Cooperation and Self-Interest Are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege through Production of Privileged Documents in a Government Investigation

Ashok M. Pinto

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Legal Ethics and Professional Responsibility Commons, and the Legal Profession Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol106/iss2/6

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
COOPERATION AND SELF-INTEREST ARE STRANGE BEDFELLOWS: LIMITED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE THROUGH PRODUCTION OF PRIVILEGED DOCUMENTS IN A GOVERNMENT INVESTIGATION

Ashok M. Pinto*

I. INTRODUCTION .......................................................................................... 360
II. BACKGROUND ............................................................................................ 362
   A. The Attorney-Client Privilege ............................................................... 362
   B. The Work Product Doctrine ................................................................. 365
   C. Disclosure of Privileged Communications and Documents to the Government and the Selective Waiver Doctrine .............................................................................. 367
III. SELECTIVE/LIMITED WAIVER ACROSS THE CIRCUITS AND IN SEC INVESTIGATIONS ................................................................................................................. 368
   A. The Eighth Circuit’s View ..................................................................... 368
   B. The View of the First, Third, Fourth, Sixth, Federal, and District of Columbia Circuits .................................................................................................................. 371
      1. United States v. Massachusetts Institute of Technology .................. 371
      2. Genentech, Inc. v. United States International Trade Commission .... 373
      3. Westinghouse Electric Corp. v. Republic of Philippines .................. 374
      4. In re Martin Marietta Corp. ................................................................. 375
      5. Permian Corp. v. United States ......................................................... 377
   C. Waiver in the Context of SEC Investigations ......................................... 380

---

* J.D., University of Illinois College of Law, 2003; A.B., Stanford University, 1996. The author gratefully acknowledges the assistance of Scott Clair, Anthony Manhart and Professor John Gueguen, who served as insightful editors of this Article. In addition, the author is indebted to Professor David Meyer for his advice. Finally, the author wishes to thank his family for their faithful support and constant encouragement.

359
IV. CONGRESSIONAL OR JUDICIAL INTERVENTION IS NECESSARY TO RESOLVE THE CIRCUIT SPLIT AND PROVIDE CERTAINTY TO LITIGANTS.................................................................................................................. 382

A. A Possible Model Solution: Pierce County v. Guillen ..................................................................................... 383
1. Requirements of a Proposed Statutory Scheme ............................................................................................. 385
2. Potential Freedom of Information Act Issues ................................................................................................ 385

B. The Alternative: A Judicial Remedy ............................................................................................................. 386

C. Criticism of Proposed Remedies and the Last Word ....................................................................................... 387

V. CONCLUSION..................................................................................................................................................... 388

I. INTRODUCTION

In conjunction with a broad investigation of possible Medicare and Medicaid fraud by a large health care provider, the Department of Justice ("DOJ") discovered that the provider in question had conducted internal audits of its patient records.1 When the DOJ requested to obtain the audits, the provider denied the request based on the attorney-client privilege and the work product doctrine.2 Ultimately, settlement negotiations resulted in the production of some of the audits.3 Private payors then sued the provider to recover sums that they alleged were over-billed by the provider.4 To support their case, the private payors sought to obtain the audits in discovery, contending that any privilege associated with them was waived once the audits had been disclosed to the government.5 A federal appellate court was left to decide this complex issue at the intersection of the competing interests of promoting cooperation with a government investigation and preserving a time-honored right.

The attorney-client privilege is a bedrock principle of the American legal system. Such privilege is intended to facilitate openness between attorney and client in the context of legal representation.6 Furthermore, even the general

---


2 See id. at 292.

3 See id.

4 See id. at 293.

5 See id.

6 See JOHN W. GERGACZ, ATTORNEY CORPORATE CLIENT PRIVILEGE § 1.02, at 1-4 (2d ed. 1990).
public, armed with legal knowledge derived from prime-time television, understands the basic tenets of the attorney-client privilege. Indeed, the issue of attorney-client privilege with regard to document disclosure arises frequently in civil litigation.7

Generally, any disclosure outside the attorney-client relationship waives the privilege because a third party is under no obligation to maintain confidentiality.8 As the above example demonstrates, an interesting matter arises with the disclosure of documents in conjunction with an investigation of a corporation by a government agency such as the DOJ or the Securities and Exchange Commission ("SEC"). Whether the disclosure of documents in the course of a government investigation constitutes a waiver of the attorney-client privilege is a difficult question.

Predictably, courts are divided on this issue. Some have found that turning over privileged materials to government investigators does not waive the attorney-client privilege.9 In so finding, these courts have recognized a parallel interest of promoting efficiency in the administration of justice. Other courts, adhering to a stricter interpretation of the privilege doctrine, have found that such surrender of materials renders the privilege waived.10 Thus, a split in the federal circuits has emerged. As it is unlikely that the Supreme Court will grant certiorari to decide this issue given its heavy docket,11 a legislative remedy is the logical alternative for resolving the split.

11 See THE SUPREME COURT OF THE UNITED STATES, THE JUSTICES’ CASELOAD, at http://www.supremecourts.gov/aboutjusticecaseload.pdf (last visited Jan. 17, 2004) (noting that plenary review and oral arguments are granted in only about 100 cases per term). Although a judicial remedy may be unlikely, and Congress may subsequently abrogate any such judicial rem-
Part II of this Article discusses the contours of the attorney-client privilege and its companion, the work product doctrine, and their respective limitations. Part III outlines the division of federal appellate courts as to the validity of the concept of selective waiver. Part IV contends that Congress should enact legislation to address the uncertainty regarding selective waiver of attorney-client privilege when turning over confidential documents to government investigators by creating a qualified limited waiver rule. Alternatively, the judiciary could determine that limited waiver is applicable in instances where government investigations are involved. Such legislative or judicial intervention would resolve the circuit split, providing certainty to litigants and an incentive for continuing self-regulation by corporations.

II. BACKGROUND

A. The Attorney-Client Privilege

"The attorney-client privilege is the oldest of the testimonial privileges protecting confidential communications." 12 Historically an attorney could assert the privilege to prevent being required to take an oath and testify against his client. The modern notion of the attorney-client privilege is that it is the client’s prerogative. 13 The privilege essentially means that “there can be neither compelled nor voluntary disclosure by the attorney of matters conveyed to the attorney in confidence by a client for the purpose of seeking legal advice.” 14 The rationale that underlies this doctrine is that an attorney can provide the best professional advice when the information is provided to him or her in confidence. 15

12 See Epstein, supra note 7, at 2. For a comprehensive discussion of both the attorney-client privilege and the work product doctrine, see 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 2017, 2021-28 (2d ed. 1994).

13 See Epstein, supra note 7, at 2; 8 Wigmore on Evidence § 2290, at 542-43 (McNaughton rev. ed. 1961).

14 See Epstein, supra note 7, at 2-3.

15 See id; see also Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (observing that the purpose of the privilege is "to encourage clients to make full disclosures to their attorneys"); Trammel v. United States, 445 U.S. 40, 51 (1979) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."); In re Colton, 201 F. Supp. 13, 15 (S.D.N.Y. 1961), aff'd, 306 F.2d 633 (2d Cir. 1962) ("In the eighteenth century, when the desire for truth overcame the wish to protect the honor of witnesses and several testimonial privileges disappeared, the attorney-client privilege was retained, on the new theory that it was necessary to encourage clients to make the fullest disclosures to their attorneys, to enable the latter to properly advise the clients. This is the basis of the privilege today."); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) ("In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of perti-
The attorney counsels the client as to the extent of the privilege and makes certain that privileged documents are not disclosed by accident. Thus, by ensuring candor and facilitating effective legal representation, the attorney-client privilege serves an integral role in the litigation process.

The limited waiver problem tests the boundaries of the attorney-client privilege. Thus, examining the well-established definition of the attorney-client privilege is crucial in understanding its limitations. Wigmore maintains that:

1. [w]here 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 instance permanently protected
7. from disclosure by himself or by the legal advisor.
8. except the protection be waived.

This multifactor test provides a guide for determining whether the attorney-client privilege attaches.

It is commonly accepted that four elements are necessary to establish the attorney-client privilege: "(1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client." In addition, the privilege normally cannot be waived; rather it must be affirmatively raised. There are several ways in which the attorney-client privilege can be waived. Generally, if privileged information has been released into the public domain, either affirmatively

---

16 See Epstein, supra note 7, at 2-3.
17 See 8 Wigmore, supra note 13, at 554. The United Shoe decision also contains a multifactor test:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become the 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 in 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.

19 See Epstein, supra note 7, at 2.
20 For a review of actions and situations which constitute waiver, see id. at 292-302.
or through some failure to safeguard, it is no longer confidential.\textsuperscript{21} Moreover, if a client discloses part of a privileged communication, he or she cannot assert privilege for the remainder of the communication, effectively waiving the privilege.\textsuperscript{22} The privilege may also be waived within the context of a judicial proceeding. When disclosure is required as part of such a proceeding, the modern view is that evidence of the privileged matter is not admissible against the holder if he or she did not have the opportunity to assert the privilege or if disclosure was compelled in error.\textsuperscript{23} In judicial proceedings, courts also look to see whether an objection was made at the time discovery was compelled.\textsuperscript{24} Finally, the privilege can be waived by inadvertent disclosure. With regard to inadvertent disclosure, courts have applied a variety of approaches, including strict waiver, a gross negligence requirement for waiver, and a case-by-case balancing test.\textsuperscript{25}

The attorney-client privilege is deeply instilled in our legal system. Although the attorney-client privilege dates as far back as Roman times, its formulation in Elizabethan England is the closest to the doctrine in use today.\textsuperscript{26} On many occasions, the Supreme Court has defined and reaffirmed the need for the attorney-client privilege.\textsuperscript{27} It is "founded on upon the 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."\textsuperscript{28} Furthermore, the American Bar Association has outlined contours of

\begin{footnotesize}
\begin{enumerate}
\item See id. at 292; see also \textit{In re} Kidder Peabody Secs. Litig., 168 F.R.D. 459, 468 (S.D.N.Y. 1996) (holding investigation notes which became part of a corporate report were not privileged). \textsuperscript{21}
\item See Tsai-Son Nguyen v. Excel Corp., 197 F.3d 200, 207-08 (5th Cir. 1999); EPSTEIN, supra note 7, at 296. \textsuperscript{22}
\item See EPSTEIN, supra note 7, at 297. Generally followed by the courts although not enacted, Proposed Rule of Evidence 512 states: "Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege." GLEN WEISSENBERGER & JAMES J. DUANE, \textit{FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY} 994 (2001). \textsuperscript{23}
\item See EPSTEIN, supra note 7, at 298. \textsuperscript{24}
\item See id. at 309-16. \textsuperscript{25}
\item GERGACZ, supra note 6, § 1.02, at 1-4. \textsuperscript{26}
\item See, \textit{e.g.}, Fisher v. United States, 425 U.S. 391, 403 (1976) ("As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."); Hunt v. Blackburn, 128 U.S. 464, 470 (1888). \textit{See generally} Max Radin, \textit{The Privilege of Confidential Communications Between Lawyers and Client}, 16 Cal. L. Rev. 487, 492 (1928) (debating whether the attorney-client privilege promotes law-abiding behavior by clients). \textsuperscript{27}
\item Westinghouse Elec. Corp. v Republic of Phil., 951 F.2d 1414, 1423 (3d Cir. 1991) (citing Hunt v. Blackburn, 128 U.S. 464, 470 (1888)). \textsuperscript{28}
\end{enumerate}
\end{footnotesize}
the privilege in its Model Rules of Professional Conduct. In short, the attorney-client privilege is an integral part of the American legal system, promoting justice and efficiency of the judicial process while protecting the relationship between advocate and client. The possibility of waiving this privilege raises complex and intriguing issues, particularly with regard to corporate clients.

B. The Work Product Doctrine

A companion to the attorney-client privilege, the work product doctrine encompasses materials used to prepare for litigation. Often, certain materials may be covered by both the attorney-client privilege and the work product doctrine; thus, the two doctrines overlap. However, given that each doctrine is somewhat unique, each should be asserted separately. Because the work product doctrine "may protect any document prepared in anticipation of litigation by or for a party or his representative," its protection is potentially broader than the attorney-client privilege. However, the protection that the attorney-client privilege affords is generally stronger than that provided by the work product doctrine. Lastly, if an opponent can demonstrate undue hardship, work product may be discovered, whereas the same showing will never defeat the attorney-client privilege's promise of confidentiality.

---

29 Model Rules of Prof'l. Conduct R. 1.6 (2002) provides as follows:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

30 Gergacz, supra note 6, § 7.01, at 7-4.

31 See id.; see also United States v. Nobles, 422 U.S. 225, 238 (1975) (observing that the work product doctrine is distinct from and broader than the attorney-client privilege and that the traditional exceptions of one do not automatically apply to the other).

32 Gergacz, supra note 6, § 7.01, at 7-3 (observing that the work product doctrine is broader than and distinct from the attorney-client privilege).

33 See id.

34 See id.
The work product doctrine first came to the fore in the seminal case of *Hickman v. Taylor*.\(^{35}\) In *Hickman*, the petitioner sought to obtain memoranda containing statements of fact from individuals who witnessed the sinking of a tugboat on the Delaware River near Philadelphia.\(^{36}\) Affirming the decision of the Third Circuit,\(^{37}\) the Supreme Court disallowed discovery of materials prepared by the opponent's counsel in anticipation of litigation.\(^{38}\) The Court held that such protection of materials prepared by counsel could only be defeated by a showing of good cause.\(^{39}\) In the years following *Hickman*, courts applied the ruling on a case-by-case basis, often with conflicting results.\(^{40}\) In order to provide better clarity and uniformity, Rule 26(b)(3) of the Federal Rules of Civil Procedure was adopted in 1970.\(^{41}\) Rule 26(b)(3) was thus an attempt to reconcile *Hickman* and the *Federal Rules of Civil Procedure*,\(^{42}\) and has effectively supplanted the holding in *Hickman*.\(^{43}\) The rule provides that an attorney can never be compelled to disclose his or her mental impressions, conclusions, and opinions, even given a showing of relevance, substantial need, or undue hardship.\(^{44}\)

\(^{35}\) 329 U.S. 495 (1947).

\(^{36}\) *Id.* at 498.


\(^{38}\) *See* *Hickman*, 329 U.S. at 505.

\(^{39}\) *See id.*

\(^{40}\) *See, e.g.*, *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 733 (4th Cir. 1974).

\(^{41}\) The rule states:

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FED. R. CIV. P. 26(b)(3).

\(^{42}\) *See Duplan*, 509 F.2d at 733.


\(^{44}\) *See Duplan*, 509 F.2d at 734.
Thus, the evolution of the work product doctrine has resulted in a standard which protects client confidences from subsequent revelation. As preparation for litigation may often involve issues of compliance with a government regulatory body, possible waiver of the work product doctrine, as with the attorney-client privilege, raises thorny issues regarding third party access to confidential information.

C. Disclosure of Privileged Communications and Documents to the Government and the Selective Waiver Doctrine

Because the federal government has limited resources, broad enforcement of rules and laws is impossible. Faced with these constraints, and unable to execute a widespread crackdown, government regulatory agencies must find alternate methods to foster compliance. Voluntary disclosure programs are often part of the enforcement scheme of these agencies. The disclosure of privileged documents to the government often arises within the context of the SEC's Voluntary Disclosure Plan or disclosure in response to a subpoena. The Voluntary Disclosure Plan reduces the costs of enforcement and encourages corporations to investigate possible violations and report them to the SEC. In return for its cooperation, the corporation will not be subject to a civil enforcement action provided that it corrects all the violations discovered. The Antitrust Division of the DOJ also has an immunity policy for corporations that voluntarily disclose illegal activity prior to the start of an investigation. A clear


47 See Gergacz, supra note 6, § 5.03[4], at 5-47.

48 See Watts, supra note 46, at 1346 n.47. See generally Beth S. Dorris, Note, The Limited Waiver Rule: Creation of an SEC-Corporation Privilege, 36 STAN. L. REV. 789, 804 (1984) (limiting discussion to the SEC's Voluntary Disclosure Plan). The note argues that the limited waiver rule should be abandoned:

The limited waiver rule does not concern the privilege between attorney and client; rather, it implicitly creates a new privilege between corporations and the SEC. This rule and the new privilege that it represents clash with government disclosure laws and reduce pressure on corporations to comply with securities laws. Furthermore, the new privilege is unnecessary because a healthy flow of voluntary corporate disclosures to the SEC already exists.

Id. at 789.

49 See Watts, supra note 46, at 1341; see also Dorris, supra note 48, at 793-96.

50 See DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY, at
public policy interest in the efficient administration of the law supports voluntary disclosure.51

Opinions diverge when it comes to assessing the effects and consequences of waiver. For example, one perspective treats disclosure to the government as a disclosure to a third party, thus waiving any privilege. However, this might hinder the public policy interest of the efficient administration of the law. This conflict between protection of privilege and effective regulatory enforcement constitutes part of the current division among federal appellate courts.52

III. SELECTIVE/LIMITED WAIVER ACROSS THE CIRCUITS AND IN SEC INVESTIGATIONS

A. The Eighth Circuit's View

In Diversified Industries v. Meredith,53 the Eighth Circuit articulated the view that voluntary disclosure to a government agency does not waive the attorney-client privilege with respect to other parties. Diversified and Weatherhead had previously been engaged in the sale of large amounts of copper.54 In “proxy fight” litigation, it was discovered that Diversified had maintained a “slush fund” for improper purposes, such as bribing officials at Weatherhead.55 An ensuing investigation resulted in disclosures by Diversified to the SEC.56 In its lawsuit against Diversified, Weatherhead alleged an illicit conspiracy to purchase inferior copper from Diversified and sought damages.57

On appeal, Diversified petitioned for a writ of mandamus58 directed at the Honorable James H. Meredith, Chief Judge for the United States District Court in the Eastern District of Missouri.59 The petition requested protection of a memorandum and a report from discovery by its opponent, the Weatherhead Company.60 An SEC investigation had prompted the earlier production of the


See Gergacz, supra note 6, § 5.03, at 5-47.

See supra notes 9-10 and accompanying text.

572 F.2d 596 (8th Cir. 1978) (en banc).

Id. at 607.

Id.

Id.

Id.

See id. at 599 (explaining the use of mandamus as a means for obtaining immediate appellate review).

See id. at 598-99.

Id. at 599.
documents in question. The Washington, D.C. law firm of Wilmer, Cutler & Pickering prepared both reports for Diversified. Diversified also wanted to protect corporate meeting minutes that discussed the memorandum and the report. The district court ordered Diversified to disclose these materials; thereupon, Diversified appealed to the Eighth Circuit. The Eighth Circuit originally granted Diversified's petition in part and denied it in part, ordering the district court to stay its order compelling disclosure as to documents that the appellate court found to be protected under the attorney-client privilege. The case was subsequently heard en banc.

Citing Hickman, Diversified asserted that the documents were within the scope of the attorney-client privilege and the work product doctrine. In contrast, Weatherhead contended that the attorney-client privilege was inapplicable and that once Diversified turned the materials over to the SEC, the privilege was effectively waived.

Writing for the panel, Judge Henley found that neither the memorandum nor the report were entitled to protection. In the majority of the panel's view, the issue of the memorandum was straightforward because it contained no confidential information. While it acknowledged the issue of the report to be more complex, the court nonetheless failed to find it worthy of protection. In short, the majority of the panel found that it was unreasonable to determine that the report had been prepared in anticipation of litigation, as the work product doctrine requires.

Because the materials were not found to be privileged, the panel did not directly address the issue of waiver. However, Judge Henley did express the panel's view on this issue in dicta:

---

61 Id.
62 Id.
63 Id.
64 Id.
65 Id. at 611.
66 Id. at 606.
67 Id. at 599.
68 Id.
69 See id. at 603. In the en banc decision, Judge Henley and Chief Judge Gibson filed separate opinions concurring in part and dissenting in part. Id. at 611. Judge Bright filed a dissenting opinion. Id. at 617.
70 See id. at 603-04.
71 Id. at 604.
72 Id.
We would be reluctant to hold that voluntary surrender of privileged material to a governmental agency in obedience to an agency subpoena constitutes a waiver of the privilege for all purposes, including its use in subsequent private litigation in which the material is sought to be used against the party which yielded it to the agency.\(^{73}\)

Furthermore, in his concurring and dissenting opinion, Judge Heaney agreed that voluntary surrender of privileged material to the SEC did not constitute a waiver of privilege.\(^{74}\) He also disagreed with the majority, asserting that the attorney-client privilege was indeed applicable to the memorandum prepared by Wilmer, Cutler & Pickering.\(^{75}\)

The matter again came before the court – this time en banc. Upon re-hearing, the Eighth Circuit concluded that the report, relevant portions of the corporate minutes, and a letter were entitled to the attorney-client privilege.\(^{76}\) In doing so, the court rejected the previously predominant “control group” test, defining employee communications as a corporate client’s communications when the employee yields substantial decision-making power.\(^{77}\) Instead, citing increasing criticism of the “control group” test, it adopted the test from *Harper & Row Publishers v. Decker*,\(^{78}\) including employee communications as client communications when the employee communicates at the direction of his or her supervisors and the subject matter is within the scope of employment.\(^{79}\) It further added requirements, set forth by noted Judge Jack B. Weinstein, designed to limit potential abuse.\(^{80}\)

---

\(^{73}\) *Id.* at 604 n.1.

\(^{74}\) *Id.* at 604 (Heaney, J., concurring in part, dissenting in part). Judge Heaney cited a line of cases which held “[a] waiver of privilege must occur in the same proceeding in which it is sought to be invoked.” *Id.*

\(^{75}\) *Id.* at 604-05.

\(^{76}\) *Id.* at 611.

\(^{77}\) *Id.* at 608 (citing City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962)).

\(^{78}\) 423 F.2d 487 (7th Cir. 1970), aff’d by an equally divided Court, 400 U.S. 348 (1971).

\(^{79}\) *Diversified Indus.*, 572 F.2d at 608.

\(^{80}\) *Id.* at 609 (citing 2 *Jack B. Weinstein & Margaret A. Berger, Weinstein’s Evidence* § 503(b)[04] (1975)). Thus, for the attorney-client privilege to be applicable to an employee’s communications, a corporation must show the following:

1. the communication was made for the purpose of securing legal advice; 2. the employee making the communication did so at the direction of his corporate superior; 3. the superior made the request so that the corporation could secure legal advice; 4. the subject matter of the communication is within the scope of the employee’s corporate duties; and 5. the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.
The court also held that disclosure of privileged material to the SEC pursuant to a subpoena constituted a limited waiver of the privilege. The court observed that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." Moreover, Judge Henley concurred with the majority opinion written by Judge Heaney on this point. In conclusion, the Eighth Circuit's holding in Diversified Industries underscores the significant public policy interest in promoting self-regulation that supports a limited waiver rule.

B. The View of the First, Third, Fourth, Sixth, Federal and District of Columbia Circuits

1. United States v. Massachusetts Institute of Technology

The limited waiver issue came before the First Circuit in United States v. Massachusetts Institute of Technology within the context of an investigation by the Internal Revenue Service ("IRS"). In 1993, the IRS conducted an audit of the Massachusetts Institute of Technology ("MIT") to determine whether MIT still qualified for tax exempt status under 26 U.S.C. § 501(c)(3). The IRS requested billing statements from the law firms that had previously represented MIT as well as "minutes of the MIT Corporation and its executive and auditing committees." MIT complied but redacted certain portions of the requested documents, citing the attorney-client privilege and the work product doctrine. After MIT declined to supply the redacted information, the IRS attempted to obtain the information from the auditing branch of the Department of Defense ("DOD"), to which MIT had submitted the information in its entirety in response to an audit with regard to contracts between MIT and the DOD. The DOD essentially refused to provide the information without MIT's explicit consent.

---

Id.
81 Id. at 611.
82 Id.
83 Id. at 612 (Henley, J., concurring in part, dissenting in part).
84 129 F.3d 681 (1st Cir. 1997).
85 Id. at 682.
86 Id.
87 Id. at 683.
88 Id.
89 Id.
The United States District Court for the Eastern District of Massachusetts held that MIT's disclosure of its legal bills to the audit agency waived the attorney-client privilege. The court also ordered MIT to turn over the minutes because it had substantially disclosed them in its legal bills. However, the district court did not directly address the waiver issue, finding that the documents were discoverable as ordinary business records.

The First Circuit affirmed the district court's decision in part and vacated it in part. Finding no applicable federal constitutional provision, statutory provision, nor court rule to govern the case, the appellate court looked to common law to determine the scope of the privilege. It acknowledged that a range of scenarios could be included under the category of "waiver," including "situations as divergent as an express and voluntary surrender of the privilege, partial disclosure of a privileged document, selective disclosure to some outsiders but not all, and inadvertent overhearings or disclosures."

After comparing the view of the Eighth Circuit with that of the Second, Third, Fourth, Federal, and District of Columbia ("D.C. Circuit") Circuits, the court declined to adopt the Eighth Circuit's position:

[T]he general principle that disclosure normally negates the privilege is worth maintaining. To maintain it here makes the law more predictable and certainly eases its administration. Following the Eighth Circuit's approach would require, at the very least, a new set of difficult line-drawing exercises that would consume time and increase uncertainty.

Writing for the court, Judge Boudin found that although a client's "intent to maintain confidentiality is ordinarily necessary to continued protection," it was insufficient in this instance. MIT forfeited the privilege when it disclosed the information to the audit agency; therefore, MIT could not refuse to comply with the IRS's request for the same information.

---

91 See id. at 305.
92 See id.
93 Mass. Inst. of Tech., 129 F.3d at 688.
94 Id. at 684.
95 Id. (citing MCCORMICK ON EVIDENCE § 93, at 341-48 (J.W. Strong ed., 4th ed. 1992)).
96 Id. at 685.
97 Id. at 684-85.
98 Id.
The court also acknowledged an important distinction between the work product doctrine and the attorney-client privilege:

[W]ork product protection is not as easily waived as the attorney-client privilege. The privilege, it is said, is designed to protect confidentiality, so that any disclosure outside the magic circle is inconsistent with the privilege; by contrast, work product protection is provided against "adversaries," so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection.99

Boudin found that MIT's disclosure to the audit agency was "a disclosure to a potential adversary" because the possibility for litigation clearly existed.100 For this reason, MIT forfeited protection of the work product doctrine and the attorney-client privilege. In reaching its conclusion, the First Circuit favored adherence to the clarity of the existing rules rather than abandoning them in favor of a still-amorphous limited waiver doctrine.

2. Genentech, Inc. v. United States International Trade Commission

The Federal Circuit addressed the issue of waiver of the attorney-client privilege and the work product doctrine in a prior ongoing lawsuit in Genentech, Inc. v. United States International Trade Commission.101 In 1993, Genentech filed a complaint with the International Trade Commission ("ITC") seeking an investigation based on an alleged infringement of four of its patents relating to recombinant production of human growth hormone by its competitors.102 At the same time, Genentech was suing other competitors (Eli Lilly and the Regents of the University of California) in Indiana for patent infringement.103 In that lawsuit, Genentech inadvertently produced some 12,000 pages of documents it considered to be privileged under either the work product doctrine or the attorney-client privilege.104 The United States District Court for the Southern District of Indiana ruled that Genentech had waived its privilege with respect to those documents.105 Following this ruling, Genentech's opponents in the ITC proceeding immediately requested disclosure of the documents.106

99 Id. at 687.
100 Id.
101 122 F.3d 1409 (Fed. Cir. 1997).
102 Id. at 1412.
103 Id.
104 Id. at 1413.
105 See In re Recombinant DNA Tech. Patent and Contract Litig., 850 F. Supp. 769 (S.D. Ind. Published by The Research Repository @ WVU, 2004
Chief Judge Archer disagreed with Genentech's view that the waiver of a privilege should be limited to the proceeding in the district court. Indeed, the court recognized that it had never subscribed to the limited waiver theory advanced by the Eighth and Ninth Circuits. Finding that Genentech's document screening procedures were inadequate and that Genentech had not made "best efforts" to maintain the confidentiality of the documents," the court held that the waiver was general and could be asserted in the ITC proceeding. Using reasoning similar to that of the First Circuit in the Massachusetts Institute of Technology case, the Federal Circuit relied on the relative certainty that general waiver offers in reaching its decision to reject limited waiver. Thus, the Federal Circuit declined to adopt the limited waiver theory, instead adhering to a general waiver approach.

3. Westinghouse Electric Corp. v. Republic of Philippines

The Third Circuit took up the limited waiver issue in Westinghouse Electric Corp. v. Republic of Philippines. The Republic of the Philippines ("Philippines") alleged that Westinghouse had obtained a power plant contract by bribing a government official and thereby tortiously interfering with the fiduciary relationship between President Ferdinand Marcos and the Philippine people. The Philippines therefore sought to recover damages from Westinghouse, alleging that Westinghouse had retained Herminio Disini, a friend of Marcos, to promote its interests with its National Power Company. Through discovery, the Philippines sought documents that Westinghouse had provided to the SEC in conjunction with an investigation. Kirkland & Ellis, counsel to Westinghouse at the time of the investigation, provided letters to the SEC detailing the results of the investigation but did not supply any of the supporting documents. Westinghouse asserted that it had a "reasonable expectation of

---

106 Genentech, 122 F.3d at 1413.
107 Id. at 1416-17.
108 Id. at 1417.
109 Id. at 1418.
110 951 F.2d 1414 (3d Cir. 1991).
111 Id. at 1417. David Boies, formerly of Cravath, Swaine & Moore, and more recently involved in the Microsoft antitrust litigation and the 2000 presidential election controversy, represented Westinghouse in the litigation. Id.
112 Id.
113 Id. at 1418.
114 Id. at 1417.
115 Id. at 1418.
continuing confidentiality for the materials shown to the SEC” based on the SEC’s own confidentiality provisions and the Eighth Circuit’s holding in Diversified Industries.\textsuperscript{116}

The same documents were subsequently disclosed to the DOJ as part of that agency’s investigation of Westinghouse’s use of illegal bribes for contracts in the Philippines and other countries.\textsuperscript{117} Westinghouse finally disclosed the documents to the DOJ only after entering into a confidentiality agreement.\textsuperscript{118} Under the terms of this agreement, the documents would not be viewed by anyone outside the DOJ and the disclosure would not constitute a waiver of the attorney-client privilege or the work product doctrine.\textsuperscript{119} In spite of this agreement, the district court in New Jersey found that these disclosures constituted a waiver of the attorney-client privilege and the work product doctrine.\textsuperscript{120}

The Third Circuit upheld the district court’s ruling, rejecting the selective waiver approach in Diversified Industries.\textsuperscript{121} Writing for the court, Judge Becker agreed with the D.C. Circuit’s reasoning in Permian Corp. v. United States that a selective waiver rule does not “serve the purpose of encouraging full disclosure to one’s attorney.”\textsuperscript{122} Instead, it only encourages disclosure to government agencies – an objective that is “laudable” but beyond the intended purposes of the attorney-client privilege.\textsuperscript{123} Essentially, the court was reluctant to grant what it deemed to be an entirely new privilege. Reasoning that the disclosures to the SEC and the DOJ were not made in furtherance of the purposes of the doctrine, it held that the work product doctrine was waived against all other adversaries.\textsuperscript{124} Rejecting the widely asserted rationale for limited waiver and contending that limited waiver exceeds the bounds of the attorney-client privilege itself, the Third Circuit declined to follow the Eighth Circuit on this issue.

4. \textit{In re Martin Marietta Corp.}

William Pollard, a former employee of defense contractor Martin Marietta, was accused of government fraud and mail fraud with regard to overstating

\begin{itemize}
\item \textsuperscript{116} \textit{Id.}.
\item \textsuperscript{117} \textit{Id.} at 1419.
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{121} See supra notes 53-83 and accompanying text.
\item \textsuperscript{122} \textit{Westinghouse}, 951 F.2d at 1425. For a discussion of \textit{Permian Corp. v. United States}, 665 F.2d 1214 (D.C. Cir. 1981), see infra Part III.B.5.
\item \textsuperscript{123} \textit{Westinghouse}, 951 F.2d at 1425.
\item \textsuperscript{124} \textit{Id.} at 1429.
\end{itemize}
travel costs when requesting reimbursement by the DOD. Through discovery, Pollard sought Martin Marietta documents pertaining to audit papers, witness statements, and administrative settlement agreements. Martin Marietta argued, inter alia, that the documents in question were protected by the attorney-client privilege and the work product doctrine. In turn, Pollard argued that Martin Marietta had impliedly waived the privilege when it disclosed the documents to the United States Attorney and the DOD in conjunction with a settlement agreement.

The Fourth Circuit examined the limited waiver rule closely in the context of both the attorney-client privilege and the work product doctrine. The court noted policy concerns that militate in favor of an implied limited waiver rule, including "facilitating settlement of litigation, permitting full cooperation among joint defendants, expediting discovery and encouraging voluntary disclosure to regulatory agencies." In keeping with previously held views of the Fourth Circuit, the court rejected the limited waiver concept with regard to the attorney-client privilege and non-opinion work product; it upheld limited waiver with regard to opinion work product. Therefore, attempts to use work product materials for purposes of testimony, including a position paper submitted to the government on why Martin Marietta should not be prosecuted and its underlying witness statements, would constitute a waiver. In so finding, the court looked to three key factors:

First, we note that the federal government's and Martin Marietta's interests were decidedly adverse during the proceedings at issue. Martin Marietta faced criminal charges in the one instance and debarment from federal contracting in the other. We do not decide the issue of disclosures in less adverse circumstances like regulatory disclosures. Second, we note that Martin Marietta made an express assurance of completeness of its disclosure to the United States Attorney. Third, we note that the

---

125 In re Martin Marietta Corp., 856 F.2d 619, 620 (4th Cir. 1988).
126 Id. at 621.
127 Id. at 622. See generally Breckinridge L. Willcox, Martin Marietta and the Erosion of the Attorney-Client Privilege and Work Product Protection, 49 Md. L. Rev. 917, 922 (1990) (distinguishing between partial waiver, "the strategic disclosure of a subset of a larger class of privileged or protected material," and selective waiver, "a purposeful disclosure to a third person by a party who continues to assert privilege or protection as to all others").
128 Martin Marietta, 856 F.2d at 623.
130 Martin Marietta, 856 F.2d at 623.
131 Id. at 624; see United States v. Nobles, 422 U.S. 225, 239 (1975); Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222-23 (4th Cir. 1976).
disclosures were made in a direct attempt to settle active controversies between Martin Marietta and the United States Attorney and the DOD. Not only was there not community of interest, the disclosures were made under promise of completeness to induce an adversary to settle. \(^{132}\)

According greater protection to opinion work product, the Fourth Circuit remanded the case for further proceedings, instructing the district court to conduct an in camera review of documents for which work product protection was claimed. \(^{133}\) Thus, the court drew a more difficult distinction between types of work product protection in its partial adoption of the limited waiver rule.

5. *Permian Corp. v. United States*

In *Permian Corp. v. United States*, \(^{134}\) the district court issued a permanent injunction to bar the SEC from disclosing Permian Corporation’s documents to the United States Department of Energy. District Judge Parker upheld the attorney-client privilege and work product doctrine, holding that disclosure of these documents to the SEC did not constitute a waiver of the privileges. \(^{135}\) On appeal, the government argued that the privileges had been waived.

Applying the “clearly erroneous” standard, \(^{136}\) the D.C. Circuit upheld the district court’s rejection of the government’s assertion that Occidental, Permian’s parent corporation, “clearly and intentionally waived its privilege claims vis-à-vis government agencies.” \(^{137}\) The court thus upheld the work product privilege with regard to twenty-nine of the thirty-six documents in question. \(^{138}\) However, it also concluded that Occidental had waived protection of all of the thirty-six documents under the attorney-client privilege. \(^{139}\) Judge Mikva characterized Occidental’s request to apply the limited waiver doctrine as “wholly unpersuasive.” \(^{140}\) He did not believe that application of limited waiver would facilitate communication between attorney and client:

---

\(^{132}\) Martin Marietta, 856 F.2d at 625.  
\(^{133}\) *Id.* at 626.  
\(^{135}\) *Id.* at *10.  
\(^{136}\) See *Fed. R. Civ. P.* 52(c).  
\(^{138}\) *Id.* at 1222.  
\(^{139}\) *Id.*  
\(^{140}\) *Id.* at 1220.
Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a "friendly" agency . . . . 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. 141

The D.C. Circuit remanded the case to the district court for it to determine the privileged status of the other seven documents. 142 Subsequent cases in the D.C. Circuit followed the Permian court's decision. 143 Thus, just as Judge Mikva was not swayed by the limited waiver argument in Permian, courts in this circuit subsequently addressing the issue have not recognized limited waiver.


As discussed at the outset of this Article, 144 the plaintiffs, suing Columbia/HCA for over-billing, sought to compel the production of documents that Columbia/HCA had furnished to the DOJ in conjunction with the prior investigation. 145 The United States District Court for the Middle District of Tennessee granted this request. 146 On appeal, the Sixth Circuit affirmed the district court's decision, holding that Columbia/HCA could not use the selective waiver doctrine and that its waiver of attorney-client privilege constituted a waiver of the work product doctrine. 147

141 Id. at 1221.
142 Id. at 1222.
143 See In re Subpoenas Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984); In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982).
144 See supra notes 1-5 and accompanying text.
147 Columbia/HCA, 293 F.3d at 289.
The Sixth Circuit took a comprehensive survey of "selective," or limited waiver, caselaw, policy concerns, and potential ramifications of a limited waiver rule before concluding that it could not adopt one.\textsuperscript{148} The court identified three possible scenarios: selective waiver is permissible, selective waiver is not permissible, or selective waiver is permissible if the government agrees to a confidentiality order.\textsuperscript{149} After thoroughly analyzing the aforementioned body of caselaw, the court declined to adopt the selective waiver theory. Judge Russell observed that "[t]he attorney-client 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."\textsuperscript{150} Instead of fostering frankness between attorney and client, adoption of selective waiver would merely serve as a tool for strategic advantage – a tactic of waiving or invoking privilege when it best suits the client.\textsuperscript{151} The court also noted that the attorney-client privilege is a common law right, "not a creature of contract, arranged between parties to suit the whim of the moment."\textsuperscript{152} If the invocation of privilege occurred on a case-by-case or opponent-by-opponent basis, the facilitation of government cooperation would be a never-ending argument, resulting in a "difficult and fretful linedrawing process . . . consuming immeasurable private and judicial resources in a vain attempt to distinguish one private litigant from the next."\textsuperscript{153} Noting that selective waiver could be construed as facilitating obfuscation, Judge Russell observed that government investigatory agencies "should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain."\textsuperscript{154} The court reached this same conclusion with regard to selective waiver of the work product doctrine.\textsuperscript{155} In the dissent, Judge Boggs suggested that by exposing an entity to liability with respect to all parties, the majority's decision "unnecessarily raises the cost of cooperating with a government investigation."\textsuperscript{156} Arguing that easing the burden on the government in conducting investigations is as important as upholding the attorney-client privilege and work product doctrine, Boggs suggested a bright-line rule allowing selective waiver to a government agency:

\textsuperscript{148} Id. at 295-302.

\textsuperscript{149} Id.

\textsuperscript{150} Id. at 302.

\textsuperscript{151} See id. at 302-03.

\textsuperscript{152} Id. at 303.

\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 307.

\textsuperscript{156} Id. at 307 (Boggs, J., dissenting).
[A] problem with the rule-like features of the exception is that the exception may have limited efficacy absent uniformity among the courts. It would be difficult to remove the disincentive to cooperate with the government if the protection from waiver depended on the circuit in which a party would be eventually involved in litigation. The mere split between our sister circuits should not dissuade us from adopting the exception. This court should follow the legal position that it finds most meritorious and leave the problem of uniformity to a higher court.157

In short, the dissent believed that “Columbia intended to preserve both the attorney-client and the attorney-work-product privileges and that a limited disclosure pursuant to a government agency’s investigatory request ought not to waive the privileges as to all other parties.”158 Recognizing an important public policy interest in facilitating cooperation with the government, Judge Boggs advocated the adoption of a limited waiver rule in spite of a predominantly opposing view in the federal circuits. The Columbia/HCA decision provides the most thorough analysis of the limited waiver issue to date. It sets the stage for the legislative and judicial remedies advocated in Part IV.

C. Waiver in the Context of SEC Investigations

Created in 1934 following the passage of the Securities Act of 1933159 and the Securities Exchange Act of 1934,160 the SEC maintains as its primary goals the protection of investors and the maintenance of integrity in the securities markets.161 Its Enforcement Division targets violations of securities laws, recommends action in federal court or before an administrative law judge, and negotiates settlements.162 Because corporations are faced with a “vast and complicated array of regulatory legislation,” they frequently utilize legal counsel to ensure compliance.163 Conducting an internal investigation can fulfill the legal duty to investigate, preempt a government investigation, meet public expecta-
tions, enable a corporation to act knowledgably and proactively, and mitigate a sentence if conviction occurs.164 Thus, corporations have become increasingly inclined, albeit cautiously, to conduct internal investigations.165 The results of these investigations become a source of controversy once they are handed over to the government.

The Supreme Court addressed the issue of waiver in the context of an SEC investigation in Upjohn Co. v. United States.166 Upjohn, a pharmaceutical manufacturer, had initiated an internal investigation of suspect payments by its foreign subsidiaries.167 The company’s general counsel subsequently submitted a report regarding these payments to both the SEC and the IRS.168 When the IRS demanded production of the supporting documents, Upjohn refused, citing the attorney-client privilege and the work product doctrine.169 In Upjohn, after the United States District Court for the Western District of Michigan issued an order enforcing the IRS’s summons for documents, the Sixth Circuit affirmed in part, reversed in part and remanded the case.170 The Sixth Circuit found that there had been no waiver of the attorney-client privilege, but that under the “control group” test, the privilege did not apply.171

In an opinion written by then Associate Justice Rehnquist, the Court reversed the Sixth Circuit’s holding and remanded the case.172 Noting that the communications were “considered ‘highly confidential’ when made,” and were “kept confidential by the company,” Justice Rehnquist recognized that protecting the communications from compelled disclosure was consistent with the “underlying purposes” of the privilege.173 Further, he deemed that the privilege “only protects the disclosure of communications,” not the disclosure of underlying facts.174 The Court also found that the work product doctrine did apply to IRS summonses.175 Although the majority declined to articulate a bright-line rule regarding the applicability of privilege, Chief Justice Burger believed that

165 See id. at 491.
166 449 U.S. at 383.
167 Id. at 386.
168 Id. at 387.
169 Id. at 388.
171 Id.
172 Upjohn, 449 U.S. at 402.
173 Id. at 395.
174 Id.
175 Id. at 401-02.
the articulation of such a standard would provide the guidance that corporations and lower federal courts required.\textsuperscript{176}

Through broad view of the attorney-client privilege adopted in \textit{Upjohn}, the Court recognized the importance of internal investigations by corporations.\textsuperscript{177} However, because the chief focus of both the Supreme Court and the Sixth Circuit was on the confidentiality of the communications rather than the issue of waiver, and because the Supreme Court did not offer much guidance for applying the newly expanded attorney-corporate-client privilege, differences of opinion among the federal circuits on the waiver issue persisted.\textsuperscript{178}

IV. CONGRESSIONAL OR JUDICIAL INTERVENTION IS NECESSARY TO RESOLVE THE CIRCUIT SPLIT AND PROVIDE CERTAINTY TO LITIGANTS

The dilemma discussed in the preceding section outlines the competing interests and rationales for either adopting or rejecting a selective or partial waiver rule. The "hopeless confusion"\textsuperscript{179} with which the courts continue to be faced requires clarity and proper incentives for the parties involved: protecting the basic rights of litigants in formal judicial proceedings while maintaining an incentive to cooperate with government investigations.\textsuperscript{180} Recognition of a public interest in facilitating this cooperation with the government is integral to understanding the rationale for adopting the limited waiver exception. Two possible solutions are a legislative resolution, which would define the contours of the attorney-client privilege and the work product doctrine in the special context of a government agency investigation, and a judicial remedy, where courts would recognize a limited waiver exception to the attorney-client privilege and the work product doctrine on a case-by-case basis.

The hesitancy of courts to adopt a limited waiver rule can be attributed to the view that such a rule creates an entirely new privilege, rather than expanding the current one.\textsuperscript{181} Moreover, the need for such a rule is arguable, given the current protection offered by the attorney-client privilege and the protections offered by government agencies.\textsuperscript{182} However, the lack of true adversarial status between corporations and investigating government agencies, the tremendous

\textsuperscript{176} Id. at 403 (Burger, C.J., concurring).

\textsuperscript{177} See Watts, supra note 46, at 1342.

\textsuperscript{178} Id. at 1344.

\textsuperscript{179} Gergacz, supra note 6, § 5.03[4][c], at 5-53.


\textsuperscript{182} See Dorris, supra note 48, at 789.
costs saved, and the deterrent effect enjoyed by the government strongly support the admittedly daunting task of creating and adopting a viable limited waiver rule. By intervening, Congress could create a bright-line rule and lend a modicum of certainty to both government investigators and would-be defendants.

A. A Possible Model Solution: Pierce County v. Guillen

In a parallel context, the Supreme Court’s recent holding in Pierce County v. Guillen\(^{183}\) offers a template for solving the issue of waiver within the context of the attorney-client privilege and the work product doctrine. The case contains elements of both a legislative and a judicial solution. In Guillen, the Court addressed Congressional measures enacted to improve highway safety.\(^{184}\) Specifically, the Hazard Elimination Program\(^{185}\) called upon states and local governments to evaluate public roads in order to “identify hazardous locations, sections, and elements . . . which may constitute a danger to motorists.”\(^{186}\) States objected to this measure because it did not provide for confidentiality of disclosures, thus exposing them to liability for accidents occurring at the identified locations before repairs took place.\(^{187}\) In response to these concerns, Congress enacted 23 U.S.C. § 409, which prevented such data from being entered into evidence in federal or state court.\(^{188}\)

Lower courts disagreed as to the meaning of section 409.\(^{189}\) Some argued that section 409 encompassed pretrial discovery, while others maintained that it only protected materials “actually generated by a governmental agency

---

\(^{183}\) 537 U.S. 129 (2003).

\(^{184}\) Id. at 133.


\(^{186}\) Id. § 152(a)(1).

\(^{187}\) Guillen, 537 U.S. at 134.

\(^{188}\) The statute provided in pertinent part:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.


\(^{189}\) Guillen, 537 U.S. at 134-35.
for § 152 purposes," thus allowing discovery of compiled information. Amendments to section 409 in 1991 and 1995 foreclosed the possibility of access to such information in pretrial discovery and expressly prohibited the use of "compiled or collected" data. The plaintiff in Guillen challenged the state's refusal to disclose the data under the State's Public Disclosure Act and sought an order to compel in a separate action. The Washington Supreme Court found that section 409 violated the Commerce Clause and the Necessary and Proper Clause of the United States Constitution.

Addressing the scope of section 409, the Supreme Court adopted the United States' interpretation of the statute, namely that it

protects all reports, surveys, schedules, lists or data actually compiled or collected for § 152 purposes, but does not protect information that was originally compiled or collected for purposes unrelated to § 152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point "collected" by another agency for § 152 purposes.

Writing for the Court, Justice Thomas noted that because section 409 establishes an evidentiary privilege, it must be construed narrowly. Justice Thomas further observed that the revision of section 409 "would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decision making, and ultimately, greater safety on our Nation's roads." While finding that the statute did not violate the Commerce

190 Id.
191 The amended statute states as follows:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.

192 Guillen, 537 U.S. at 136-37.
193 Id. at 139.
194 Id. at 144.
195 Id.
196 Id. at 147.
Clause, the Court did not reach the issue of whether the statute was proper under the Spending Clause or the Necessary and Proper Clause.197

In summary, the Guillen decision indicates that Congress could reasonably enact a statutory provision preventing materials provided to a government agency in an investigation from being discoverable or entered into evidence. The provisions and rationale of the highway safety statutes, discussed above, provide a solid foundation on which to base this proposed statute. They also highlight the need for explicit and lucid statutory construction.

1. Requirements of a Proposed Statutory Scheme

It is necessary to outline the parameters of any proposed statute aimed at addressing the limited waiver issue. The statute must address which government investigations are covered. In addition, the types of privilege covered – attorney-client, opinion work product, non-opinion work product – must be specified. The statute must articulate which types of proceedings – civil, criminal, prior, and subsequent – are precluded from using the materials in question. Such specificity will prevent opponents in ancillary litigation from gaining an unfair advantage in those proceedings based on the candid disclosures of the corporation to the government as part of an investigation.

2. Potential Freedom of Information Act Issues

As one commentator has noted,198 a limited waiver statute may conflict with the Freedom of Information Act ("FOIA").199 While information must be in the possession of the government to be obtainable under FOIA,200 shareholders may also be entitled to obtain such information in pursuit of a shareholder derivative suit.201 Limited waiver could allow corporations to use disclosure

---

197 Id.
198 See Dorris, supra note 48, at 806-13.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying –

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D).

Id. § 552(a)(2)(D)-(E). Some states also have statutes similar to FOIA. See, e.g., Guillen, 537 U.S. at 137 n.2 (outlining Washington's statute).
under the statute to protect certain incriminating information from ever being used against them. The careful drafting of the statute would have to consider these potential implications. By recognizing these difficulties, Congress could avoid ambiguities, and ultimately, the need – as seen in the Guillen case – for statutory amendments. In summary, the Supreme Court’s holding in Guillen offers guidance for a statutory resolution to the limited waiver issue as well as some reassurance that such a statute is likely to be deemed constitutional by the Supreme Court.

B. The Alternative: A Judicial Remedy

A judicial remedy is certainly worthy of consideration. Although a legislative statute might be preferable because of its explicit nature, many such proposals have failed to emerge from Congressional subcommittees alive.202 Such proposals may have failed due to the intricacies of potential conflicts with existing law, unintended consequences and incentives, and difficulties of interpretation. By adopting a qualified limited waiver rule, the Supreme Court can put an end to the current state of disarray.203

If the Supreme Court decides to hear a case involving limited waiver, it can resolve the current split in the circuits by either embracing or rejecting the doctrine.204 One commentator has argued that the Court could rely on its decision in Upjohn and find that a limited waiver rule would be appropriate.205 Such an approach would avoid “cooperation being bought at the price of . . . [the] attorney-client privilege.”206 As Judge Boggs persuasively argued in the Columbia/HCA dissent, uniformity in the federal circuits is essential to providing an incentive for corporations to cooperate with the government.207 Further, an imbalance in circuit opinions favoring abolition of the limited waiver rule should not prevent the Court from reaching a solution that has true merit.208

No solution is perfect, and the judicial remedy is no exception. It would be remiss to omit a discussion of the shortcomings of any judicial resolution. First, it can be argued that if clients divulge information to third parties, they would have also disclosed it to their attorneys without the protection of privilege.209 This willingness to step outside the bounds of the attorney-client privi-
lege critically weakens any subsequent argument to assert the privilege. To take this argument one step further, it would seem that there is no justification for a limited waiver. In addition to attacking the lack of grounds for granting a limited waiver, critics could emphasize the huge tactical advantage that such a rule would afford corporate America. Noting that “corporate counsel will be forever grateful,” one commentator contends that favoring corporations in this manner surpasses the original intent of the attorney-client privilege and work product doctrine. Realistically, there will always be some measure of conflict between government regulatory bodies and corporations. Perhaps the best synergy between these competing interests can be achieved if the proposed statutory solution is implemented to guide judicial analysis and thus better define the boundaries of privilege.

C. Criticism of Proposed Remedies and the Last Word

The remedies advocated herein are not without opposition. Indeed, some have argued for the abandonment of the limited waiver rule. The SEC corporation privilege recognized by the courts has been described as a “judicial inroad on the Congressional policy of open government and free information.” Opponents to the limited privilege rule also cite the previously discussed FOIA problems in support of their argument. Furthermore, any expanded privilege may ultimately undermine the enforcement of securities laws by unduly protecting the SEC and “prevent[ing] disclosure of valuable information to private litigants, grand juries, and agencies other than the SEC bringing enforcement actions of their own.” In addition, since voluntary compliance with SEC investigations has already been achieved, it may not be necessary to provide a privilege to foster compliance. Thus, opponents of the limited waiver rule contend that such burdens outweigh any possible benefits from its adoption. In spite of these arguments, this Article submits that the policy justifications, resulting clarity and fairness to parties, and overall benefit that adoption of the rule offers outweigh the assertions of detractors. Enhanced levels of compliance with governmental agencies would enable them to allocate their resources toward solving the most difficult and complicated issues in their


210 See id.
211 See Watts, supra note 46, at 1352.
212 Dorris, supra note 48, at 823.
213 See id.
214 Id.
215 See id.
216 See id. at 824.
respective areas of expertise. The scope of protection provided to corporations to reward their forthrightness would be substantial enough to encourage such cooperation, but not overly broad so that they receive unfair safeguards. If properly implemented, adoption of a limited waiver rule would create a win-win scenario for all sides.

V. CONCLUSION

Little guidance in the form of legal scholarship or statutory texts is available to address the problem of waiver of the attorney-client privilege in the context of a government investigation. Several federal circuits have encountered the question and have issued diverging opinions as to whether the privilege is waived entirely once confidentiality has been breached. The circuits have abstained from joining the Eighth Circuit’s adoption of a limited waiver rule as articulated in Diversified Industries. This hesitancy disserves the government, corporations, and the public in general, as it perpetuates confusion among interested parties and blurs the incentives and interests. Because the waiver of privilege arises frequently in investigations of alleged improper dealings of a corporation, the issue is particularly timely in the wake of recent myriad corporate scandals.217

There is a clear public interest in encouraging self-policing by corporations, one that is on par with that of the attorney-client privilege itself. By promulgating a rule that establishes a limited waiver of the privilege in the context of government investigations, Congress can prevent manipulation of the privilege and provide a bright-line rule to courts, government investigators and potential defendants. With a statute in place, the Supreme Court will be able to resolve the circuit split that currently exists. In the alternative, judicial recognition of a limited waiver rule carved out of the attorney-client privilege and the work product doctrine would resolve the split while maintaining a case-by-case analysis. The need for an answer to this problem has never been greater.