court ordered Qwest to produce all of the Limited Waiver Material, with one exception (the "August 15, 2005 Order"). (App. 49a-50a) The exception related to "opinion work product" found in a limited number of memoranda prepared by Qwest's litigation counsel that the district court instructed Qwest to redact before production. (App. 49a-50a)

Qwest sought reconsideration of the portion of the district court's August 15, 2005 Order requiring production of the

opinion work product contained in the remaining Limited Waiver Material and requested that the district court certify its August 15, 2005 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On February 2, 2006, the district court granted in part and denied in part Qwest's motion to reconsider and certify. (App. 54a-55a) The court held that Qwest had not waived "opinion work product" protections with respect to any of the Limited Waiver Material and thus instructed Qwest to redact "opinion work product" from all of the Limited Waiver Material prior to its production. (App. 52a)<sup>3</sup> The court refused to certify the August 15, 2005 Order for interlocutory appeal, however. (App. 53a-54a)

Qwest then sought further review in the Tenth Circuit by writ of mandamus. The court of appeals determined that it was appropriate to consider the merits of Qwest's position and acknowledged that the question Qwest presented "is of considerable public interest." (App. 7a) The Tenth Circuit also seemed to accept the Sixth Circuit's judgment that the limited waiver principle Qwest advocated "would further the search for truth, realize considerable investigative efficiencies, encourage settlements, and possibly increase corporate self-policing" (App. 25a (citing *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 (6th Cir. 2002), *cert. dismissed sub nom, HCA, Inc. v. Tenn. Laborers Health and Welfare Fund*, 539 U.S. 977

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<sup>3</sup> The court of appeals did not review the district court's ruling that "opinion" work product had not been waived and, accordingly, that issue is not presented by this Petition. However, since courts commonly recognize that "opinion" work product is afforded even greater protections than "fact" work product, *see, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 400-02 (1981), the limited waiver rule that Qwest urges to protect "fact" work product would, as a practical matter, protect "opinion" work product as well. On the other hand, even if fact work product were waived by production to the government under the circumstances presented in this case, the district court correctly concluded that it does not follow that opinion work product would also be waived.

(2003))), but concluded that “the record in this case is not sufficient to justify adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material” (App. 24a). It therefore declined to issue a writ of mandamus and allowed to stand the district court decision compelling production of the documents at issue.

## ARGUMENT

### I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS REGARDING AN ISSUE OF SIGNIFICANT IMPORTANCE TO LAW ENFORCEMENT AUTHORITIES AND LITIGANTS.

More than a dozen years ago, the federal district court in Colorado characterized the law of limited waiver as an area of “hopeless confusion.” *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 696 (D. Colo. 1993). After reviewing the state of the law more recently, the Sixth Circuit voiced that same assessment. *See In re Columbia/HCA Healthcare*, 293 F.3d at 295. In fact, the confusion is so profound that it is difficult even to describe all of the various positions established by the federal courts.

The Eighth Circuit stands at one end of the spectrum with its *en banc* decision in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (*en banc*), which held that the production of privileged documents to the SEC resulted in a waiver of the attorney-client privilege only with respect to that agency, even absent a confidentiality agreement between the producing party and the SEC. *Id.* at 611. At the other end of the spectrum stand the Tenth and Sixth Circuits, each of which has held that both the attorney-client privilege and at least some work product protections are waived by production of documents to law enforcement agencies, even where the producing party has obtained written confidentiality agreements with those agencies. *See In re Qwest*, App. 26a-

28a; *In re Columbia/HCA Healthcare*, 293 F.3d at 302-07. *But see id.* at 307-14 (Boggs, J., dissenting). And even those two decisions differ in the scope of their analysis.

Between these two extremes lies a vast range of confusion that makes it difficult to determine where some of the other circuits stand on the issue.<sup>4</sup> For example, the Tenth Circuit reads Second Circuit law to be consistent with its own in rejecting the possibility of a limited waiver of attorney-client privilege based on an agreement between law enforcement agencies and the producing party (App. 15a), but acknowledges that the Second Circuit seems to have left room for a limited waiver of work product protections under similar circumstances (App. 22a-23a). The Sixth Circuit, by contrast, reads the Second Circuit's opinion in *In re Steinhardt Partners, LP*, 9 F.3d 230 (2d Cir. 1993), to acknowledge that any waiver may be avoided through an appropriate agreement between the producing party and the government. *See In re Columbia/HCA Healthcare*, 293 F.3d at 300-01 (discussing *Steinhardt*). In fact, three district courts in the Second Circuit have relied on *Steinhardt Partners* to find no waiver of attorney-client privilege or work product protections when adequate agreements between law enforcement agencies and the producing parties are demonstrated. *See In re Natural Gas Commodity Litig.*, Civ. A. No. 03-6186VMAJP, 2005

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<sup>4</sup> The confusion also extends to the terminology used in the various courts of appeals. In *Diversified*, the Eighth Circuit employed the term "limited waiver" to describe its holding that production of privileged documents to the SEC did not waive applicable privileges with respect to other parties. *Diversified*, 572 F.2d at 611. The Sixth and the Tenth Circuits, however, have described this same argument as one of "selective waiver" rather than "limited waiver." *In re Qwest*, App. 2a-3a; *In re Columbia/HCA Healthcare*, 293 F.3d at 295, n.5 (quoting *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423, n.7 (3d Cir. 1991)) (additional citations omitted). Like the court in *Diversified*, *Qwest* has characterized its position as one of "limited waiver" in the proceedings below and it does so in this Petition as well.

WL 1457666, at \*\* 5-9 (S.D.N.Y. June 21, 2005) (magistrate judge opinion addressing work product protections), *aff'd*, Civ. A. No. 03-6186VMAJP, Docket No. 369 (S.D.N.Y. Dec. 2, 2005); *Maruzen Co. v. HSBC USA, Inc.*, Civ. A. Nos. 00-1079-RO, 00-1512-RO, 2002 WL 1628782, at \*\* 1-2 (S.D.N.Y. July 23, 2002) (addressing work product protections); *In re Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274, 284 (S.D.N.Y. 1995) (addressing attorney-client privilege).<sup>5</sup>

Similarly, although the Tenth Circuit reads First Circuit law to support rejection of a limited waiver concept (App. 15a (citing *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 682 (1st Cir. 1997))), the Sixth Circuit interprets the First Circuit as having “left the door open to selective waiver conditioned on the presence of a confidentiality agreement,” *In re Columbia/HCA Healthcare*, 293 F.3d at 301 (citing *United States v. Billmyer*, 57 F.3d 31, 37 (1st Cir. 1995)); *see also In re Keeper of Records*, 348 F.3d 16, 28 (1st Cir. 2003) (reservations against waiver of privileges in presenting information to the government were “fully effective”).

This confusion is compounded by the fact that a number of appellate decisions commonly cited in discussions of this area of law have addressed the issue in cases that did not involve written agreements between the producing party and law enforcement agencies, or in contexts that were markedly different than the facts presented in this case and *In re Columbia/HCA Healthcare*. For example, both the D.C.

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<sup>5</sup> The Reporter to the Advisory Committee appears to agree with the Sixth Circuit’s interpretation of *Steinhardt Partners* as a case that leaves open the possibility of selective waiver of both attorney-client privilege and work product protection where a confidentiality agreement exists between the parties. *See* Memorandum from Dan Capra, Reporter, and Ken Broun, Consultant, to Advisory Committee on Evidence Rules, at 15-16 (Mar. 22, 2006) (on file with the Advisory Committee on Evidence Rules).

Circuit's decision in *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981), and the Third Circuit's ruling in *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), were decided in cases where no written agreement had been reached between the producing party and law enforcement authorities regarding limitations on waiver as to third parties. See *Permian*, 665 F.2d at 1217; *Westinghouse*, 951 F.2d at 1417-18, 1427. Nonetheless, both are cited as decisions that foreclose the possibility of limited waiver in their respective circuits. See, e.g., *In re Qwest*, App. 14a-15a; *In re Columbia/HCA Healthcare*, 293 F.3d at 295.<sup>6</sup> In fact, however, in a post-*Permian* case, the D.C. Circuit indicated its willingness to find limited waivers in circumstances similar to the instant case—where explicit written confidentiality agreements with government agencies exist, noting that the policy objectives of the *Diversified* court can be accomplished if the “SEC or any other government agency . . . expressly agree[s] to any limits on disclosure to other agencies consistent with their responsibilities under law.” *In re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982). The Seventh Circuit has also endorsed the idea that a finding of limited waiver might be appropriate under the circumstances present here. See *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (noting that other courts' rejection of limited waiver was due, in part, to the fact that they feel—“reasonably enough”—“that the possessor of the privileged information should have been more careful, as

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<sup>6</sup> Similarly, the First Circuit's decision in *Massachusetts Institute of Technology*, 129 F.3d 681 – cited by the court in *In re Qwest* as evidence of that circuit's hostility toward limited waiver (App. 15a)—did not involve any written limited waiver agreement. Indeed, that case involved an attempt by MIT to refuse to produce to the IRS information that it previously had provided to another agency of the government. See 129 F.3d at 683. Thus, *Massachusetts Institute of Technology* does not invoke the same considerations as those presented by cases like this one.

by obtaining an agreement by the person to whom they made the disclosure not to spread it further”).

In short, the decisions of the federal courts of appeals offer a kaleidoscope of different approaches and different outcomes to the question posed by this Petition. The law continues in a state of “hopeless confusion,” more than a dozen years after the observation of the Colorado district court in *In re M & L Business Machine Co.*, 161 B.R. at 696.

## **II. PRODUCTION OF PRIVILEGED DOCUMENTS TO LAW ENFORCEMENT AGENCIES SUBJECT TO WRITTEN AGREEMENTS LIMITING THE RESULTING WAIVER SHOULD NOT CONSTITUTE A BROAD WAIVER OF PRIVILEGE PROTECTIONS.**

Rule 501 of the Federal Rules of Evidence dictates that testimonial privileges in the federal courts should be “governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience.” As this Court has recognized, Congress enacted Rule 501 to afford federal courts “the flexibility to develop rules of privilege on a case-by-case basis” and to “leave the door open to change.” *Trammel v. United States*, 445 U.S. 40, 46 (1980) (quoting 120 Cong. Rec. 40891 (1974) and citing S. Rep. No. 93-1277, at 11 (1974)).<sup>7</sup>

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<sup>7</sup> In 1972, the Chief Justice transmitted to Congress proposed Rules of Evidence formulated by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and this Court. Those proposed rules would have established nine specific testimonial privileges. Congress rejected that recommendation in favor of the current Rule 501, however, which acknowledges the authority of the federal courts “to continue the evolutionary development of testimonial privileges ‘governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience.’” *Trammel*, 445 U.S. at 47 (quoting Fed. R. Evid. 501). As noted above,

This Petition urges the Court to consider an issue that has divided the lower federal courts for decades—whether production of privileged documents to federal law enforcement authorities pursuant to written confidentiality agreements waives privileges with respect to private litigants who otherwise would not be entitled to obtain the privileged materials. Certainly, “reason and experience” counsel that limitations on the waiver effect of cooperation with federal law enforcement authorities will encourage cooperation with law enforcement and should be recognized where consistent with fairness to all litigants, as is the case here.<sup>8</sup>

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this approach was designed to provide the courts flexibility to develop rules of privilege on a case-by-case basis rather than to bind them to a specific set of testimonial privileges.

<sup>8</sup> At the outset, it should be recognized that the issue relates to waiver of privilege, not to the creation of a privilege *vel non*, the views of the Tenth Circuit notwithstanding. (App. 32a-36a) Recognition or creation of a privilege generally renders an entire category of communications inaccessible to all. Since it is commonly recognized that “the public . . . has a right to every man’s evidence,” *United States v. Nixon*, 418 U.S. 683, 709 (1974), new privileges are recognized only when it is determined that the importance of preserving the confidentiality of those communications “promotes sufficiently important interests to outweigh the need for probative evidence.” *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996); *see also Univ. of Penn. v. EEOC*, 493 U.S. 182, 188-95 (1990) (declining to recognize a privilege that would protect against disclosure of academic peer review materials). Application of limited waiver principles to communications already deemed to be privileged, by contrast, does not have the same impact as the recognition of a new privilege because it does not render entire categories of communications immune from discovery, but rather merely allows a party to maintain the confidence of privileged information against some parties but not others. As a result, the analysis of questions related to the possible waiver of privilege addresses significantly different concerns than does the analysis of questions related to the creation of a privilege itself.

**A. Limitation Of Waiver Will Encourage Cooperation With Law Enforcement Without Being Unfair To Private Litigants.**

**1. *Strong Policy Considerations Favor Limiting The Scope Of Waiver In This Context.***

It can hardly be gainsaid that the efforts of federal law enforcement agencies are enhanced by the cooperation of persons they regulate, since cooperation frequently provides law enforcement agencies with information that otherwise might only be obtained through litigation, if at all. Both the SEC and the DOJ have recognized this truism,<sup>9</sup> and the DOJ

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<sup>9</sup> For example, the DOJ has viewed this type of cooperation as so useful that it has instructed federal prosecutors to consider “waiver of corporate attorney-client and work product protections” as a factor in deciding whether to charge a company with a crime. Memorandum from Deputy Attorney General Larry D. Thompson to U.S. Attorneys (Jan. 20, 2003) (on file with author), *available at* [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf) (last modified Sept. 6, 2006) (“Thompson Memorandum”). While the Thompson Memorandum has come under attack from some circles, it represents DOJ’s recognition of the importance of the cooperation of private parties to the effectiveness of law enforcement efforts.

Similarly, in publishing for comment regulations that would have enacted a limited waiver principle, the SEC noted that recognition of a limited waiver principle would “serve[] the public interest because it significantly enhances the Commission’s ability to conduct expeditious investigations and obtain prompt relief, where appropriate, for defrauded investors.” *Implementation of Standards of Professional Conduct for Attorneys*, SEC Rel. No. 33-8150 (Nov. 21, 2002); 67 Fed. Reg. 71670, 71694 (Dec. 2, 2002). Although the SEC later withdrew this proposal because of questions regarding its jurisdiction to promulgate such a standard by regulation and concerns that the SEC might be infringing on judicial prerogatives if it attempted to do so, the Commission never retreated from its basic position that a limited waiver rule was to be encouraged. *See Implementation of Standards of Professional Conduct for Attorneys*, SEC Rel. No. 33-8185 (Jan. 29, 2003); 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003).

acknowledged in this very case that agreements of the kind at issue allow the government to obtain information promptly, without complicated enforcement proceedings. (App. 74a-75a, n.1) Indeed, the DOJ acknowledged here that the information Qwest produced as a result of the agreements “has been useful for, and in some cases essential to, the United States Attorney’s Office’s criminal investigation.” (App. 77a, ¶ F) It likewise cannot seriously be disputed that corporate and individual cooperation with law enforcement authorities would be enhanced by the recognition of a uniform limited waiver principle that allows parties to cooperate with law enforcement authorities without automatically being compelled to waive their attorney-client privileges and work product protections as to others.

**2. *Limiting Privilege Waiver From Production To Law Enforcement Authorities Is Fair To Third Parties.***

Ultimately, the question presented is whether some compromise of the confidentiality of information with respect to law enforcement authorities should in all cases eliminate privileges and work product protections with respect to all others. This issue must be resolved with regard to considerations of fairness, which commonly have played a central role in determining whether waivers have occurred and in defining their scope. *See, e.g., In re Keeper of Records*, 348 F.3d at 23-25; *In re Grand Jury Proceedings*, 219 F.3d 175, 183 (2d Cir. 2000); *In re von Bulow*, 828 F.2d 94, 101-02 (2d Cir. 1987). For example, fairness considerations are at the heart of the “sword and shield” principles, which prevent a party from advancing certain privileged information in litigation while seeking to deny the adversary access to other privileged information addressing the same subject. *See, e.g., In re Keeper of Records*, 348 F.3d at 25 (“Where a party has not thrust a partial disclosure into ongoing litigation, fairness concerns neither require nor permit massive breaching of the

attorney-client privilege.”); *In re Grand Jury Proceedings*, 219 F.3d at 186-87 (reversing district court’s blanket finding of waiver because the corporation asserting privilege did not take any affirmative steps to inject privileged materials into the proceeding); *Frontier Refining, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 704 (10th Cir. 1998) (“Frontier did not use the work product as a sword and is not, therefore, prohibited from shielding the material from discovery.”). Considerations of fairness also predominate in the analysis of many courts that are called upon to assess whether inadvertent document disclosure results in a waiver of privilege as to all possible parties, and in determining the scope of any waiver as to those parties for whom waiver is found. *See In re Grand Jury Proceedings*, 219 F.3d at 183 (“When waiver occurs as a result of inadvertent document disclosure, courts have limited the scope of that waiver based on the circumstances involved and overall fairness.”) (citing *United States v. Gangi*, 1 F. Supp. 2d 256, 264 (S.D.N.Y. 1998)).

Fairness hardly requires that civil litigants automatically become entitled to prove their cases from the files of opposing counsel or from the privileged communications of their adversaries, merely because an adversary has elected to cooperate with law enforcement authorities. Moreover, as this Court observed in rejecting an argument that a broad definition of the corporate attorney-client privilege might restrict the flow of information, recognition of a limited waiver principle in this context would “put[] the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts . . . .” *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

The SEC voiced virtually the identical view in explaining its continuing support for a limited waiver principle in 2003, notwithstanding its decision to withdraw a proposed

regulation accomplishing such a limitation due to concerns about its jurisdiction to address the issue and related concerns about infringing the prerogatives of the federal judiciary. See note 9, *supra*. As the SEC explained:

The Commission also finds that preserving the privilege or protection for internal reports shared with the Commission does not harm private litigants or put them at any kind of strategic disadvantage. At worst, private litigants would be in exactly the same position that they would have been in if the Commission had not obtained the privileged or protected materials.

*Implementation of Standards of Professional Conduct for Attorneys*, SEC Rel. No. 33-8185; see also 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003). Courts have voiced this opinion as well. See, e.g., *Westinghouse*, 951 F.2d at 1426, n.13 (“[I]n our view, when a client discloses privileged information to a government agency, the private litigant in subsequent proceedings is no worse off than it would have been had the disclosure to the agency not occurred.”); *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 689 (S.D.N.Y. 1980) (“The only prejudice that appears to arise is the prejudice that results whenever a party is deprived of information it would rather have. Such prejudice is neither caused nor acerbated by the disclosure of privileged information to the SEC in a separate, nonpublic proceeding to which the plaintiffs were not a party.”); *Saito v. McKesson HBOC, Inc.*, Civ. A. No. 18553, 2002 WL 31657622, at \*6 (Del. Ch. Nov. 13, 2002) (“[F]airness has little relevance in the context of *selective* waivers . . . because disclosure to one adversary does not prejudice a subsequent adversary any more than it would have if the initial disclosure had never been made.”) (emphasis in original).

Finally, any concerns about fairness to litigants are best addressed in the context of the litigation in which those concerns arise, and the courts have ample resources to do so.

For example, if a party sought to use privileged documents that had been produced to law enforcement agencies to its advantage in separate civil litigation, the “sword and shield” principles discussed previously would guide the decision.

In short, there is no reason to adhere to a rigid dogma, holding that disclosure of privileged information to the government waives privileges and work product protections to the universe at large when doing so necessarily diminishes parties’ willingness to cooperate with federal law enforcement authorities and is not necessary to promote fairness between the cooperating party and litigants in other venues. Recognition of a limited waiver principle in this context would foster a recognized and important policy interest, leaving to the courts the task of addressing claims of unfairness in the specific factual contexts in which they may later arise.<sup>10</sup>

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<sup>10</sup> As Judge Boggs noted in his dissent in *In re Columbia/HCA Healthcare*,

It is not clear why an exception to the *third-party waiver rule* need be moored to the justifications of the *attorney-client privilege*. More precisely, we ought to seek guidance from the justifications for the waiver rule to which the exception is made. Those justifications are not exactly coincident with the justifications for the privilege itself. . . .

....

The preference against selective use of privileged material is nothing more than a policy preference, and really also has very little to do with fostering frank communication between attorney and client. The question for this court is one of policy: Whether the benefits obtained by the absolute prohibition on strategic disclosure outweigh the benefits of the information of which the government has been deprived by the rule? As the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail.

293 F.3d at 308, 311 (Boggs, J., dissenting).

**B. The Tenth Circuit's Resolution Of This Issue  
Reflects An Unduly Narrow View Of Judicial  
Powers And Responsibilities Under Rule 501.**

The Tenth Circuit's analysis of the issue was cabined by its unduly narrow view of its powers and responsibilities under Rule 501. As this Court has explained, Rule 501 was enacted to promote flexibility and to allow for growth and change in the development of evidentiary privileges. *Trammel*, 445 U.S. at 46. Necessarily, the "reason and experience" that courts are to apply in determining whether an existing principle is to be adopted or modified should not be constrained by the limits of the record immediately before it. The Court of Appeals failed to recognize that basic proposition.

For example, although the Tenth Circuit acknowledged that recognition of a limited waiver rule "may well be a means to encourage cooperation with law enforcement, an end with unquestioned benefits to the commonwealth" (App. 25a (citing Andrew J. McNally, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure of Corporate Wrongdoing by Restricting Third Party Access to Disclosed Materials*, 35 Seton Hall L. Rev. 823, 825-27 (2005))), and characterized the Sixth Circuit's view of the positive contributions of such a rule in even stronger terms,<sup>11</sup> the court ultimately found that "[t]he record before us . . . does not support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine" (App. 25a). In a similar vein, the Tenth Circuit asserted that "if selective waiver were as essential to government operations as Qwest claims, it would seem the agencies would support Qwest's position." (App. 26a) But, as the court also noted,

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<sup>11</sup> As the Tenth Circuit stated, "[t]he Sixth Circuit majority in *Columbia/HCA Healthcare* conceded that a selective waiver rule would further the search for truth, realize considerable investigative efficiencies, encourage settlements, and possibly increase corporate self-policing." (App. 25a (citing *In re Columbia/HCA Healthcare*, 293 F.3d at 303))

the DOJ “carefully took no position on the parties’ dispute” and “declined an invitation to participate in oral argument.” (App. 26a)<sup>12</sup>

These observations and others, which appear to have driven the Tenth Circuit’s ultimate decision, reflect a begrudging view of the powers and responsibilities of the federal courts that is antithetical to the flexible nature of Rule 501. The question is not whether cooperation with law enforcement authorities will “cease” in the absence of the proposed limited waiver principle, or whether such a rule is “essential to government operations,” but whether cooperation with law enforcement authorities would be enhanced if such a rule were recognized. The Tenth Circuit acknowledged that it would. That being the case, the question should then be whether recognition of such a limited waiver principle in cases of this kind can be accomplished without creating unfairness in circumstances such as those here. Qwest respectfully submits that no such unfairness would occur, particularly because, as discussed above, the application of a limited waiver principle would leave private litigants precisely where they would have been if Qwest had never provided the Limited Waiver Material to the government in the first place.

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<sup>12</sup> Rather than speculate about what DOJ *might have said* in support of the position advocated by Qwest, it is more appropriate to focus on what DOJ *did* say. As noted previously, the memorandum filed by the DOJ in this case acknowledged that confidentiality agreements of the kind at issue allow the government to obtain information promptly, without complicated enforcement proceedings (App. 74a-75a, n.1), and that the information Qwest produced as a result of its agreements with the Department of Justice “has been useful for, and in some cases essential to, the United States Attorney’s Office’s criminal investigation” (App. 77a, ¶ F). The court of appeals made no mention of these DOJ statements at all in its opinion, however. Moreover, the Tenth Circuit answered its own question with respect to the SEC’s silence in the mandamus proceeding, noting that the court had not sought the SEC’s views. (App. 26a, n.4)

Moreover, recognition of the limited waiver principle advocated here will not place any burdensome obligation on the district courts, as the Tenth Circuit suggested. (App. 28a) Even with a limited waiver principle, the burdens of discovery disputes will continue to remain on the parties in the first instance, requiring them to meet and confer regarding specific issues and disagreements and to present for judicial review those that cannot be resolved without judicial intervention. If particular Limited Waiver Material were actually introduced into evidence in a criminal trial, as the DOJ has indicated may occur, Qwest's privileges would most likely be waived with respect to those particular documents. This more limited waiver, resolved on a document by document basis, is a risk Qwest assumed when it produced these documents to the SEC and the DOJ pursuant to agreements that recognized those agencies' abilities to disclose the documents as required by law or in furtherance of their discharge of their duties and responsibilities. (App. 68a-69a, 70a-72a) The resulting burden on the district court to decide a controversy based on the concrete record presented to it is hardly a basis for refusing to recognize the principle advocated here.<sup>13</sup>

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<sup>13</sup> Nor is it necessary for this Court to identify or address the various scenarios in which a waiver may occur as a result of law enforcement agencies' use of the Limited Waiver Material, or the use of those documents by Qwest itself. In recognizing the psychotherapist-patient privilege in *Jaffee*, this Court indicated that the precise contours of that privilege would be developed thereafter on a case-by-case basis, noting that "[a] rule that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner." 518 U.S. at 18. The same analysis would be expected in this case as well, even though no new privilege is involved.

**III. THIS PETITION PRESENTS AN ISSUE OF  
CONSIDERABLE PUBLIC IMPORTANCE  
THAT SHOULD BE RESOLVED AT THIS  
TIME.**

**A. This Is An Issue Of Significant Importance To  
Federal Law Enforcement Agencies And Their  
Potential Targets Alike.**

The attorney-client privilege is an essential foundation of the attorney-client relationship. It promotes a client's candor with his or her counsel, thus enabling the attorney to fully understand the facts relating to an issue on which legal advice is sought. In the corporate context, the privilege allows employees to engage in the "full and frank communications" that are essential to avoid corporate wrongdoing and error, and to discover and address them when they occur. *Upjohn Co.*, 449 U.S. at 389; *see generally id.* at 389-93; *see also Trammel*, 445 U.S. at 50 (the attorney-client privilege promotes "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth"); *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996) (observing that "counseling clients and bringing them into compliance with the law" is a "valuable social service [that] cannot be performed effectively if clients are scared to tell their lawyers what they are doing").

The separate protections of the work product doctrine are equally important, as they recognize that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Absent the protections of the work product doctrine, "much of what is now put down in writing would remain unwritten . . . [a]nd the interests of the clients and the cause of justice would be poorly served." *Id.* at 511.

As the Tenth Circuit correctly noted, “the issue of selective waiver is of considerable public interest.” (App. 7a) Indeed, it has become an issue of significant importance both to federal law enforcement authorities and to those seeking to cooperate with them.

Federal law enforcement authorities are increasingly demanding that companies they investigate produce privileged documents and have come to depend on such cooperation as a means of conserving scarce resources. When federal authorities make such demands, the responding company is faced with a difficult choice. It can say no and be deemed uncooperative—risking suit, regulatory sanction, or a catastrophic indictment—or it can acquiesce and thereby run the risk of possibly waiving its privileges with respect to an unknown and unknowable number of adversaries in separate civil litigation involving other parties. As the Association of Corporate Counsel and the Chamber of Commerce of the United States noted as *amici* before the Tenth Circuit, increasing prosecutorial demands for waivers of privilege as an element of cooperation in their investigations has led to a “culture of waiver.” (App. 36a) Thus, those organizations supported the limited waiver principle advocated in the court of appeals as one means of mitigating the possible adverse consequences of cooperation with law enforcement authorities. (App. 36a)

Because of the importance and difficulty of such decisions, it is critical that everyone involved have a clear understanding of the rules governing their cooperation with law enforcement authorities—and that those rules be uniform. As this Court has instructed, “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all.” *Upjohn Co.*, 449 U.S. at 393. The variation and ambiguity among the United States Courts

of Appeals compounds these problems, leaving litigants uncertain about whether conduct constitutes a waiver of privilege and thus chilling potential cooperation with law enforcement efforts.

**B. Recent Activities Of The Advisory Committee On Evidence Rules Confirm The Importance Of This Issue And The Merit Of The Principle Advocated By Qwest.**

On August 10, 2006, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Standing Committee") published for public comment a proposed Rule 502 of the Federal Rules of Evidence which, if adopted in its current form, would recognize that disclosure of privileged information to federal or state agencies during their investigations does not effect a waiver of privilege as to third parties.<sup>14</sup> The activities of the Advisory Committee are significant in two respects. First, as the Tenth Circuit recognized, concerns voiced by the Advisory Committee and others evidence the significant public interest in the issues

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<sup>14</sup> See Memorandum from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to the Bench, Bar, and Public on Proposed Amendments to the Federal Rules (Aug. 10, 2006) (on file with author), *available at* [http://www.uscourts.gov/rules/Memo\\_Bench\\_Bar\\_and\\_Public\\_2006.pdf](http://www.uscourts.gov/rules/Memo_Bench_Bar_and_Public_2006.pdf) (last modified Sept. 6, 2006). Proposed Rule 502(b)(3) provides as follows:

A voluntary disclosure [of privileged information] does not operate as a waiver if the disclosure is made to a federal, state or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation.

Memorandum from Jerry E. Smith, Chair of the Advisory Committee on Evidence Rules, to David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure (revised June 30, 2006) (on file with author), *available at* [http://www.uscourts.gov/rules/Excerpt\\_EV\\_Report\\_Pub.pdf#page=4](http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf#page=4) (last modified Sept. 6, 2006).

presented by this Petition. (App. 7a, n.2) Second, although the Advisory Committee process is in its preliminary phases, the proposed Rule it has advanced for public comment evidences at the very least that the principle Qwest advocates in this Petition is a responsible one that is entitled to serious consideration.

The activities of the Advisory Committee should not, however, diminish the Court's willingness to entertain this Petition and address the issue on the merits. That Committee is only in the initial phases of an extended process that will not conclude for years.<sup>15</sup> No one knows at this point whether any new Rules of Evidence will result from this process, much less what they might be. Furthermore, none of these developments will assist this Petitioner, which has properly raised the issue now. More important, perhaps, the issue of limited waiver will remain one of considerable public significance as to which the lower courts will remain profoundly divided unless and until a new rule of evidence is adopted.

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<sup>15</sup> In view of the elaborate rulemaking processes established by Congress and codified in the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, as supplemented by official publications of the Federal Rules of Practice and Procedure Administrative Office of the U.S. Courts, see *The Rulemaking Process: A Summary for the Bench and the Bar* (Apr. 2006), available at <http://www.uscourts.gov/rules/proceduresum.htm> (last modified Sept. 6, 2006); *The Rulemaking Process: Judicial Conference Procedures*, available at <http://www.uscourts.gov/rules/procedurejc.htm> (last modified Sept. 6, 2006), the process for consideration and eventual promulgation of a proposed new rule of evidence will almost certainly take more than two years. Even if Proposed Rule 502 proceeds through all of the necessary review and public comment periods at the most expeditious pace contemplated by the rulemaking procedures, it would not be transmitted to this Court for submission to Congress before May 1, 2008. Moreover, because the proposed Rule 502 affects privilege, 28 U.S.C. § 2074(b) requires that it be enacted directly by Congress. Thus, once the formal rule-making process draws to a close, there is no automatic implementation that would establish any limitation on the period for Congressional action, as is the case for some proposed rules.

This Petition presents the issue clearly, and this Court's resolution of the question at this time is both necessary and appropriate.

**CONCLUSION**

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 6, 2006

*Attorneys for Petitioner,  
Qwest Communications International Inc.*

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**APPENDIX A**

**PUBLISH**

**UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT**

[Filed June 19, 2006]

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No. 06-1070

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In re: QWEST COMMUNICATIONS INTERNATIONAL INC.,  
Securities Litigation,  
Petitioner,

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NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND;  
CLIFFORD MOSHER; TEJINDAR SINGH; SAT PAL SINGH,  
Real-Parties-in-Interest,

and

ASSOCIATION OF CORPORATE COUNSEL; CHAMBER OF  
COMMERCE OF THE UNITED STATES OF AMERICA,  
Amici Curiae.

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**ON PETITION FOR WRIT OF MANDAMUS TO THE  
UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLORADO  
(D.C. No. 01-CV-1451-REB-CBS)**

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William J. Leone, United States Attorney, Denver, Colorado; Catherine Y. Hancock, Michael S. Rabb, Appellate Staff, United States Department of Justice, Washington, D.C., on the brief for the United States Department of Justice.

Susan Hackett, Association of Corporate Counsel; Robin S. Conrad, Amar D. Sarwal, National Chamber Litigation Center, Inc.; W. Stephen Cannon, Todd Anderson, Jean Kim, Constantine Cannon, P.C., Washington, D.C., on the brief for Amici Curiae.

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Before **HENRY, MURPHY, and HARTZ**, Circuit Judges.

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**MURPHY**, Circuit Judge.

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In this mandamus action, Qwest Communications International, Inc. (Qwest), presents an issue of first impression in this circuit, namely, whether Qwest waived the attorney-client privilege and work-product doctrine, as to third-party civil litigants, by releasing privileged materials to federal agencies in the course of the agencies' investigation of Qwest. Qwest urges us to adopt a rule of "selective waiver" or "limited waiver" which would allow production of attorney-client privileged and work-product documents to the United States Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) without waiver of further protection for those materials. On the record before us, we hold that the district court did not abuse its discretion in

declining to apply selective waiver. Thus, we DENY the petition for a writ of mandamus.

### **I. Background and District Court Proceedings**

In early 2002, the SEC began investigating Qwest's business practices. In the summer of 2002, Qwest learned that the DOJ, through the United States Attorney's Office for the District of Colorado, had also commenced a criminal investigation of Qwest. During these investigations, Qwest produced to the agencies over 220,000 pages of documents protected by the attorney-client privilege and the work-product doctrine (the Waiver Documents). Qwest chose not to produce another 390,000 pages of privileged documents to the agencies.

The production of the Waiver Documents was pursuant to subpoena and pursuant to written confidentiality agreements between Qwest and each agency.<sup>1</sup> In relevant part, these agreements stated that Qwest did not intend to waive the attorney-client privilege or work-product protection. The SEC agreed to "maintain the confidentiality of the [Waiver Documents] pursuant to this Agreement and . . . not disclose them to any third party, except to the extent that the Staff determines that disclosure is otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities." Pet'r Br., Ex. B at 1. Similarly, the DOJ agreed to maintain the Waiver Documents' confidentiality and not disclose them to third parties, "except to the extent that DOJ determines that disclosure is otherwise required by law or would be in furtherance of DOJ's dis-

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<sup>1</sup> At oral argument Qwest disclaimed any argument that its production of the Waiver Documents to the agencies was involuntary. Thus, we take it as settled that Qwest's production of the Waiver Documents was voluntary, and we do not address the effect of the subpoenas. We commend Qwest for its candor, which allows us to focus on material issues rather than extraneous matters.

charge of its duties and responsibilities.” *Id.*, Ex. C at 1. In addition, Qwest agreed that the DOJ could share the Waiver Documents with other state, local, and federal agencies, and that it could “make direct or derivative use of the [Waiver Documents] in any proceeding and its investigation.” *Id.* at 1-2. In other agreements with the DOJ, Qwest agreed that the agency could

make full use of any information it obtains under this agreement in any lawful manner in furtherance of its investigation, including, without limitation, analyses, interviews, grand jury proceedings, court proceedings, consultation with and support of other federal, state or local agencies, consultations with experts or potential experts, and the selection and/or retention of testifying experts.

DOJ Resp. Br., Ex. 3 at 1; *see also id.* Ex. 4 at 3 (same); *id.* Ex. 5 (same) at 1-2.

Even prior to the initiation of the federal investigations, plaintiffs had filed civil cases against Qwest that involved many of the same issues as the investigations. More such actions were filed after the federal investigations began. Several of the cases were filed in the United States District Court for the District of Colorado, and many were consolidated into a federal securities action designated *In re Qwest Communications International, Inc. Securities Litigation*, Case No. 1:01-CV-01451 REB-CBS (the Securities Case). The Real Parties in Interest before us (the Plaintiffs) are the lead plaintiffs in the Securities Case.

In the course of the Securities Case, Qwest produced millions of pages of documents to the Plaintiffs, but it did not produce the Waiver Documents. It argued the Waiver Documents remained privileged despite Qwest’s production to the agencies. After the Plaintiffs moved to compel production of the Waiver Documents, the magistrate judge concluded Qwest

had waived the attorney-client privilege and work-product protection by producing the Waiver Documents to the agencies and ordered Qwest to produce the Waiver Documents to the Plaintiffs. Qwest objected. The district court refused to overrule the magistrate judge's order compelling production and ordered Qwest to produce the Waiver Documents. The district court also ordered Qwest to produce certain reports prepared by its counsel Boies, Schiller & Flexner LLP (collectively, the BSF Report), redacted of attorney opinion work product.

Qwest filed a motion to reconsider the order to produce the Waiver Documents and to certify an interlocutory appeal. Granting the motion in part, the district court clarified its order to specify that Qwest could redact attorney opinion work product from the Waiver Documents, as well as from the BSF Report, before producing them to the Plaintiffs. The court, however, declined to certify an interlocutory appeal of the waiver issue. Consequently, Qwest filed a petition for a writ of mandamus in this court. At Qwest's request, the district court stayed its order to produce pending our mandamus decision.

Neither the directive to redact the BSF Report nor the order to disclose the redacted version have been challenged in this proceeding. Moreover, the parties have not challenged the order to redact attorney opinion work product from the Waiver Documents. Thus, there is no issue concerning opinion work product before us, and our decision is not directed to waiver of opinion work product. For purposes of clarity, we also note that this decision involves no issues of inadvertent disclosure, *see, e.g., Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997), disclosure to a non-adverse party, *see In re M & L Bus. Mach. Co.*, 161 B.R. 689, 696 (D. Colo. 1993), or disclosure under a confidentiality agreement that prohibits further disclosures without the express agreement of the privilege holder.

## II. Analysis

### A. Mandamus

We must first decide whether it is appropriate for us to entertain Qwest's petition for an extraordinary writ. "The Supreme Court has required that a party seeking mandamus demonstrate that he has no other adequate means of relief and that his right to the writ is 'clear and indisputable.'" *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 654 (10th Cir. 1984) (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam)).

In a mandamus action in which petitioner seeks to have discovery orders involving a claim of privilege reviewed, we have held that review is appropriate when: (1) disclosure of the allegedly privileged or confidential information renders impossible any meaningful appellate review of the claim of privilege or confidentiality; and (2) the disclosure involves questions of substantial importance to the administration of justice.

*Id.* at 654-55 (quotations omitted).

Citing *Boughton v. Cotter Corp.*, 10 F.3d 746 (10th Cir. 1993), the Plaintiffs first contend Qwest has adequate appellate remedies, in that the district court's order can be reviewed on direct appeal after final judgment. In *Boughton*, a company sought to bring an interlocutory appeal of an order to produce allegedly privileged documents. In considering whether other avenues of relief might be appropriate, this court held that it could not grant the defendant mandamus relief because the district court's order requiring production would be correctable on appeal. *Id.* at 751. Qwest replies that production would negate the value of the attorney-client privilege and work-product protection. Qwest further submits that appellate review after judgment would be meaningless because there are numerous other cases pending across the country in which coordinated discovery agreements would

require it to disclose the Waiver Documents to other plaintiffs if it discloses them to the Plaintiffs in the Securities Case.

In *Barclaysamerican*, this court held that “[i]n most cases disclosure makes meaningful review impossible because after disclosure whatever privilege attaches would be worthless.” 746 F.2d at 655 (quotation omitted); *see also United States v. West*, 672 F.2d 796, 799 (10th Cir. 1982) (“Whether disclosure is limited to a motion or granted in the course of the trial, the privilege is still rendered worthless. Any subsequent review, even after limited disclosure, would be for naught, because the damage would already be accomplished. Thus, appellate review of the claim would be meaningless.”). *Boughton* did not address this principle. In this case, however, given the litigation pending outside this court’s jurisdiction, normal appellate review could not return the parties to the status quo by ordering the return of any documents this court might determine were improperly ordered produced. As in *Barclaysamerican* and *West*, review after production would essentially be meaningless in terms of protecting the Waiver Documents.

The Plaintiffs also argue Qwest does not raise an issue of substantial importance to the administration of justice, and this case is instead merely a discovery dispute between private litigants. *See Barclaysamerican*, 746 F.2d at 655. To the contrary, it appears the issue of selective waiver is of considerable public interest.<sup>2</sup> In addition, in advocating the adoption of selective waiver, Qwest primarily relies on the

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<sup>2</sup> Indicia of public interest in selective waiver include numerous commentaries and articles, the filing of the amicus brief in this action, a recent oversight hearing by a House subcommittee, and recent developments before the United States Sentencing Commission and the Advisory Committee on Evidence Rules to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the Advisory Committee). The actions of Congress, the Sentencing Commission, and the Advisory Committee are discussed below.

interests of law enforcement in ensuring voluntary cooperation of companies subject to investigation. To the extent this matter requires us to consider applying selective waiver, then, it presents an issue of substantial importance to the administration of justice.

Finally, other circuit courts considering selective waiver have decided it was appropriate to do so in the context of a petition for a writ of mandamus. See *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 233 (2d Cir. 1993); *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1422 (3d Cir. 1991); *In re Chrysler Motors Corp.*, 860 F.2d 844, 845 (8th Cir. 1988); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 607 (8th Cir. 1977) (en banc). Noting that the question remained open in the circuit, that the district courts of the circuit and other circuit courts had split, and the consequence that the privilege would be lost if review awaited final judgment, the Second Circuit went so far as to state, “[t]his dispute presents one of the very rare circumstances permitting the use of mandamus to review a district court order.” *Steinhardt Partners*, 9 F.3d at 233. For these reasons, this court addresses the merits of Qwest’s petition.

The issuance of the writ rests within the court’s discretion. *Kerr v. United States Dist. Court*, 426 U.S. 394, 403 (1976). This court considers five nonconclusive factors to assist in determining whether to grant mandamus relief: (1) whether the party has alternative means to secure relief; (2) whether the party will be damaged “in a way not correctable on appeal”; (3) whether “the district court’s order constitutes an abuse of discretion”; (4) whether the order “represents an often repeated error and manifests a persistent disregard of federal rules”; and (5) whether the order raises “new and important problems or issues of law of the first impression.” *Pacificare of Okla., Inc. v. Burrage*, 59 F.3d 151, 153 (10th Cir. 1995). We have held that “[t]he right to the writ is clear and indisputable when the petitioner can show a judicial

usurpation of power or a clear abuse of discretion.” *West*, 672 F.2d at 799; *see also Frontier Ref., Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 699 (10th Cir. 1998) (holding that a district court’s order compelling discovery is reviewed for abuse of discretion, legal questions are reviewed de novo and factual determinations for clear error). When the district court errs in deciding a legal issue, it necessarily abuses its discretion. *See Koon v. United States*, 518 U.S. 81, 100 (1996).

### **B. The Attorney-Client Privilege and Work-Product Doctrine**

Federal Rule of Evidence 501 provides that privileges in federal-question cases generally are “governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” The Advisory Committee Notes state 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.”<sup>3</sup>

The Supreme Court has cautioned that “[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man’s evidence.” *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quotations omitted). The Court further has cautioned that

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<sup>3</sup> Technically the work-product doctrine is distinguishable from the testimonial “true” privileges. *See* 1 Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 1.3.11 (Richard D. Friedman ed., 2002). The work-product doctrine is embodied in Fed. R. Civ. P. 26(b)(3). It is therefore excepted from Rule 501, which applies except where “otherwise required . . . in rules prescribed by the Supreme Court pursuant to statutory authority.” The principles of *Hickman v. Taylor*, 329 U.S. 495 (1947), continue to govern the application of Rule 26(b)(3). Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 479-81 (4th ed. 2001). Given that our analysis focuses on the common law, the fact that the work-product doctrine is not a true privilege is not material in this case.

such rules and privileges “must be strictly construed and accepted ‘only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.’” *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). “[A]lthough Rule 501 manifests a congressional desire not to freeze the law of privilege but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, we are disinclined to exercise this authority expansively.” *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (citation and quotation omitted).

### 1. Attorney-Client Privilege

The attorney-client privilege is “the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). “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.” *Id.* The privilege serves the client’s need for legal advice, but it also serves the attorney’s need to receive complete information in order to give the proper advice. *See id.* at 390; *see also* 8 John Henry Wigmore, *Evidence* § 2291 (John T. McNaughton rev. 1961); Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 3 (4th ed. 2001). Under the common law, a critical component of the privilege “is whether the communication between the client and the attorney is made in confidence of the relationship and under circumstances from which it may reasonably be assumed that the communication will remain in confidence.” *United States v. Lopez*, 777 F.2d 543, 552 (10th Cir. 1985).

Because confidentiality is key to the privilege, “[t]he attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party.”

*United States v. Ryans*, 903 F.2d 731, 741 n.13 (10th Cir. 1990). This court has stated, “the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant.” *Id.* (quotation and alteration omitted). This court has also held that “[c]ourts need not allow the claim of attorney-client privilege when the party claiming the privilege is attempting to utilize the privilege in a manner that is not consistent with the privilege.” *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989). “Any voluntary disclosure by the client is inconsistent with the attorney-client relationship and waives the privilege.” *Id.*

## 2. Work-Product Doctrine

In *Hickman v. Taylor*, the source of the work-product doctrine, plaintiffs sought the production of certain witness statements collected by defendants’ attorney and memoranda concerning the attorney’s interviews of other witnesses. 329 U.S. 495, 499-500 (1947). The Court held that plaintiffs had made no showing of need for the materials or justification for securing them from defendants’ counsel. The requests thus “[fell] outside the arena of discovery and contravene[d] the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.” *Id.* at 510. “In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Id.*

The work-product doctrine subsequently was incorporated into Fed. R. Civ. P. 26(b)(3), which provides:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision

(b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another . . . party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Thus, the doctrine is interpreted under both the rule and *Hickman*. See Epstein at 479-81. "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). It "is an intensely practical [doctrine], grounded in the realities of the litigation in our adversary system." *Id.*

Work product can be opinion work product, which some courts have held to be absolutely privileged, or non-opinion work product, i.e., fact work product, which may be discoverable under appropriate circumstances. See *Frontier Ref.*, 136 F.3d at 704 n.12; see also *Hickman*, 329 U.S. at 511-12 (noting that, upon presentation of adequate reasons, non-privileged, relevant facts included in an attorney's files may be subject to discovery); Fed. R. Civ. P. 26(b)(3) (providing special protection for opinion work product). The protection provided by the work-product doctrine is not absolute, and it may be waived. See *Nobles*, 422 U.S. at 239. This court has indicated that production of work-product material during discovery waives a work-product objection. *Grace United Methodist Church v. City of Cheyenne*, 427 F.3d 775, 801-02 (10th Cir. 2005); see also *Foster v. Hill (In re Foster)*, 188

F.3d 1259, 1272 (10th Cir. 1999) (indicating that the work-product doctrine is affected when a disclosure is to an adversary).

### **C. Case Law on Selective Waiver**

In light of this precedent, Qwest will have waived the attorney-client privilege and work-product protection for the Waiver Documents by disclosing them to the SEC and the DOJ, unless this court adopts a selective waiver rule. This court has not yet considered the concept of selective waiver. Our review of the opinions of other circuits, however, indicates there is almost unanimous rejection of selective waiver. Only the Eighth Circuit has adopted selective waiver in circumstances applicable to Qwest.

#### **1. Attorney-Client Privilege**

##### **a. Circuit Adopting Selective Waiver**

The Eighth Circuit created the concept of selective waiver in *Diversified Industries*, 572 F.2d at 611. There, a company defending a civil proceeding sought to protect a memorandum and a report prepared by its counsel that it had previously produced to the SEC in response to an agency subpoena. *Id.* at 599. The court's discussion of selective waiver is but a single paragraph:

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. 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.

*Id.* at 611 (citations omitted).

**b. Circuits Rejecting Selective Waiver**

Most circuits have rejected selective waiver of the attorney-client privilege. The D.C. Circuit was the first circuit to consider the issue after *Diversified*. In *Permian Corp. v. United States*, the Department of Energy requested documents from the SEC, which had obtained them from the company. 665 F.2d 1214, 1216-17 (D.C. Cir. 1981). After considering the privilege's purpose of protecting the attorney-client relationship by shielding confidential communications, the court held that the company had "destroyed the confidential status of the seven attorney-client communications by permitting their disclosure to the SEC staff." *Id.* at 1219. It found the proposal of selective waiver "wholly unpersuasive." *Id.* at 1220.

First, we 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. . . . 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.

*Id.* at 1220-21. The court continued, "[t]he 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." *Id.* at 1221. "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." *Id.* at 1222. The

D.C. Circuit reiterated its position in *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984).

Using similar reasoning, the First, Second, Third, and Fourth Circuits all have joined the D.C. Circuit in rejecting selective waiver. See *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) (“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.”); *Westinghouse*, 951 F.2d at 1425 (“[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.”); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988) (“The Fourth Circuit has not embraced the concept of limited waiver of the attorney-client privilege.”); *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982) (“A claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes.”).

The most recent circuit to reject selective waiver of the attorney-client privilege is the Sixth Circuit, which issued a comprehensive opinion in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002). As in this case, civil plaintiffs in *Columbia/HCA Healthcare* sought documents the company already had pro-