

# NOTE

## WHEN IT COMES TO PRIVILEGE, YOU'RE BETTER OFF DEAD: PROTECTING ATTORNEY-CLIENT COMMUNICATIONS SENT THROUGH PRISON EMAIL SYSTEMS

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*Some federal prosecutors are reading emails sent between inmates and their attorneys. The federal prison email system, called TRULINCS, requires inmates to acknowledge that their emails are monitored and thereby not covered by attorney-client privilege. In the past, prosecutors used “privilege teams” to sort ostensibly privileged emails from unprivileged emails, but some prosecutors have stopped that practice. This Note argues that emails sent through TRULINCS could still be protected under the doctrine of selective waiver, which has been raised in securities litigation to no effect. This Note suggests that the rationale of attorney-client privilege—encouraging full and frank communication between attorneys and their clients—is best served by the application of selective waiver to emails sent through TRULINCS. This Note also explains that the rationales courts offer against selective waiver are not at play in the context of prison emails.*

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#### INTRODUCTION

Dr. Syed Imran Ahmed's attorneys had a problem: They could not email their client. Dr. Ahmed, a surgeon accused of Medicare fraud, was being held at the Metropolitan Detention Center in Brooklyn, New York.<sup>2</sup> Dr. Ahmed's case had generated "50,000 pages of documents so far, including 'Medicare claim data and patient information.'"<sup>3</sup> The data and information was at the heart of Dr. Ahmed's case, and his attorneys could not understand it without the doctor's assistance.<sup>4</sup>

In court documents filed in the Eastern District of New York (E.D.N.Y.), Morris J. Fodeman—one of Dr. Ahmed's attorneys acting as a public defender at a \$125 hourly rate—stated that an in-person visit to his client took around five hours, including travel time to the prison and wait time at the prison while jail personnel retrieved Dr. Ahmed.<sup>5</sup> Although it was *technically* possible to set up unmonitored phone calls with his client, Fodeman stated, "a paralegal spent four days and left eight messages requesting such a call and got nowhere."<sup>6</sup> Given the time and expense associated with in-person meetings and the effective impossibility of arranging unmonitored phone calls, Fodeman wanted to email Dr.

<sup>1</sup> Stephanie Clifford, *Prosecutors Are Reading Emails from Inmates to Lawyers*, N.Y. TIMES (July 22, 2014), [http://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html?\\_r=0](http://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html?_r=0).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Ahmed—and had done so before—so that Dr. Ahmed could respond easily to questions as they arose.<sup>7</sup>

But the prosecution team was reading their emails.<sup>8</sup>

Attorney-client privilege, the prosecutors argued, did not apply here because Dr. Ahmed waived the privilege by using the prison email system, the Trust Fund Limited Inmate Computer System (TRULINCS).<sup>9</sup> To use the system, each inmate must read and accept a notice that all emails sent through TRULINCS are monitored by prison administrators.<sup>10</sup> As such, Dr. Ahmed had no reasonable expectation of privacy when emailing his attorneys.<sup>11</sup> While in the past prosecutors used a “privilege team” to sort privileged emails from non-privileged emails, budget cuts had forced prosecutors to shut down the team.<sup>12</sup> Sorting out privileged emails would be too high of an administrative burden, prosecutors argued.<sup>13</sup>

While the judge in Dr. Ahmed’s case, the Hon. Dora L. Irizarry, U.S.D.J., did not take kindly to the prosecution’s arguments,<sup>14</sup> courts’ responses to similar situations have been mixed. For example, another judge in the E.D.N.Y. ruled that prosecutors could read TRULINCS communications sent between attorneys and their clients.<sup>15</sup> In that case, the defense argued that the Bureau of Prisons’ (BOP) refusal to provide “a privileged form of email communication” infringed their client’s right to effective counsel under the Sixth Amendment.<sup>16</sup> However, the judge ruled that “by implementing TRULINCS in recent years, BOP has not placed restrictions on inmates’ ability to contact their counsel, but rather it has significantly increased inmates’ ability to communicate with the outside world, including with their counsel, even if not currently in a privileged form.”<sup>17</sup>

This Note will argue that emails sent between attorneys and their clients through the TRULINCS system could be protected under the doctrine of selective waiver. Part I will overview the role of attorney-client privilege in prison communication between clients and their attorneys.

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<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See id.* (“‘That’s hogwash,’ Judge Irizarry said. ‘You’re going to tell me you don’t want to know what your adversary’s strategy is? What kind of a litigator are you then? Give me a break.’”).

<sup>15</sup> *See United States v. Asaro*, No. 14-CR-26 (ARR), 2014 U.S. Dist. LEXIS 97396, at \*4–5 (E.D.N.Y. July 15, 2014).

<sup>16</sup> *Id.* at \*3.

<sup>17</sup> *Id.* at \*4.

Part II will explain the selective waiver doctrine, its rejection by most courts in the securities litigation context, and its applicability to TRULINCS communications.

Part II.A.1 argues that courts decline to apply selective waiver in the securities litigation context for three primary reasons. First, selective waiver does not encourage full and frank communication between attorneys and their clients. Second, selective waiver obstructs the fact-finding process beyond the scope envisioned by the attorney-client privilege. Finally, selective waiver, at least in the securities context, is not supported by a sufficiently important public interest.

In Part II.A.2, this Note will demonstrate that a federal inmate could viably raise selective waiver in certain circumstances. Part II.A.2 argues that application of selective waiver can encourage full and frank communication between attorneys and their clients, not unduly obstruct the fact-finding process, and supports the public's interest in effective legal representation. Part II.B argues that federal prosecutors cannot overcome the attorney-client privilege through the assertion of administrative burden. Finally, this Note will conclude by considering some practical questions about selective waiver's application.

## I. ATTORNEY-CLIENT PRIVILEGE AND PRISON COMMUNICATION

### A. *The Attorney-Client Privilege*

#### 1. Rationales for the Attorney-Client Privilege

In federal court, common law defines the scope and application of the attorney-client privilege.<sup>18</sup> Generally, the attorney-client privilege protects communications made in confidence between privileged persons "for the purpose of obtaining or providing legal assistance for the client."<sup>19</sup>

In *Upjohn Co. v. United States*, the Supreme Court provided a concise and frequently quoted rationale for the attorney-client privilege.<sup>20</sup> The Court stated, "[The] purpose [of the attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."<sup>21</sup> The Restatement (Third) of the Law Governing Lawyers (the Restatement) outlines "three related assumptions" that together justify the Court's statement.<sup>22</sup>

<sup>18</sup> FED. R. EVID. 501. For purposes of this Note, I will focus on federal law.

<sup>19</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 2000).

<sup>20</sup> See 449 U.S. 383, 389 (1981).

<sup>21</sup> *Id.*

<sup>22</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c.

First, “vindicating rights and complying with” legal obligations are “matters often too complex” for lay clients, which is why they consult lawyers.<sup>23</sup> Second, attorney-client relationships can present information asymmetry problems without “frank and full discussion.”<sup>24</sup> Lawyers are better suited to determine relevant facts and how legal rules will apply to those facts.<sup>25</sup> As such, lawyers need clients to disclose all of the facts so that lawyers can render effective legal assistance.<sup>26</sup> Third, “clients would be unwilling to disclose personal, embarrassing, or unpleasant facts unless they could be assured that neither they nor their lawyers could be called later to testify to the communication.”<sup>27</sup>

The rationale provided by the *Upjohn* Court and the Restatement’s related assumptions underscore the idea that public interests drive the application of the attorney-client privilege.<sup>28</sup> For example, courts frequently hold that the attorney-client privilege survives the death of a lawyer’s client.<sup>29</sup> As explained by the Court in *Swidler & Berlin v. United States*, clients may be hesitant to share damaging or incriminating information with their attorneys if it could be revealed after their deaths: “Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client’s lifetime.”<sup>30</sup>

However, public interests can also curtail the application of the attorney-client privilege.<sup>31</sup> Privileges are “strictly construed and accepted” to the extent that the public’s interest in concealing evidence outweighs “the fundamental principle that ‘the public . . . has a right to every man’s evidence.’”<sup>32</sup> Hence, married couples cannot invoke the marital privilege to prevent their partners from offering testimony against them.<sup>33</sup> Archaic notions of familial peace and spousal subjugation were once offered as justifications for such a rule, but those purported justifications

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<sup>23</sup> *Id.*

<sup>24</sup> *See id.*

<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See Jaffee v. Redmond*, 518 U.S. 1, 11 (1996).

<sup>29</sup> *See Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) (“It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in [a criminal proceeding where the deceased may have information relevant to the prosecution’s investigation]. While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation—thoughtful speculation, but speculation nonetheless—as to whether posthumous termination of the privilege would diminish a client’s willingness to confide in an attorney.”).

<sup>30</sup> *Id.* at 407; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 77 (AM. LAW INST. 2000).

<sup>31</sup> *See Trammel v. United States*, 445 U.S. 40, 50–51 (1980).

<sup>32</sup> *See id.* at 50 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

<sup>33</sup> *See id.* at 52–53.

are simply wrong.<sup>34</sup> Similarly, clients cannot invoke the attorney-client privilege to prevent the disclosure of attorney-client communications when clients “consult[ ] a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so.”<sup>35</sup> This “crime-fraud exception” is justified on the grounds that clients may not seek protection of the law while abusing the law.<sup>36</sup>

## 2. Scope and Waiver of the Attorney-Client Privilege

The attorney-client privilege does not have a fixed expression.<sup>37</sup> Courts apply or decline to apply the privilege on a case-by-case basis, with an eye towards competing interests: the need for effective representation and the effective administration of justice.<sup>38</sup> Making matters more complicated, the duration of the attorney-client privilege may be perpetual.<sup>39</sup> As such, identifying the scope of the attorney-client privilege in the abstract is difficult. It is perhaps easier to say when the attorney-client privilege does not apply. Notably for our purposes, the attorney-client privilege is waived when “the client, the client’s lawyer, or another authorized agent . . . voluntarily discloses the communication in a non-privileged communication.”<sup>40</sup> This waiver generally extends to communications relating to the same subject matter as that which was voluntarily revealed.<sup>41</sup> Hence, one would argue that a prisoner waives the attorney-client privilege with respect to communications about subject matter *x* when he voluntarily sends a TRULINCS communication relating to subject matter *x*.

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<sup>34</sup> See *id.* at 52 (“Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. . . . [Moreover, w]hen one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.”).

<sup>35</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82(a).

<sup>36</sup> See *Clark v. United States*, 289 U.S. 1, 15 (1933); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 cmt. b (“When a client consults a lawyer intending to violate elemental legal obligations, there is less social interest in protecting the communication. Correlatively, there is a public interest in preventing clients from attempting to misuse the client-lawyer relationship for seriously harmful ends.”).

<sup>37</sup> See *Univ. of Pa. v. E.E.O.C.*, 493 U.S. 182, 189 (1990) (discussing the Court’s discretion to “develop rules of privilege on a case-by-case basis” and application of that discretion where Congress has expressed a position on a particular type of privilege).

<sup>38</sup> See *Upjohn v. United States*, 449 U.S. 383, 389–90 (1981).

<sup>39</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 77.

<sup>40</sup> *Id.* § 79.

<sup>41</sup> See *id.* cmt. f.

## B. Attorney-Client Privilege and TRULINCS

### 1. Forms of Prison Communication

Federal prisoners have several means of communication. In addition to email, discussed below, prisoners can meet with visitors in person, use the telephone, and correspond through traditional mail.<sup>42</sup> Each prison governs a prisoner's visitation rights.<sup>43</sup> For telephone calls, prisoners are generally allotted 300 minutes per calendar month, or 10 minutes a day.<sup>44</sup> Prison officials monitor every call.<sup>45</sup> Prisoners may set up unmonitored legal phone calls, which do not count against prisoners' 300-minute allotment.<sup>46</sup> Once established, "[prison s]taff may not monitor an inmate's properly placed call to an attorney."<sup>47</sup> However, unmonitored calls are subject to the procedures of individual prisons.<sup>48</sup> Typically, prisoners must demonstrate that other means of communication are inadequate to communicate with their attorneys.<sup>49</sup> This showing is made in light of the Bureau's presumption that "[f]requent unmonitored telephone calls increase an inmate's opportunity to pursue illegal activities without detection, and require an inordinate amount of staff time."<sup>50</sup>

Regarding traditional correspondence, prison staff designates each piece of mail as either "general" or "special" mail.<sup>51</sup> General mail is "incoming or outgoing correspondence other than *special mail*."<sup>52</sup> Special mail includes, *inter alia*, correspondence sent between prisoners and their attorneys.<sup>53</sup> Prison staff open and inspect general mail for contraband and "content which might threaten the security or good order of the institution."<sup>54</sup> Special mail is screened for physical contraband in the receiving inmate's presence.<sup>55</sup> Additionally, prison staff do not read special mail "if the sender is adequately identified on the envelope, and the front of the envelope is marked 'Special Mail—Open only in the pres-

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<sup>42</sup> See FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 31–32 (2014) [hereinafter BOP GUIDE].

<sup>43</sup> See *id.* at 31.

<sup>44</sup> *Id.*

<sup>45</sup> See *id.* at 32.

<sup>46</sup> See *id.* at 34–35.

<sup>47</sup> 28 C.F.R. § 540.102 (2008).

<sup>48</sup> See *id.*

<sup>49</sup> See BOP GUIDE, *supra* note 42, at 35.

<sup>50</sup> *Id.*

<sup>51</sup> See *id.* at 32.

<sup>52</sup> 28 C.F.R. § 540.2(a) (2014).

<sup>53</sup> *Id.* § 540.2(c).

<sup>54</sup> BOP GUIDE, *supra* note 42, at 32.

<sup>55</sup> 28 C.F.R. § 540.18(a).

ence of the inmate.<sup>56</sup> In this way, special mail preserves the confidentiality of properly marked attorney-client communications.<sup>57</sup>

## 2. The TRULINCS Email System

The Trust Fund Limited Inmate Computer System (TRULINCS) is used to “send electronic messages . . . securely, efficiently, and economically.”<sup>58</sup> According to the Bureau of Prisons (BOP), TRULINCS is a privilege, revocable by each prison’s warden.<sup>59</sup> However, each prisoner pays a fee for the privilege to use the TRULINCS system.<sup>60</sup>

According to the BOP, the objectives of TRULINCS are:

- To provide inmates with an alternative means of written communication with the public.
- To provide the Bureau [of Prisons] with a more efficient, cost-effective, and secure method of managing and monitoring inmate communication services.
- To reduce the opportunities for illegal drugs or contraband to be introduced into Bureau facilities through inmate mail.<sup>61</sup>

To use the system, each prisoner maintains a TRULINCS contacts list, which lists persons outside the prison that the prisoner can exchange emails with.<sup>62</sup> Prison staff monitors all messages exchanged through TRULINCS.<sup>63</sup> Before using the TRULINCS system, each prisoner must read and accept a notice that states prisoners “voluntarily consent to having all incoming and outgoing electronic messages, including transactional data, message contents, and other activities, monitored and retained by Bureau staff.”<sup>64</sup> Although prisoners may add special mail recipients, such as their attorneys, to their TRULINCS contacts list, electronic messages sent to and from their attorneys do not receive special mail procedures.<sup>65</sup> As such, attorney-client communications purportedly

<sup>56</sup> *Id.*

<sup>57</sup> See *Henthorn v. Swinson*, 955 F.2d 351, 354 (5th Cir. 1992); see also BOP GUIDE, *supra* note 42, at 34 (stating that “[p]articular care is taken to ensure that ‘special mail’ (mail to or from courts, attorneys, and certain government officials) is kept confidential”).

<sup>58</sup> FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, TRUST FUND LIMITED INMATE COMPUTER SYSTEM (TRULINCS)—ELECTRONIC MESSAGING 1 (2009) [hereinafter TRULINCS].

<sup>59</sup> *Id.* at 2.

<sup>60</sup> *Id.* at 8.

<sup>61</sup> *Id.* at 1.

<sup>62</sup> *Id.* at 5–6.

<sup>63</sup> *Id.* at 7.

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.* at 4.

lose confidential protection, even though they would likely retain their privileged character if sent through traditional mail.<sup>66</sup>

## II. THE SELECTIVE WAIVER DOCTRINE AND TRULINCS COMMUNICATIONS

Generally, the attorney-client privilege is waived when clients or attorneys in their capacity as agents for their clients voluntarily disclose otherwise privileged communications to third parties.<sup>67</sup> Voluntary disclosures are inconsistent with the assertion of privilege, because clients or their attorneys have not treated their communications as if they deserved to be privileged.<sup>68</sup> Accordingly, most courts of appeal to consider the issue have held that clients may not “selectively waive” the attorney-client privilege.<sup>69</sup> For example, corporations under investigation by federal agencies such as the Securities and Exchange Commission (SEC) cannot reveal otherwise privileged communications to these agencies and assert the privilege against other litigants with claims against the corporation.<sup>70</sup>

When defendants raise selective waiver, they wish to waive the privilege as to some communications so they can gain a benefit from one party while invoking the privilege against other parties.<sup>71</sup> If successfully raised in securities litigation, a corporate defendant gains the benefit of leniency from federal agencies by waiving the privilege for certain communications while protecting itself from litigious private parties.<sup>72</sup> Assuming *arguendo* that federal prisoners voluntarily waive the attorney-client privilege when they exchange emails with their attorneys via TRULINCS, then the doctrine of selective waiver has some appeal, because it would allow prisoners to gain the benefits of the TRULINCS system

<sup>66</sup> See *id.* at 2–3.

<sup>67</sup> See *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423–24 (3d Cir. 1991).

<sup>68</sup> See *id.*

<sup>69</sup> See *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012) (citing *In re Qwest Communications Int'l*, 450 F.3d 1179, 1197 (10th Cir. 2006); *Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 (6th Cir. 2002); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997); *Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1416–18 (Fed. Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993); *Westinghouse*, 951 F.2d at 1425; *In re Martin Marietta Corp.*, 856 F.2d 619, 623–24 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981); see also *In re Columbia*, 293 F.3d at 302–03 (discussing selective waiver).

<sup>70</sup> See *In re Columbia*, 293 F.3d at 302–05.

<sup>71</sup> See *id.* at 298–99 (describing the operation of the selective waiver doctrine); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (arguing that encouraging corporations to comply with government investigations supports applying the selective privilege doctrine).

<sup>72</sup> See *Diversified*, 572 F.2d at 611.

without truly sacrificing attorney-client privilege.<sup>73</sup> Prisoners could argue that they are voluntarily waiving the privilege as to the BOP to gain the benefit of confidential communication, but invoking the privilege against federal prosecutors—the “private party” in this situation.<sup>74</sup>

### A. *Selective Waiver Doctrine and TRULINCS*

#### 1. Rationales Against Selective Waiver

Courts offer several rationales for rejecting the selective waiver doctrine in the securities litigation context. First, voluntary disclosure of privileged communications to third parties is inconsistent with the purpose of the attorney-client privilege.<sup>75</sup> As discussed above, the attorney-client privilege seeks to ensure that clients share all information with their attorneys, thus enabling attorneys to render effective counsel to their clients. By disclosing confidential communications to government investigators, a client has decided that the benefit of the privilege is outweighed by the benefit of cooperation with investigators.<sup>76</sup> Yet, “[t]he privilege depends on the assumption that full and frank communication will be fostered by the assurance of confidentiality, and the justification for granting the privilege ‘ceases when the client does not appear to have been desirous of secrecy.’”<sup>77</sup>

While a client’s desire to cooperate with government investigations may be “laudable,”<sup>78</sup> the privilege “was never designed to protect conversations between a client and the Government—i.e., an adverse party—rather, it pertains only to conversations between the client and *his or her* attorney.”<sup>79</sup> That is, the attorney-client privilege is not a trial tactic to be used against some parties but not others.<sup>80</sup> For an illustrative example, consider *Westinghouse Electric Corp. v. Republic of the Philippines*.<sup>81</sup> In that case, the Philippines sought tort damages from Westinghouse for bribing the country’s president in exchange for a power plant.<sup>82</sup> During discovery, the Philippines “sought certain documents generated during an internal investigation conducted by Westinghouse’s outside

<sup>73</sup> Cf. *id.*

<sup>74</sup> Cf. *id.*

<sup>75</sup> See, e.g., *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423–24 (3d Cir. 1991).

<sup>76</sup> See *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

<sup>77</sup> *Id.* at 1220 (citation omitted).

<sup>78</sup> See *id.* at 1221.

<sup>79</sup> See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002).

<sup>80</sup> See *Permian*, 665 F.2d at 1221 (“The attorney-client privilege is not designed for such tactical employment.”).

<sup>81</sup> 951 F.2d 1414 (3d Cir. 1991).

<sup>82</sup> See *id.* at 1417.

counsel.”<sup>83</sup> Previously, Westinghouse had disclosed the documents in question to the SEC and the Department of Justice (DOJ) during related investigations by those agencies.<sup>84</sup> Westinghouse objected to the Philippines’ discovery requests on attorney-privilege grounds.<sup>85</sup> The Third Circuit Court of Appeals held that Westinghouse could not invoke the privilege.<sup>86</sup> It noted that courts have recognized instances “[w]hen disclosure to a third party is necessary for the client to obtain informed legal advice.”<sup>87</sup> For example, “client[s] may disclose communications to co-defendants or co-litigants without waiving the privilege.”<sup>88</sup> However, the court reasoned that selective waiver is inconsistent with the attorney-client privilege because the only purpose of selective waiver is to encourage communication with the government.<sup>89</sup> Hence, the court concluded that application of the selective waiver doctrine would expand the attorney-client privilege beyond its intended purpose.<sup>90</sup>

Second, the attorney-client privilege obstructs the truth-finding process and is therefore construed narrowly.<sup>91</sup> The Ninth Circuit Court of Appeals reached that conclusion in *In re Pacific Pictures Corporation*.<sup>92</sup> In that case, D.C. Comics (D.C.) sued producer Marc Toberoff. D.C. claimed Toberoff “interfered with [D.C.’s] contractual relationships” with the heirs of the creators of the Superman comic.<sup>93</sup> D.C.’s case was based on a cover letter, prepared by an attorney who worked for Toberoff, which the attorney had sent to D.C.<sup>94</sup> The cover letter detailed Toberoff’s “alleged master plan to capture Superman for himself.”<sup>95</sup> “Rather than exploiting the documents [including the cover letter], D.C. Comics entrusted them to an outside attorney and sought to obtain them through ordinary discovery . . . .”<sup>96</sup> Toberoff alleged that the attorney stole the cover letter along with other documents and resisted the discovery request.<sup>97</sup> Approximately a month after D.C. filed suit, however, Toberoff asked the U.S. Attorney’s Office to investigate the attorney’s

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<sup>83</sup> *Id.*

<sup>84</sup> *See id.*

<sup>85</sup> *See id.* at 1420.

<sup>86</sup> *See id.* at 1425.

<sup>87</sup> *See id.* at 1424.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.* at 1425 (“Because the selective waiver rule . . . protects disclosures made for entirely different purposes [than obtaining informed legal advice], it cannot be reconciled with traditional attorney-client privilege doctrine.”).

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> 679 F.3d 1121 (9th Cir. 2012).

<sup>93</sup> *See id.* at 1124–25.

<sup>94</sup> *See id.*

<sup>95</sup> *See id.* at 1125.

<sup>96</sup> *See id.*

<sup>97</sup> *See id.*

alleged theft.<sup>98</sup> The U.S. Attorney's Office agreed to assist, on condition that Toberoff hand over all relevant documents, including the cover letter.<sup>99</sup> The U.S. Attorney's Office promised not to disclose any confidential documents to third parties.<sup>100</sup> Toberoff immediately complied.<sup>101</sup> D.C. argued that Toberoff's compliance waived any remaining privilege on the disputed documents.<sup>102</sup>

The Ninth Circuit agreed.<sup>103</sup> The court concluded that the privilege must be construed narrowly, consistent with the limited purpose of the attorney-client privilege (i.e., full and frank communication) and the principle that "the public has a right to every man's evidence."<sup>104</sup> Application of the selective waiver doctrine would "unmoor" the attorney-client privilege from its traditional purpose while contravening the "every man's evidence" rule.<sup>105</sup> Although the court noted that it is empowered by the Federal Rules of Evidence to create new evidentiary privileges, it also noted that the Supreme Court has urged courts to exercise such power sparingly.<sup>106</sup>

Third, an exception to the attorney-client privilege must be supported by a sufficiently important interest that outweighs the public's interest in every man's evidence.<sup>107</sup> Traditionally, that interest is effective representation fostered through full and frank communication.<sup>108</sup> In cases like *Westinghouse* and *Pacific Pictures*, the interest in question—increasing cooperation with government investigations—was important but did not outweigh the public's interest in an unobstructed truth-finding process.<sup>109</sup> Moreover, the courts in those cases noted that even if that interest did outweigh the public's interest in every man's evidence, selective waiver did not appear to increase cooperation with government investigations as the court in *Diversified* suggested it would.<sup>110</sup> Hence, application of selective waiver was unwarranted in those cases.<sup>111</sup>

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See *id.* at 1126–27.

<sup>104</sup> See *id.* at 1126 (citation omitted).

<sup>105</sup> See *id.* at 1127–28.

<sup>106</sup> See *id.* at 1128.

<sup>107</sup> See *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425–26 (3d Cir. 1991).

<sup>108</sup> See *id.* at 1425 ("The traditional waiver doctrine provides that disclosure to third parties waives the attorney-client privilege unless the disclosure serves the purpose of enabling clients to obtain informed legal advice.").

<sup>109</sup> See *id.* at 1425–26; *In re Pac. Pictures*, 679 F.3d at 1127–28.

<sup>110</sup> See *Westinghouse*, 951 F.2d at 1426; *In re Pac. Pictures*, 679 F.3d at 1127–28.

<sup>111</sup> See *Westinghouse*, 951 F.2d at 1426; *In re Pac. Pictures*, 679 F.3d at 1127–28.

## 2. The Factors Weighing Against Selective Waiver Doctrine Do Not Apply to TRULINCS Communications

As we can see, courts decline to apply selective waiver doctrine in light of the purpose of the attorney-client privilege: To encourage full and frank communication between clients and attorneys and thereby ensure effective representation for clients. As discussed above, courts only privilege communications when doing so serves that purpose and is not outweighed by countervailing public interests. “The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.”<sup>112</sup>

For example, clients’ cooperating with government investigations is presumably an attempt to bring the clients in line with laws they were supposed to follow in the first place. However, as one court noted, selective waiver does not distinguish between private litigants and public ones.<sup>113</sup> A corporate client could invoke selective waiver against one government agency while disclosing confidential information to another.<sup>114</sup> As a result, selective waiver could lead to an anomalous result, in which the regulations of one agency take priority over the regulations of another.<sup>115</sup> Hence, courts are loath to encourage cooperation by granting entities a privilege for complying with pre-existing legal duties. Such entities cannot have their cake and eat it, too, so to speak.

Although the doctrine of selective waiver has been decried by most courts of appeal as inconsistent with the underlying rationales of the attorney-client privilege, the federal courts’ distaste for the doctrine may be fact specific.<sup>116</sup> For example, corporate securities defendants are usually sophisticated litigants with robust legal teams protecting their interests.<sup>117</sup> As sophisticated litigants, corporate defendants are already well equipped to protect themselves from adverse parties without courts granting them the added benefit of selective waiver. As discussed above, corporate defendants could use selective waiver as a shield against federal investigation and a sword against other litigants with claims against the corporation.<sup>118</sup> Such a use of the attorney-client privilege has little if

<sup>112</sup> *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

<sup>113</sup> *See id.* at 1221–22.

<sup>114</sup> *See id.*

<sup>115</sup> *See id.* at 1222.

<sup>116</sup> *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302–05 (6th Cir. 2002).

<sup>117</sup> *See In re Pac. Pictures Corp.*, 679 F.3d 1121, 1127–28 (9th Cir. 2012).

<sup>118</sup> *See In re Columbia*, 293 F.3d at 302–03.

anything to do with encouraging full and frank communication between corporate defendants and their counsel.<sup>119</sup>

Indeed, no such privilege was established at the time Westinghouse decided to cooperate with the SEC and the DOJ. When Westinghouse first disclosed privileged materials to the SEC, only one court of appeals had adopted the selective waiver rule. By the time Westinghouse made its disclosures to the DOJ, another court of appeals had trenchantly rejected the selective waiver rule. [The court found] it significant that Westinghouse chose to cooperate despite the absence of an established privileged protecting disclosures to government agencies. [The court also noted] that many other corporations also have chosen to cooperate with the SEC despite the lack of an established privilege protecting their disclosures.<sup>120</sup>

Hence, there is no reason to believe that a corporate defendant will be more forthcoming with its counsel if selective waiver is an option.

Additionally, federal agencies—despite courts' near universal rejection of the selective waiver doctrine in the corporate context—frequently sign confidentiality agreements, in which they agree to keep confidential the communications revealed by corporate defendants.<sup>121</sup> Even if courts did not honor those agreements, cloaking voluntary disclosures in the attorney-client privilege would effectively aid federal agencies in obfuscating the fact-finding process in related litigation by private parties.<sup>122</sup> Hence, the selective waiver doctrine, as applied in the securities context, acts counter to the effective administration of justice and does little to enhance the goals of the attorney-client privilege.<sup>123</sup>

However, the application of the selective waiver doctrine may not *always* be inconsistent with the rationales underlying the attorney-client privilege. Federal inmates do not have the same resources as corporate defendants. From 2009 to 2010, the average length of a federal sentence imposed on a convicted offender was 54 months.<sup>124</sup> Among convicted

<sup>119</sup> See *id.* at 302.

<sup>120</sup> *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426 (3d Cir. 1991).

<sup>121</sup> See *In re Columbia*, 293 F.3d at 303.

<sup>122</sup> See *id.* (“The investigatory agencies of the Government should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain.”).

<sup>123</sup> See *id.* at 302–03.

<sup>124</sup> OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES 22 tbl.5.2 (2013).

offenders, over half were under the age of forty.<sup>125</sup> Most convicted offenders were Black/African American or Hispanic/Latino.<sup>126</sup> Among convicted African Americans, 82.5% were sentenced to incarceration; among convicted Hispanics, 83.6% were sentenced to incarceration.<sup>127</sup> Although exact figures are unavailable from the BOP, the latest data from the Bureau of Labor Statistics (BLS) indicates that half of African American and Hispanic persons over sixteen years old make less than \$638 per week.<sup>128</sup> Of course, that statistic assumes employment; the unemployment rate is currently 10.9% for African Americans and 6.8% for Hispanics.<sup>129</sup> Unsurprisingly then, public defenders “represent 60 percent of all criminal defendants in the federal court system.”<sup>130</sup> In 2012, the median salary of a public defender with 11–15 years of experience was \$78,600.<sup>131</sup> Hence, it is safe to assume that many federal prisoners do not have robust legal teams working their defense.

To demonstrate that the selective waiver doctrine could serve the purpose of the attorney-client privilege, consider an example based on the statistics just discussed.<sup>132</sup> Suppose Defendant (D) is charged with a federal crime. D is incarcerated in a federal prison and is awaiting trial. Since D is unable to afford counsel, the court appoints a federal public defender (the FPD) to represent him. Preparation for D’s trial involves reviewing hundreds of documents related to D’s charges. Assume that the FPD must have extensive conversations with D to understand the documents. Assume further that these conversations involve confidential communications, particularly relating to D’s trial strategy. Moreover, assume that the FPD and D frequently communicate via TRULINCS and that the BOP wishes to monitor these communications in the interest of prison security.

<sup>125</sup> See *id.* at 20 tbl.4.4.

<sup>126</sup> See *id.*

<sup>127</sup> See *id.* at 23 tbl.5.3.

<sup>128</sup> *Earnings by Demographics*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/cps/earnings.htm#demographics> (last visited Nov. 19, 2015) (click “Most requested series” hyperlink; then select “Median wkly earnings . . . Black or African Amer” and “Median wkly earnings . . . Hispanic or Latino” and click “Retrieve Data” hyperlink).

<sup>129</sup> *Databases, Tables & Calculators by Subject*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/data/> (last visited Nov. 19, 2015) (click “Unemployment” hyperlink; then click “Top Picks” under “Labor Force Statistics” heading; then select “Unemployment Rate—Black or African American” and “Unemployment Rate—Hispanic or Latino” and click “Retrieve Data” hyperlink).

<sup>130</sup> Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES (Aug. 23, 2013), [http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of-steep-federal-budget-cuts.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of-steep-federal-budget-cuts.html?pagewanted=all&_r=0).

<sup>131</sup> Press Release, Nat’l Ass’n for Law Placement, *New Public Interest and Public Sector Salary Figures from NALP Show Little Growth Since 2004* (Oct. 18, 2012), [http://www.nalp.org/2012\\_pubint\\_salaries](http://www.nalp.org/2012_pubint_salaries).

<sup>132</sup> Notably, I have not found any cases in which a defendant raises selective waiver to protect communications sent via TRULINCS.

As we have already discussed, prisoners have several means of privileged communication, including special mail, unmonitored phone calls, and in-person visits. Assume for the sake of this hypothetical that unmonitored phone calls are simply unfeasible. D and the FPD have made several requests for unmonitored phone calls, but none of them have been acknowledged. Assume further that the average time for the FPD and D to exchange mail is one week, whereas exchanges through TRULINCS are nearly instantaneous. Moreover, D can access the TRULINCS system at least once a day to review documents and respond to the FPD. Hence, in-person and TRULINCS are the FPD and D's most expedient methods of communication.

Suppose D wishes to take her case to trial. The “[m]edian days from felony case filing to case termination” between 1994 and 2010 was 454 days or about 1.25 years.<sup>133</sup> In a national survey of public defenders, a majority of respondents indicated that it would take three to four hours “for an attorney in [their] main office to leave the office, travel to the [incarceration] facility, have the client brought to a meeting room, conduct a one hour interview, and then return to the office” during a “typical weekday visit.”<sup>134</sup> Assuming that a visit to D would take the FPD four hours, including one hour of one-on-one time, that visitation at the prison is limited to typical business hours (e.g., 9 a.m. to 5 p.m., Monday through Friday), and that the time from filing to trial was fifty-two weeks, the FPD could spend a maximum of 520 hours with her client.

However, one would be hard-pressed to find a public defender who could meet with his or her client twice a day, Monday through Friday, for the extent of his or her client's stay in prison. Indeed, one would be hard-pressed to find a public defender *with just one client!*<sup>135</sup>

For example, [at a public hearing held by the American Bar Association] a [public defender] from Pennsylvania told of a county that had had 4172 cases in 1980 but that the number of cases had grown to 8000 in 2000 without any growth in the staff size of the public defender's office. Especially interesting was the testimony of the Public Defender for the State of Rhode Island, who detailed the caseload problems of his agency. . . . Each lawyer was handling, on average, 1517 misdemeanor

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<sup>133</sup> OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2010, at 20 fig.11 (2013).

<sup>134</sup> NICHOLAS M. PACE ET AL., RAND CORP., CASE WEIGHTS FOR FEDERAL DEFENDER ORGANIZATIONS 236 (2011).

<sup>135</sup> NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 12–13 (2011) (discussing national studies of the caseloads of public defenders).

cases and 239 felonies, or a total of 1756 cases each year. The dimension of the caseload problem is staggering when compared with the testimony of the chief defender from another jurisdiction . . . in which each lawyer had an average annual caseload of 311 felonies, misdemeanors, and other matters. If . . . [an] analysis of 1850 available hours in a year is applied to public defenders in Rhode Island, each attorney would have, on average, one hour and five minutes to devote to each of his or her cases—to meet with clients, interview witnesses, prepare bail and pretrial motions, appear in court, and so on. Often, therefore, there is only time to “meet and plead” clients guilty.<sup>136</sup>

Consider this scenario in light of the three requirements for creating a new privilege raised in Part II.A.1. First, application of the privilege must encourage full and frank communication between D and the FPD. Second, application of the privilege cannot obstruct the truth-finding process beyond the scope envisioned by privilege doctrine. Third, application of the privilege must be supported by a sufficiently important interest.

a) Application of the Privilege in This Case Would Encourage Full and Frank Communication Between D and the FPD

If the federal prosecutors handling D’s case could read TRULINCS emails sent between D and the FPD, then the prosecutors could learn valuable information about D’s trial strategy. Obviously, D and the FPD would want to keep their trial strategy confidential. Hence, D and the FPD would communicate *less* through TRULINCS and rely on other means of communication to prevent the prosecutors from learning this valuable information. Under the facts of our hypothetical, those other means are either unavailable or ineffective. Similarly, the FPD simply does not have the time to sit with D in-person to review all of the documents relating to his case. As such, the overall level of communication between D and the FPD will decrease, unless D can assert the attorney-client privilege to protect the TRULINCS communications. By asserting selective waiver, D could prevent the prosecutors from learning the valuable confidential information contained in those communications but still allow prison administrators to review D’s emails to ensure the safety and security of the prison.

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<sup>136</sup> See *id.* at 17–18 (footnotes omitted).

There is little risk of D “gaming” the system by invoking selective waiver in this context. D is not voluntarily waiving the privilege to cooperate with a government investigation and obtain the benefit of leniency; rather, he is seeking to protect confidential communications and thereby ensure effective representation at trial.<sup>137</sup> The only voluntary waiver D makes is with respect to the BOP, which wants to read D’s emails to ensure prison security. The federal prosecutors in this example will not “go easier” on D if he allows them to read his TRULINCS emails. In fact, the federal prosecutors will have a stronger case if they are allowed to do so. As such, D does not obtain a special advantage by invoking selective waiver.<sup>138</sup> The benefit D receives—the protection of attorney-client communications—is available to him through special mail, unmonitored phone calls, and in-person communications. Hence, the only benefit D receives is the exact benefit the attorney-client privilege seeks to protect: Robust communication between attorney and client, which fosters effective representation.

Although one might argue that the availability of alternative means of communication diminishes the need to protect TRULINCS emails, the attorney-client privilege is not circumscribed by the availability of alternative forms of communication.<sup>139</sup> Necessity plays a role in application of the privilege, insofar as it protects communications that would not have been made without the privilege.<sup>140</sup> Nevertheless, application of the privilege is not a function of absolute necessity.<sup>141</sup> Presumably, clients would be hesitant to use any form of communication if clients were required first to show that a particular form of communication was absolutely necessary before the privilege attached.

b) Application of the Privilege Will Not Obstruct the Fact-Finding Process Beyond the Scope Envisioned by the Privilege Doctrine

Recall that the attorney-client privilege strikes a balance between the need for the effective administration of justice and the need for effec-

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<sup>137</sup> See *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991) (“When disclosure to a third party is necessary for the client to obtain informed legal advice, courts have recognized exceptions to the rule that disclosure waives the attorney-client privilege.”).

<sup>138</sup> Cf. *id.* at 1425.

<sup>139</sup> See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 (AM. LAW INST. 2000) (“A communication can be in any form. Most confidential client communications to a lawyer are written or spoken words, but the privilege applies to communication through technologically enhanced methods such as telephone and telegraph, audio or video tape recording, film, teletypewriter, and other electronic means.”).

<sup>140</sup> See *Fisher v. United States*, 425 U.S. 391, 403 (1976).

<sup>141</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

tive legal representation.<sup>142</sup> The attorney-client privilege is meant to obstruct the truth-finding process to strike that balance.<sup>143</sup> As the Supreme Court put it, “[S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.”<sup>144</sup> In the above hypothetical, D will not make necessary communications to his lawyer if the TRULINCS communications are not privileged. Although he may still communicate with the FPD through other means, the importance of document review makes frequent communication necessary under the facts of the hypothetical and renders the other means of communication insufficient for D’s representation.

c) Application of Selective Waiver is Supported by D’s Interest in Effective Representation

If the privilege does not protect D’s TRULINCS communications, then the FPD will be forced to schedule inefficient in-person visits to review documents with D. As discussed, the FPD will have a limited amount of time to visit with D (and in a worst case scenario, the FPD could have almost 1,800 cases, including D’s case).<sup>145</sup> Consider the calamity this could spell for D’s case if it looked anything like Dr. Ahmed’s case, which was discussed in the Introduction. In that case, there were “50,000 pages of documents” to review.<sup>146</sup> If D’s case involved 50,000 pages of documents, and the FPD could spend a maximum of 520 hours of one-on-one time with D,<sup>147</sup> then D and the FPD could review about 106 pages per hour *at most*. This is a rosy and unrealistic scenario. In reality, the FPD will have exponentially less than 520 hours to spend with D.<sup>148</sup>

Presumably, then, the FPD will have to triage documents to ensure that the most important elements of the case are covered with her client. Arguably, key documents will go unreviewed and key pieces of legal advice will never be offered because of the time limitations. In turn, D’s trial strategy will suffer. In that case, D and his attorney will be in the exact situation the Court identified as the heart of the privilege: “disclo-

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<sup>142</sup> See *supra* text accompanying note 38.

<sup>143</sup> See 81 AM. JUR. 2D *Witnesses* § 327 (2004).

<sup>144</sup> *Fisher*, 425 U.S. at 403.

<sup>145</sup> See LEFSTEIN, *supra* note 135 and accompanying text.

<sup>146</sup> See Clifford, *supra* note 1.

<sup>147</sup> See *supra* notes 133–34 and accompanying text.

<sup>148</sup> See LEFSTEIN, *supra* note 135 and accompanying text.

tures—necessary to obtain informed legal advice—which might not have been made absent the privilege.”<sup>149</sup>

*B. Federal Prosecutors Cannot Overcome the Privilege by Asserting Administrative Burden*

Now, one might argue that application of selective waiver would effectively block prosecutors from obtaining valuable evidence even when they are entitled to it. This is a real concern.

The law of waiver . . . protects law enforcement from unfair, one-sided assertions of privilege by the subjects of law enforcement investigations and legal proceedings. This protection . . . is sufficient to guard against abuses of the privilege and assertions of privilege that do not further the administration of justice.<sup>150</sup>

Accordingly, certain exceptions to the privilege protect federal prosecutors from abuses, such as the crime-fraud exception.<sup>151</sup> Suppose that D contacted the FPD via TRULINCS and said that he wished to hide certain evidence from the federal prosecutors. The FPD agrees and the evidence is hidden. In this case, the crime-fraud exception would apply and the federal prosecutors could compel the disclosure of the TRULINCS communications in question.<sup>152</sup> Thus, selective waiver would not act as an absolute bar to discovering attorney-client communications over TRULINCS.

However, federal prosecutors cannot vitiate the attorney-client privilege through the assertion of administrative burden or mere unfairness; no jurisdiction has accepted these grounds as sufficient to overcome the privilege.<sup>153</sup> In cases such as *Dr. Ahmed's*,<sup>154</sup> the federal prosecutors seemed to confuse the attorney-client privilege with the work-product doctrine, which protects “papers prepared by or on behalf of attorneys in anticipation of litigation.”<sup>155</sup> Unlike the attorney-client privilege, the work-product doctrine *can* be overcome with a showing that the “sub-

<sup>149</sup> See *Fisher*, 425 U.S. at 403.

<sup>150</sup> Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 510 (2003) (footnote omitted).

<sup>151</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 79, 82 (AM. LAW INST. 2000).

<sup>152</sup> See *id.* § 82(a).

<sup>153</sup> See *id.* § 77 cmt. d (“The law recognizes no exception to the rule of this Section. Set out below are considerations that may support such an exception, although no court or legislature has adopted it.”).

<sup>154</sup> See *supra* Introduction.

<sup>155</sup> See *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427–28 (3d Cir. 1991).

stantial equivalent” of the materials cannot be obtained “without undue hardship.”<sup>156</sup> Hence, there may be cases in which prosecutors could obtain communications sent via TRULINCS if a court decided the communications were attorney work product and the undue hardship standard was satisfied.

Because the attorney-client privilege cannot, as a matter of law, be overcome through the assertion of administrative burden, a cost-benefit analysis of the burdens alleged by prosecutors in cases such as Dr. Ahmed’s is outside the scope of this Note. Even if administrative burden could overcome the privilege, it is worth noting that TRULINCS “is funded entirely by the Inmate Trust Fund, which is maintained by profits from inmate purchases of commissary products and telephone services, and the fees inmates . . . pay for using TRULINCS.”<sup>157</sup> Given that, the weight of federal prosecutors’ administrative burden is unclear. In Dr. Ahmed’s case, prosecutors argued that emails between clients and their attorneys, and emails between clients and third parties, cannot be sorted electronically.<sup>158</sup> As such, a privilege team must sort privileged emails from non-privileged emails before they are given to the prosecutors.<sup>159</sup> Because of budget cuts, the prosecutors could no longer afford to sort the emails.<sup>160</sup> However, since inmates pay for the cost of TRULINCS (or at least some of the cost), then presumably the cost of creating an electronic sorting program would (or could) be placed on the inmates. Hence, the administrative burden on prosecutors should *decrease*. Even if the cost of an electronic sorting system was placed on federal prosecutors, it seems improbable that the programs required to filter emails would be costly, considering that the programs are available for free to the public through popular email services such as Google’s Gmail.<sup>161</sup>

What seems more certain is that protecting TRULINCS emails with the attorney-client privilege will decrease the BOP’s administrative costs. Although it is hard to say without exact data, the BOP’s administrative costs should go down as more prisoners use email instead of traditional post to speak with their attorneys. Heavier reliance on email would mean less need to task prison officers with sorting through traditional mail. An automated program could sort electronic mail from attorneys. Search algorithms could automatically search non-attorney-client emails for suspicious language. In short, there is no obvious reason why

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<sup>156</sup> See FED. R. CIV. P. 26(b)(3)(A)(ii).

<sup>157</sup> See BOP GUIDE, *supra* note 42, at 32.

<sup>158</sup> See *supra* Introduction.

<sup>159</sup> See *supra* Introduction.

<sup>160</sup> See *supra* Introduction.

<sup>161</sup> See *Using Filters*, GOOGLE, <https://support.google.com/mail/answer/6579?hl=EN> (last visited Jan. 14, 2015).

the BOP could not serve the needs of its prisoners while ensuring prison safety for its personnel when the tools are available for free to the public.

### CONCLUSION

From a practical standpoint, two questions are worth considering before concluding this Note. First, what kind of documentation would a defendant need to viably raise selective waiver? We have already discussed the legal argument, but again, attorney-client privilege and selective waiver are fact-specific arguments. Hence, to viably raise selective waiver, a defendant would need to paint a picture for the court.<sup>162</sup>

I speculate that this picture would include detailed time logs of in-person prison visits between a defendant and her attorney, accounts of the kind of evidence at the heart of a defendant's case (e.g., medical records), and the availability of other forms of communication. A defendant would summon this evidence to show that other forms of communication (e.g., telephone, in-person visits) are practically unavailable; hence, by protecting TRULINCS communications with the attorney-client privilege, the court can encourage full and frank communication between a defendant and her attorney.<sup>163</sup> Of course, a lack of alternate forms of communication *in and of itself* is not enough to warrant application of the privilege (in the same way federal prosecutors cannot overcome the privilege by asserting administrative burden).<sup>164</sup> Rather, a lack of alternative forms of communication indicates that protecting TRULINCS communications with the privilege would increase full and frank communication between a defendant and her attorney.<sup>165</sup>

Second, is selective waiver the best legal argument to protect TRULINCS communications? A limited number of cases are available regarding TRULINCS communications, and no case directly addresses the application of selective waiver in that context. However, the defendant in *United States v. Walla* argued that a federal prosecutor's reading of his TRULINCS communications violated his Sixth Amendment right to effective counsel.<sup>166</sup> According to the Supreme Court in *Strickland v. Washington*, "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."<sup>167</sup>

162 See *supra* Introduction.

163 See *supra* Part II.A.2.

164 See *supra* Part II.B.

165 See *supra* Part II.A.2.

166 No. 14-CR-213 (MKB), 2014 WL 3734522, at \*16 (E.D.N.Y. July 25, 2014).

167 466 U.S. 668, 686 (1984).

Although the court in *Walia* rejected the defendant's argument because he had alternative forms of communication,<sup>168</sup> one might argue that ineffective assistance of counsel is better suited to the facts introduced in Part II.A.2. In my opinion, it is not clear that one argument is better than the other because they are both fact specific. However, I believe selective waiver has a slight edge because the availability of alternative forms of communication cuts heavily against the argument of ineffective assistance of counsel. In any case, a defendant would be well advised to raise all arguments to protect TRULINCS communications.

Ultimately, the purpose of this Note was not to show that the selective waiver doctrine serves the purpose of the attorney-client privilege in all cases. We have already discussed that the application of the attorney-client privilege is fact specific, so the privilege will not attach in all cases. There may be a scenario in which D shares attorney-client communications with a federal agency such as the Internal Revenue Service (IRS) to cut a deal on tax evasion charges. In that case, the federal prosecutors overseeing D's criminal case could successfully obtain all attorney-client communications relating to the subject matter of the communications revealed to the IRS. If D attempted to raise selective waiver, he would face the same problem as the defendants in *Westinghouse* and *Pacific Pictures*—that is, waiver of privilege does nothing to encourage full and frank communication between D and his attorney. However, as we have seen, selective waiver could serve the purpose of the attorney-client privilege in certain circumstances.<sup>169</sup>

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<sup>168</sup> *Walia*, 2014 WL 3734522, at \*16.

<sup>169</sup> See *supra* Part II.A.2.

