PAYING THE "TRADITIONAL PRICE" OF DISCLOSURE: THE THIRD CIRCUIT REJECTS LIMITED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991)

In *Westinghouse Electric Corp. v. Republic of the Philippines*,[1] the United States Court of Appeals for the Third Circuit concluded that a corporation waives its attorney-client privilege[2] when it reveals confidential information to investigatory government agencies.[3]

In *Westinghouse*, the Republic of the Philippines ("Republic") and its National Power Corporation ("NPC")[4] sued Westinghouse Electric Corporation ("Westinghouse"),[5] alleging that Westinghouse had obtained a

1. 951 F.2d 1414 (3d Cir. 1991).

2. The attorney-client privilege protects qualified confidential communications between an attorney and client. *See infra* notes 18-22 and accompanying text (providing background discussion of the attorney-client privilege).

3. In so doing, the Third Circuit rejected the limited waiver rule, which allows corporations to disclose privileged information to investigatory government agencies and maintain the privilege, even after such disclosure. In effect, this rule circumvents the traditional waiver rule, which provides that when confidential information is disclosed to a third party, the attorney-client privilege is waived. *See infra* notes 25-31 and accompanying text (providing a discussion of the traditional waiver rule); *see infra* text accompanying note 48 (definition of the limited waiver rule).

The *Westinghouse* court also held that a firm which voluntarily disclosed an attorney's work product to investigatory government agencies waived any protection afforded by the work-product doctrine as against all other adversaries. 951 F.2d at 1429. While both the work-product doctrine and the attorney-client privilege safeguard confidential information to facilitate the trial process, the two concepts are distinguishable. The attorney-client privilege is essentially a subcategory of the work-product doctrine. The attorney-client privilege protects only confidential communications between the client and the attorney, while the work-product doctrine is broader. The work-product doctrine promotes the adversary system by safeguarding the fruits of an attorney's trial preparations from his opponent's discovery attempts. For example, work product may include information obtained from persons other than the client, but the attorney-client privilege covers only information gathered from the client. Moreover, while only the client may waive the attorney-client privilege, an attorney may forfeit his or her work product. In addition, unlike the attorney-client privilege, the work-product doctrine is not designed to protect the interests of an individual. Rather, it is designed solely to benefit the adversary system itself. *See* Sherman L. Cohn, *The Work Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 922-23, 943 (1983). *See also* United States v. American Tel. & Tel. Co. (*In re* MCI Communications Corp.), 642 F.2d 1285, 1299 (D.C. Cir. 1980).

4. The National Power Corporation is the Philippine government agency responsible for electric power generation. Republic of the Philippines v. Westinghouse Elec. Corp., 714 F. Supp. 1362, 1364 (D.N.J. 1989).

5. The defendants (collectively referred to as "Westinghouse") were Westinghouse Electric Corporation, a Pennsylvania corporation, Westinghouse International Projects Company, a wholly-

large power plant contract[6] in the Philippines by bribing a friend of former President Ferdinand Marcos.[7] The Republic further contended that Westinghouse had tortiously interfered with the fiduciary duties that Marcos owed to the Philippine citizens and to the NPC.[8]

During discovery, the Republic sought certain documents[9] generated by a Westinghouse internal investigation.[10] Westinghouse had disclosed these documents to the Securities Exchange Commission ("SEC")[11] and the Department of Justice ("DOJ")[12] in order to cooperate with the

owned subsidiary of Westinghouse, and Burns & Roe Enterprises, Inc. ("Burns & Roe"), a New Jersey architecture/engineering corporation. *Id.*

6. The contract involved building a 600-megawatt nuclear power plant in Bagac, Bataan which commenced in 1976. *Id.* In the summer of 1973, then-President Ferdinand E. Marcos announced his government's decision to build the plant. *Id.* Many foreign companies, including Westinghouse and Burns & Roe, submitted bids for the lucrative project. *Id.*

7. *Id.* at 1365. The 15-count complaint alleged "breach of contract, fraud, tortious interference with fiduciary duties, negligence, civil conspiracy, RICO violations, antitrust violations, and various pendant state claims." *Id.* at 1364. The Republic alleged that in order to obtain a piece of the contract, both Westinghouse and Burns & Roe retained a special sales representative ("SSR"), who had influence in the presidential palace. *Id.* This SSR, Herminico Disini, a Philippine businessman and close personal friend of Marcos, allegedly offered Marcos a "piece of the action" in order to obtain his endorsement of the bidders. *Id.* at 1365. Disini agreed to promote Westinghouse and Burns & Roe's interest with the NPC. The contract with Disini required Westinghouse to pay Disini, through various corporations he owned, three percent of the total contract price. The Republic further contended that Westinghouse and Burns & Roe knew that Disini was passing these commission payments to Marcos. *Id.*

8. Republic of the Philippines v. Westinghouse Elec. Corp., 949 F.2d 653 (3d Cir. 1991). Both the Republic and the NPC sought rescission of the contracts and damages. *Id.*

9. The Republic requested that Westinghouse turn over the documents it disclosed to the Securities Exchange Commission ("SEC") and the Department of Justice ("DOJ") during investigations conducted by the two agencies. Republic of the Philippines v. Westinghouse Elec. Corp., 132 F.R.D. 384, 386 (D.N.J. 1990). *See infra* notes 10-13 and accompanying text for a discussion of these investigations.

10. Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1417 (3d Cir. 1991). In March 1978, following the commencement of an SEC investigation, Westinghouse chose to participate in the SEC Voluntary Disclosure Program and conduct a self-investigation. *Id.* *See infra* notes 37-41 and accompanying text for discussion of the SEC's Voluntary Disclosure Program. Westinghouse retained a law firm to investigate whether company officials had made improper payments. During the investigation, the law firm reported its findings in two letters. 951 F.2d at 1418.

11. The SEC investigation followed press reports concerning Westinghouse's alleged bribery of foreign officials during the Philippine nuclear plant negotiations. *Id.* Upon Westinghouse's request, the law firm that conducted the investigation revealed one of its reports to the SEC and orally presented its findings to the agency. The law firm disclosed only the report, not the findings upon which they based the presentation and report. In addition, the SEC agreed not to keep the report. *Id.* At the time, SEC regulations provided that such information would be kept confidential. *Id.* at 1418 n.4.

12. The DOJ began to investigate Westinghouse in 1978. The DOJ's investigation explored whether Westinghouse had made illegal payments to obtain contracts not only in the Philippines,

agencies' investigations.[13] The district court affirmed the magistrate's ruling that the disclosures resulted in a complete waiver of the attorney-client privilege.[14] Therefore, the Republic could obtain the requested documents.[15] Westinghouse petitioned the Third Circuit for a writ of mandamus to set aside the district court's order.[16] The Third Circuit ruled that Westinghouse's disclosure had effected a complete waiver.[17]

The attorney-client privilege[18] prevents the disclosure of information

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but also in other countries. The DOJ's investigation ended when Westinghouse entered into a plea agreement concerning payments that the company admitted making in order to obtain business in Egypt. *Id.* at 1419. After Marcos was deposed as President of the Phillipines in 1986, the DOJ renewed its investigation of Westinghouse. Pursuant to the investigation, a grand jury subpoenaed the reports from the earlier investigation. *Id.* After entering into a confidentiality agreement with the DOJ, Westinghouse ultimately disclosed the documents to the grand jury. This agreement provided:

> That the [DOJ] review at Westinghouse counsel's office (but not keep copies of) attorney-client privileged and work-product protected materials in the [the law firm's] files, that the information contained therein would not be disclosed to anyone outside of the DOJ, and that such review of the [law firm's] documents would not constitute a waiver of Westinghouse's work product and attorney-client privileges.

Id. at 1419 (citing 132 F.R.D. 384, 385-86 (D.N.J. 1991)).

13. *Id.* at 1418-19. The SEC and DOJ investigations followed press reports stating that Westinghouse had bribed foreign officials to obtain part of the Philippine power plant contract. *Id.* at 1418.

14. Waiver results from partial disclosure of confidential information which would make it unfair for the client to invoke the privilege thereafter. *See* CHARLES TIFFORD MCCORMICK, MCCORMICK ON EVIDENCE § 93 (John William Strong ed., 4th ed. 1992). *See infra* notes 23-30 and accompanying text for discussion of the traditional waiver doctrine. *See also infra* notes 18-22 and accompanying text for a discussion of the attorney-client privilege.

15. 132 F.R.D. at 388.

16. 951 F.2d at 1421.

17. *Id.* at 1431.

18. *See* 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2290 (Peter Tillers et al. eds., 4th ed. 1961). The attorney-client privilege is the oldest common-law protection for confidential communications. The privilege originally provided that the attorney's "oath and honor" allowed him to refuse to disclose his client's secrets upon examination in court. *Id.* § 87. However, by the eighteenth century the emphasis upon the code of honor had lessened and the ascertainment of truth became a higher priority. *Id.* Thus, in the early 1700s the courts developed the modern attorney-client privilege. This theory was aimed at protecting the client, rather than the attorney, and developed to encourage the client to fully disclose all information to the attorney. *Id.* § 2290.

Federal Rule of Evidence 501, which essentially codified the common-law attorney-client privilege, provides:

> Except as otherwise required by the Constitution of the United States or provided by 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.

given to an attorney for the purpose of securing legal assistance.[19] The

Essentially, Rule 501 incorporates state privilege rules to govern state claims and a federal common law for federal claims. *See* Comment, *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation,* 130 U. PA. L. REV. 1198, 1203 n.31 (citing 4 ALI-ABA COURSE MATERIALS JOURNAL 5, 6 (Dec. 1979)).

As promulgated by the Supreme Court, the proposed Federal Rules of Evidence set forth nine distinct privileges. *See* RONALD J. ALLEN & RICHARD B. KUHNS, AN ANALYTICAL APPROACH TO EVIDENCE 763 (1989). The proposed rule is a representative statement of the modern attorney-client privilege. *Id.* Proposed Federal Rule of Evidence 503 stated, in relevant part:

> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

PROPOSED FED. R. EVID. 503. Although Proposed Federal Rule of Evidence 503 was never enacted, it is often cited as a guideline regarding the scope of the privilege. *See* MCCORMICK, *supra* note 14, § 87 ("A clear statement of the scope of the privilege is embodied in the Revised Uniform Evidence Rules 502 (1986), . . . except that deleted Federal Rule of Evidence 503 did not contain [certain provisions] of the Revised Uniform Rule and except for insignificant stylistic differences, the rules are the same."); *In re* Grand Jury Proceedings Detroit, Michigan, August 1977, 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977) (concluding Congress' refusal to enact the rule as part of the Federal Rules of Evidence does not diminish its value as a definition of the privilege).

When the proposed rules dealing with privilege were submitted to Congress, they generated substantial controversy. Disagreements emerged about the scope of some of the proposed privileges, about whether the proposed list was sufficiently inclusive, and about the extent to which state or federal rules of privilege should apply in diversity actions. Congress ultimately resolved this controversy by deciding not to enact the proposed rules relating to privilege. *See* ALLEN & KUHNS, *supra*, at 763. Congress did not reject the draft of Rule 503 because of substantive shortcomings, but rather based on the theory that the common-law rules of privilege should not be articulated by a Federal Rule. *See In re* Grand Jury, 434 F. Supp. at 650 n.1.

Although the Federal Rules of Evidence mandate attorney-client confidentiality, the courts have yet to recognize a constitutional right to the privilege. *See* Comment, *supra,* at 1203 n.37 (citing Magida *ex rel.* Vulcan Detinning Co. v. Continental Can Co., 12 F.R.D. 74, 76 (S.D.N.Y. 1951) (finding that the privilege is not "sacrosanct," but rather it is a "product of legislation, without constitutional guarantee"). Some have suggested, however, that the Fifth and Sixth Amendments, taken together, offer individual criminal defendants the attorney-client privilege. *See* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement,* 91 HARV. L. REV. 464, 486 (1977).

19. In United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950), the court discussed the scope of the attorney-client privilege:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

privilege exists to foster disclosure and trust between the attorney and client.[20] Nineteenth-century courts used the attorney-client privilege to encourage clients to disclose all the facts[21] to their lawyers.[22]

Recognizing the discovery costs[23] incurred in connection with the at-

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Id. at 1358-59. A noted commentator has defined the common-law attorney-client privilege as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection may be waived.

WIGMORE, *supra* note 18, § 2292.

The attorney-client privilege applies if the client reasonably believes that the person consulted is an attorney, even though in fact the person is not. MCCORMICK, *supra* note 14, § 88 (citing People v. Barker, 27 N.W. 539 (Mich. 1886)). Communications in the course of preliminary discussion with a view toward employing the lawyer are privileged even if the attorney is not retained. *Id.* (citing *In re* DuPont's Estate, 140 P.2d 866 (Cal. Ct. App. 1943)).

The privilege was developed to protect "only those disclosures . . . which might not have been made absent the privilege." Fisher v. United States, 425 U.S. 391, 403 (1976).

20. *See generally* WIGMORE, *supra* note 18, § 2291; Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (indicating that the attorney-client privilege exists solely "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"); Trammel v. United States, 445 U.S. 40, 51 (1980) (explaining that the privilege exists because the advocate needs to know everything that relates to the client's reasons for seeking representation); Fisher v. United States, 425 U.S. 391, 403 (1976) (explaining that the objective of the attorney-client privilege is to encourage full disclosure by clients); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that the privilege is grounded upon "necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

21. *See, e.g.*, United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915) (explaining if the rule required the communications to be subjected to examination and publication, then a "practical prohibition upon professional advice and assistance" would result).

22. *See* WIGMORE, *supra* note 18, § 2291 ("The policy of the privilege has been plainly grounded since the latter part of the 1700s on subjective considerations . . . [i.e., freedom of consultation] . . . Such is the modern theory."). *See also* SCM Corp. v. Xerox Corp, 70 F.R.D. 508, 522 (D. Conn. 1976) (noting that "[t]he purpose of the privilege is to insure that the client may confide in his attorney to obtain legal advice"); Note, *supra* note 18, at 466.

The extent to which the attorney-client privilege actually benefits and promotes the attorney-client relationship remains a source of academic dispute. *See* WIGMORE, *supra* note 18, § 2291, at 553-54 ("[T]he loss to the truth is comparatively small, in modern times . . . [the privilege's] benefits are all indirect and speculative, its obstruction is plain and concrete."). *See also* Note, *supra* note 18, at 470 ("Clients seek out attorneys and will continue to do so largely because there is no ready substitute for legal advice, and perhaps, because they realize that the costs of withholding information from their legal representatives are likely to outweigh the consequences.").

23. *See, e.g.*, WIGMORE, *supra* note 18, § 2291, at 554 (the privilege "is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth."); MODEL CODE OF EVIDENCE Rule 210 cmt. (1942) ("The social good derived from [the attorney-client privilege] is believed to outweigh the harm that may come from suppression of the evidence"). As one commentator noted:

torney-client privilege, courts construe the privilege narrowly[24] and strictly apply the "waiver" doctrine.[25] A client who voluntarily discloses confidential information[26] to a third party[27] waives the attorney-client privilege with respect to that information. Thus, the waiver rule ensures that the privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principle."[28] The attorney-client privilege is intended to protect "only those disclosures . . . which might not have been made absent the privilege."[29] When a client reveals privileged information to a third party, the rationale underlying the privilege no

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> The privilege tends to force litigants to duplicate their investigative efforts, thus increasing the costs of discovery and litigation. More importantly, the attorney-client privilege . . . removes from the judicial process evidence that might be relevant to the resolution of a dispute, thus increasing the danger that cases will be wrongly decided for lack of information.

Comment, *supra* note 18, at 1204-05.

24. *See, e.g.*, WIGMORE, *supra* note 18, § 2292, at 554 (stating that the attorney-client privilege "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle"). *See also* Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423 (3d Cir. 1991) (citing *In re* Grand Jury Investigation of Sun Co., 599 F.2d 1224, 1235 (3d Cir. 1979)); *In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979); Radiant Burners Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir. 1963).

25. The waiver doctrine states that when a client voluntarily discloses privileged communications to a third party, the privilege is waived. *See* 8 CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2016, at 127 n.71 (1969) (quoting PROPOSED FED. R. EVID. 511) ("A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter."). *See also* United States v. Rockwell Int'l, 897 F.2d 1255, 1265 (3d Cir. 1990).

Courts have recognized several exceptions to the waiver doctrine. *See* WIGMORE, *supra* note 18, § 2301 (explaining that the waiver doctrine does not apply when information is disclosed to an agent assisting the attorney in giving legal advice); Hunydee v. United States, 355 F.2d 183, 184-85 (9th Cir. 1985) (holding client may disclose communications to co-defendants without waiving the privilege). In each exception, the disclosed communication was made for the common purpose of obtaining informed legal advice.

Traditionally, waiver is legally defined as the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Knowledge or lack of knowledge is unnecessary, however, for the attorney-client waiver doctrine to apply. *See* PROPOSED FED. R. EVID. 511 advisory committee's note.

26. Significantly, protected confidential information in this context does not include facts—only confidential communications. *See* City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962).

27. For the purposes of the attorney-client privilege, a third party is "one who stands in a neutral or adverse position *vis-a-vis* the subject of the communication." *In re* Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975).

28. Comment, *supra* note 18, at 1207.

29. Fisher v. United States, 425 U.S. 391, 403 (1976).

longer applies, and the privilege is waived.[30]

The waiver rule's significance increased[31] upon the advent of the SEC Voluntary Disclosure Program.[32] Originally, the SEC's primary task was to investigate corporations suspected of violating the Securities Exchange Act.[33] However, within the last twenty years the SEC has started to investigate and prosecute corporations that have allegedly bribed foreign officials or made questionable election contributions.[34] In an attempt to alleviate the additional caseload,[35] the SEC developed the Voluntary Disclosure Program,[36] which permits participating corporations to conduct internal investigations of questionable business practices using their own attorneys and resources.[37] The corporations then report their findings to the SEC and correct any problems uncovered during the investigation.[38] The SEC and the participating corporations mutually benefit from the program.[39] Corporations benefit because the SEC offers them leniency and the opportunity to avoid an intrusive investigation.[40] The SEC bene-

30. *See In re* Penn Central Commercial Paper Litig., 61 F.R.D. 453, 464 (S.D.N.Y. 1973) ("The theoretical predicate underlying all recognized privileges is that secrecy and confidentiality are necessary to promote the relationship fostered by the privilege. Once the secrecy or confidentiality is destroyed by a voluntary disclosure to a third party, the rationale for granting the privilege in the first instance no longer applies.") (citations omitted).

31. *See In re* Sealed Case, 676 F.2d 793, 819 (D.C. Cir. 1982) (concluding "the SEC's demand for disclosure of underlying documentation implicated the attorney-client privilege and work-product doctrine because every document involved in the investigation potentially was privileged."); Beth S. Dorris, Note, *The Limited Waiver Rule: Creation of an SEC-Corporation Privilege,* 36 STAN. L. REV. 789, 797 (1984). Merely conducting internal investigations does not completely further the SEC's enforcement needs; the SEC must examine all of the results to benefit. However, disclosing information to the SEC constitutes a waiver of the attorney-client privilege under the traditional doctrine. *Id.*

32. For a detailed discussion of the development of the SEC's Voluntary Disclosure Program, see *In re* Sealed Case, 676 F.2d at 818-20.

33. Dorris, *supra* note 31, at 793.

34. *Id. See* 15 U.S.C. § 78*l* (1988) (providing that a corporation which fails to report foreign bribes to the SEC violates the Securities Exchange Act); 15 U.S.C. § 78dd-1 to -2 (1988) (making foreign bribes illegal).

35. Dorris, *supra* note 31, at 794.

36. *Id. See In re* Sealed Case, 676 F.2d at 819.

37. 676 F.2d at 819. Ultimately, SEC turns over the information gathered during the investigation to the corporation's stockholders and the investing public. *Id.* at 891 n.104. However, the SEC allows corporations to redact certain information. For example, a corporation may exclude "the names of foreign nations and the identities of those who received bribes." *Id.*

38. Dorris, *supra* note 31, at 795. The SEC requires only the final report. Participating corporations are not required to present all investigative materials. *Id.* at 795 n.27.

39. *In re* Sealed Case, 676 F.2d at 819.

40. *Id.* However, the SEC does not guarantee lenient treatment; it still will seek appropriate relief in egregious cases. *Id.* at 819 n.106.

fits because it can fulfill its investigatory duties more cost-effectively.[41]

The Supreme Court's decision in *Upjohn Co. v. United States*[42] broadened the scope of a corporation's attorney-client privilege.[43] Before *Upjohn*,[44] the majority of courts advocated the "control group" test which provided that the privilege applied to only those corporate officers having discretion to make decisions based on an attorney's advice.[45] Rejecting this view, the Supreme Court held that the attorney-client privilege protected communications of all corporate employees.[46] This ruling may have enhanced corporate participation in the SEC Voluntary Disclosure Program because corporations became more confident that the privilege would protect most communications.[47]

The development of the SEC's Voluntary Disclosure Program gave rise to the limited waiver rule, which provides that the disclosure of information to an investigatory government agency does not constitute a

41. *Id.* at 800, 819. *See* Dorris, *supra* note 31, at 794-95.

42. 449 U.S. 383 (1981).

43. *See, e.g.*, John Doe v. United States (*In re* John Doe Corp.), 675 F.2d 482, 487 (2d Cir. 1982) (recognizing that despite the ancient origins of the privilege, "its applicability and scope in the context of attorneys representing corporate clients" is a relatively new subject of litigation); Dorris, *supra* note 31, at 795 ("The Supreme Court recognized this practice [SEC's Voluntary Disclosure Programs] and its importance in Upjohn Co. v. United States.").

44. In *Upjohn*, the defendant corporation allegedly bribed foreign government officials to obtain business. Upjohn conducted an internal investigation, 449 U.S. at 386, and voluntarily submitted a preliminary report to the SEC and the IRS disclosing the questionable payments. *Id.* at 387. Shortly thereafter, the IRS demanded production of the report's supporting documents. Upjohn asserted the attorney-client privilege. *Id.* at 388.

45. *Id.* at 392-93. The Supreme Court articulated the control group test:

> The question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, [and] the most satisfactory solution. . . is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney . . . then . . . the privilege will apply.

Id. at 390 (quoting General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963)).

46. 449 U.S. at 397. The court employed the "subject matter test." *See* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970). Under this test, the attorney-client privilege is extended to any lower level employee's communication to the corporation's attorney where the corporation sought the attorney's advice on the subject matter of the communication and the communication concerns matters within the scope of the employee's corporate duties. *Id.* at 491. Although the *Upjohn* Court did not explicitly adopt the subject matter test, it indicated that the attorney-client privilege should apply to most corporate communications. 449 U.S. at 391-93.

47. *See* Comment, *supra* note 18, at 1200-01 (allowing the client to assert the attorney-client privilege to communications between attorneys and low level employees of the corporation, the *Upjohn* court has encouraged increased "self-policing of corporate malfeasance through the use of corporate counsel").

waiver of the attorney-client privilege.[48] At first, the courts disfavored the theory.[49] In *In re Penn Central Commercial Paper Litigation,*[50] a district court in New York rejected the limited waiver rule, and instead applied the traditional waiver theory.[51] The court reasoned that although a witness might be less likely to cooperate with the SEC without the rule, this factor alone failed to justify departing from the well-established traditional waiver rule.[52]

However, the *Penn Central* decision did not mark the end of the limited waiver rule. Four years later, the Eighth Circuit upheld the rule in *Diversified Industries v. Meredith.*[53] Diversified conducted an internal investigation which revealed that its agents had bribed other businesses' purchasing agents.[54] The law firm conducting the investigation for Diversified prepared a memorandum which it submitted to the SEC.[55] A rival corporation subsequently brought suit against Diversified and sought to compel discovery of the memorandum.[56] Diversified argued that the memorandum was protected under the attorney-client privilege.[57] The Eighth Circuit agreed, expressing a belief that the policy of upholding the effectiveness of the SEC's Disclosure Program outweighed the parties' interest in discovery.[58]

In *Teachers Insurance & Annuity Association of America v. Shamrock*

48. *See, e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (en banc); Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 685-89 (S.D.N.Y. 1980).

49. Comment, *supra* note 18, at 1210.

50. 61 F.R.D. 453 (S.D.N.Y. 1973). In *Penn Central*, the SEC investigated a corporation and its affiliates with regard to a debenture fund. *Id.* at 457. An attorney for the corporation testified before the SEC, and the plaintiff requested the transcript and supporting documents from this investigation in discovery. *Id.* at 456. The corporation asserted the attorney-client privilege and the limited waiver theory. *Id.* at 462.

51. *Id.* at 462-64.

52. *Id.* at 464. The court noted that "it is hornbook law that the voluntary disclosure or consent to disclosure of a communication, otherwise subject to a claim of privilege, effectively waives the privilege." *Id.* at 463 (quoting MCCORMICK, *supra* note 14, § 97).

53. 572 F.2d 596 (8th Cir. 1977) (en banc).

54. *Id.* at 600. In the course of litigation during a proxy fight, discovery revealed that Diversified may have established and maintained a "slush fund" which it used to bribe purchasing agents of other business entities, including the plaintiff. *Id.*

55. *Id.* at 611.

56. *Id.* at 606. The rival corporation was Weatherhead Corporation, a brass manufacturing corporation with its principal place of business in Cleveland, Ohio. *Id.* at 607.

57. *Id.* at 599.

58. The Eighth Circuit noted that an opposite decision may frustrate 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. *See In re* LTB Sec. Litig., 89 F.R.D. 595 (N.D. Tex. 1981) (upholding limited waiver rule); Byrnes v. IDS Realty Trust

Broadcasting Co.,[59] a district court in New York added a scienter element to the limited waiver theory.[60] The *Teachers* court held that the plaintiff waived its attorney-client privilege because it had not asserted the privilege in response to a SEC subpoena.[61] Because the corporation did not prove that it intended to retain its attorney-client privilege when it disclosed certain documents, the court deemed it waived.[62] The *Teachers* decision essentially adopted the limited waiver rule articulated in *Diversified*, but added a surmountable hurdle—an intent to retain the attorney-client privilege.[63]

The limited waiver rule has not gained universal acceptance.[64] In *Permian Corp. v. United States*, the United States Court of Appeals for the District of Columbia Circuit disagreed with the Eighth Circuit's rationale in *Diversified Industries* and flatly rejected the limited waiver rule.[65] In *Permian*, the SEC obtained confidential corporate documents to facilitate its investigation regarding the adequacy of the corporation's registration statement.[66] In return, the SEC agreed that the corporation could assert the attorney-client privilege to prevent the SEC from disclosing the

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Co., 85 F.R.D. 679 (S.D.N.Y. 1980) (same); *In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368 (E.D. Wis. 1979) (same).

59. 521 F. Supp. 638 (S.D.N.Y. 1981).

60. *Id.* at 641 (explaining that it is proper to require a client who wants to retain the attorney-client privilege to "take some affirmative action to preserve confidentiality").

61. *Id.* at 646.

62. The *Teachers* court stated that "disclosure to the SEC should be deemed a complete waiver unless the right to assert the privilege in subsequent proceedings is specifically reserved at the time disclosure is made." *Id.* at 644-45. The court believed that the party was required to express intent to retain the privilege. *See* Martin P. Hicks, Note, *Limited Waiver of the Attorney-Client Privilege Upon Voluntary Disclosure to the SEC*, 50 FORDHAM L. REVIEW 963 (1982).

63. *See* Comment, *supra* note 18, at 1213, (noting that the *Teachers* ruling was effectively the same as *Diversified*, because under this ruling all parties would choose to retain the privilege and obtain an express reservation of the producing parties' claim of privilege).

64. *See In re* Subpoena Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984) (holding information revealed to SEC is no longer protected by privilege in a later grand jury proceeding); *In re* Sealed Case, 676 F.2d 793, 823 (D.C. Cir. 1982) (rejecting limited waiver of work-product privilege theory in grand jury context); *In re* Weiss, 596 F.2d 1185 (4th Cir. 1979) (per curiam) (same); *In re* Penn Central Commercial Paper Litig., 61 F.R.D. 453 (S.D.N.Y. 1973); *see also supra* notes 50-52 (discussing *Penn Central*); *cf. In re* John Doe Corp., 675 F.2d 482 (2d Cir. 1982) (rejecting limited waiver rule for corporate documents disclosed to underwriter for commercial purposes).

65. 665 F.2d 1214 (D.C. Cir. 1981).

66. *Id.* at 1216. The defendant made over 1.2 million pages of documents available to the SEC. The sheer volume of this response impaired its usefulness to the SEC. To avoid delay, the defendant's counsel negotiated with the SEC staff and a former adversary and devised a plan that would allow the SEC to obtain confidential documents directly and expeditiously from the former adversary. *Id.*

information to a third party.[67] When the Department of Energy later attempted to obtain the documents, Permian asserted the attorney-client privilege.[68] Refusing to apply the limited waiver rule, the D.C. Circuit held that Permian waived its privilege when it submitted the documents to the SEC.[69]

The *Permian* court rejected the limited waiver doctrine for three reasons.[70] First, the court noted that the rule did not advance attorney-client communication interests because the justification for the privilege disappears once it appears the client did not desire secrecy.[71] Second, the court asserted a "fairness" argument: the attorney-client privilege should not enable litigants to "pick and choose" third parties to whom it will disclose confidential information.[72] Third, the court refused to embrace the Eighth Circuit's theory that the rule is necessary to promote the SEC's Voluntary Disclosure Program.[73] The court reasoned that by allowing the SEC access while denying access to the Department of Energy, the corporation would be able to select who had access to information.[74]

In *Westinghouse v. Republic of the Philippines*,[75] the Third Circuit joined the D.C. Circuit in rejecting the limited waiver rule.[76] The Third

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67. *Id.* The SEC agreed not to:

> deliver any of the Documents to any person other than a member of the Commission or the Staff or any other government agencies, offices or bodies or to the Congress for a reasonable period of time after notice . . . of the Staff's intention to deliver the documents to such person.

Id.

68. *Id.* at 1217. The Department of Energy was investigating the corporation's compliance with petroleum price regulations. *Id.*

69. *Id.*

70. *Id.* at 1220-22.

71. *Id.* at 1220-21. The court doubted that a limited waiver rule would further the interests of the "common law privilege for confidential communications" between a client and a lawyer. *Id.* at 1220.

72. *Id.* at 1221. The court reasoned that it cannot adopt a rule that allows the client to 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.*

73. *Id.*

74. *Id.* at 1221-22.

75. 951 F.2d 1414 (3d Cir. 1991).

76. *Id.* at 1424-25. The *Westinghouse* court referred to the rule as the "selective waiver rule." The court stated that the term "limited" refers to two separate kinds of waivers—selective waivers and partial waivers. The court found that selective waiver allows the client who has already revealed privileged information to one party to continue to assert the privilege against others. In contrast, partial waiver allows a client who has disclosed part of a privileged communications to continue to

Circuit agreed with the *Permian* court's argument that the limited waiver rule does not serve the interests underlying the attorney-client privilege.[77] The court noted that the only exception to the traditional waiver doctrine exists when the information is disclosed to obtain informed legal advice.[78] Because the limited waiver rule protects disclosures made for different purposes, the court was unwilling to recognize limited waiver as an exception to the traditional waiver rule.[79]

In declining to adopt the limited waiver rule, however, the court did not rely on *Permian's* "fairness doctrine."[80] Rather, the Third Circuit found no "unfairness" in the doctrine because a private litigant who discloses privileged information to a government agency is no worse off in subsequent proceedings than had disclosure to the agency not occurred.[81]

Moreover, the court rejected the policy argument that the limited waiver rule encourages corporations to conduct internal investigations.[82] According to the Third Circuit, recognition of this alternative policy would circumvent the policies underlying the attorney-client privilege and create an entirely new privilege.[83] The court was reluctant to take such a step in light of the Supreme Court's repeated command for courts to act cautiously in recognizing new privileges.[84] Furthermore, the court noted that a new privilege must "promote sufficiently important interests to outweigh the need for probative evidence."[85] The court did not believe that the promotion of voluntary cooperation in government investigations outweighed the need for probative evidence.[86]

The Third Circuit was similarly unpersuaded by the *Diversified* court's argument that the limited waiver rule is necessary to encourage volun-

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assert the privilege against the rest of the same privileged information. *Id.* at 1423 n.7. However, in order to avoid confusion, this Comment will use the term "limited waiver" rather than "selective waiver."

77. *Id.* at 1425. The court believed that limited waiver will not encourage complete disclosure to a client's lawyer to obtain informed legal assistance. Instead, because it only encourages one to voluntarily disclose information to government agencies, the limited waiver rule extends the attorney-client privilege beyond its purpose. *Id.*

78. *Id.*

79. *Id.* *See supra* note 77.

80. 951 F.2d at 1426. "Our rejection of the [limited] waiver rule does not depend, however, on the second reason the D.C. Circuit gave in *Permian* for rejecting *Diversified*." *Id.*

81. *Id.* at 1426 n.13.

82. *Id.* at 1425.

83. *Id.*

84. *Id.* "Privileges obstruct the truth-finding process." *Id.*

85. *Id.* (citing Trammel v. United States, 445 U.S. 40, 51 (1980)).

86. *Id.* at 1425-26.

tary cooperation with government investigations.[87] The court emphasized that Westinghouse chose to cooperate with the SEC and DOJ despite uncertainty surrounding the validity of the limited waiver rule.[88] The court also noted that numerous corporations had opted to disclose information to the SEC despite the lack of an established privilege.[89]

The *Westinghouse* court was reluctant to recognize a privilege that Congress had expressly considered and rejected.[90] In 1984 Congress considered and rejected an amendment to the Securities and Exchange Act that would have established a limited waiver rule pertaining to documents disclosed to the SEC.[91] Finally, the court rejected Westinghouse's argument that it did not waive the privilege because it reasonably expected that the SEC and DOJ would maintain the confidentiality of the information the corporation disclosed.[92] The court found this fact irrelevant, noting that under traditional waiver doctrine, voluntary disclosure to a third party waives the privilege even if the third party agrees not to disclose the communication to anyone else.[93]

The Third Circuit correctly rejected the limited waiver rule. First, as the *Permian* court noted, the rationale underlying the limited waiver rule is wholly inconsistent with the policy underlying the attorney-client privilege.[94] Significantly, the widely recognized exceptions to the traditional waiver rule have one common denominator. Each furthers the goal underlying the attorney-client privilege—obtaining informed legal advice.[95] The limited waiver rule, on the other hand, serves a different goal—encouraging corporate participation in voluntary government investigations.[96] Although this goal has merit, it does not justify carving a new exception to the traditional waiver rule.[97]

Furthermore, the *Diversified* court's assertion that the rule is necessary

87. *Id.* at 1426.

88. *Id.* The court noted that at the time Westinghouse disclosed the information to the DOJ only one appellate court had adopted the limited waiver rule, while another circuit had "trenchantly rejected" the rule. *Id.*

89. *Id.* (citing Dorris, *supra* note 31, at 822). The court noted that over 425 corporations participated in the SEC's program in 1979 alone. *Id.* at 1426.

90. *Id.* at 1425.

91. *Id.* (citing 16 Sec. Reg. & L. Rep. (BNA) 461 (March 2, 1984)).

92. *Id.* at 1426-27.

93. *Id.* at 1427. *See supra* notes 26-27 and accompanying text.

94. *See supra* notes 19-22, 71, 77-78 and accompanying text.

95. *See supra* notes 19-22. *See also Westinghouse,* 951 F.2d at 1424.

96. *See supra* note 58 and accompanying text.

97. *See supra* text accompanying notes 84-85.

to ensure cooperation between corporations and investigatory government agencies is unpersuasive.[98] Indeed, Westinghouse cooperated with the SEC despite legal uncertainty regarding the limited waiver rule.[99] In addition, over 400 corporations participated in the SEC's Voluntary Disclosure Program although the rule's validity was far from established.[100] The opportunity to avoid an intrusive formal investigation and obtain lenient treatment from the SEC[101] provides sufficient incentive for corporations to cooperate without the need for limited waiver. Therefore, the primary "benefit" of the limited waiver rule is tenuous, because corporations will likely cooperate with the SEC absent the rule.[102] Accordingly, the rule is difficult to justify in light of its inevitable discovery costs.[103]

Moreover, the limited waiver rule's effects are devastating to non-SEC enforcement of the securities laws. For example, the rule greatly hampers private actions against corporations, a primary enforcement and deterrent tool against securities violations.[104] Shareholders and other litigants are forced to duplicate the corporation's investigative work given to the SEC.[105] The prohibitive cost of such discovery efforts ultimately discourages private actions.[106] Likewise, government agencies to which the privileged information is not disclosed suffer because they cannot receive the information disclosed to other agencies.[107] For instance, if a corporation could disclose information to the SEC, yet prohibit the SEC from sharing the information with other agencies, the company could easily frustrate government efficiency.[108]

Finally, as the *Permian* court indicated, the limited waiver rule permits corporations to use the attorney-client privilege as a sword rather than a shield.[109] The rule permits corporations to waive and retain the

98. *See supra* notes 87-89 and accompanying text.

99. 951 F.2d at 1425.

100. *See supra* note 89 and accompanying text.

101. *See supra* notes 39-40 and accompanying text.

102. *See* supra notes 87-89 and accompanying text.

103. *See supra* note 23.

104. *See* Dorris, *supra* note 31, at 814. Congress expressly provided for private lawsuits in the securities acts. *See, e.g.*, 15 U.S.C. §§ 77k, 77l (1988). *See* Dorris, *supra* note 31, at 815 n.118.

105. *See* Dorris, *supra* note 31, at 814-15.

106. *Id.*

107. *Id.* at 814.

108. If government agencies cannot share information with each other, they will be forced to expend unnecessary time and money duplicating discovery efforts.

109. *See* Permian v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) ("The attorney-client privilege is not designed for . . . tactical employment.").

attorney-client privilege for their benefit.[110] However, it inappropriately permits the use of the attorney-client privilege as an offensive litigation tool.[111]

The Third Circuit properly rejected the limited waiver rule. The logical reasoning of the *Westinghouse* decision provides a sound basis for other circuits or the Supreme Court to follow when faced with the issue.

Jill A. Hornstein

110. *See In re* Subpoena Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984). Referring to the limited waiver rule, the court did not want a rule that allows an attorney-client privilege in instances when disclosure is beneficial to the client while asserting it in circumstances when nondisclosure is advantageous. *Id. See also supra* note 72 and accompanying text.

111. The attorney-client privilege was intended to promote full disclosure to a client's attorney, not to strategically prevent an opposing party's discovery. *See* Comment, *supra* note 18, at 1226-27.