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Civil Procedure - A Corporation's Waiver of the Attorney-Client Privilege and Work-Product Doctrine

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CIVIL PROCEDURE—A CORPORATION’S WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE


I. INTRODUCTION

Our legal system demands the full and open disclosure of evidence relevant to a pending case, subject to certain exceptions. This open process facilitates the transfer of material between parties and allows for effective case preparation. It furthers the ultimate aims of our evidentiary rules, procedural fairness and the finding of truth.

Evidentiary privileges protect special relationships and material and limit this information exchange. Such privileges inhibit the free flow of

1. See United States v. Bryan, 339 U.S. 323, 331 (1950). The Bryan Court noted the importance of open disclosure:

   Dean Wigmore stated the proposition thus: “For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.”

   *Id.*

   This idea is also embodied in the Federal Rules of Civil Procedure governing the evidence discovery process. See *Fed. R. Civ. P.* 26-37. The discovery rules serve three primary purposes. First, the rules preserve important information that might not be available at trial. Second, they serve to pinpoint the issues in dispute between the parties. Finally, they lead to any testimony or evidence in existence on any factual issue in controversy. See *John J. Coud et al., Civil Procedure* 710-11 (5th ed. 1989).

   For a further discussion of the principles behind open disclosure of information, see *Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1450 (1985) (setting forth comprehensive discussion and summary of history of various evidentiary privileges, their place in today’s legal system and how they might be waived) [hereinafter *Privileged Communications*].

   2. See Hickman v. Taylor, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”).


   4. See *Privileged Communications*, *supra* note 1, at 1454. Privileges balance a court’s power to order evidence by allowing a person to withhold information that the person would normally be compelled to disclose. See *Coud, supra* note 1, at 778. A privilege may also permit a person to preclude another from re-
important information and reflect a policy judgment that certain material will be withheld to protect other compelling considerations.\textsuperscript{5} Courts, however, interpret privileges that deny access to information carefully and narrowly, relying on the axiom that any impediment to the open availability of information is discouraged.\textsuperscript{6}

In \textit{Westinghouse Electric Corp. v. Republic of the Philippines,}\textsuperscript{7} the United States Court of Appeals for the Third Circuit examined two important evidentiary privileges:\textsuperscript{8} the attorney-client privilege and the work-product privilege. \textit{Id.} For example, the holder of the privilege may decline to be a witness. \textit{Id.} Federal Rule of Evidence 501 provides the general rule for the interpretation of evidentiary privileges:

\begin{quote}
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.
\end{quote}

\textit{FED. R. EVID.} 501.

5. In \textit{Trammel v. United States,}\textsuperscript{1} the Supreme Court acknowledged these competing considerations when it said of exclusionary rules and testimonial privileges that "they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for obtaining the truth.' " \textit{Trammel v. United States, 445 U.S.} 40, 50 (1980) (quoting \textit{Elkins v. United States}, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

For a discussion of attorney-client privileges and the spectrum of opinions interpreting their scope, see Marvin E. Frankel, \textit{The Search for Truth Continued: More Disclosure, Less Privilege}, 54 U. COLO. L. REV. 51 (1982) (criticizing attorney-client privileges and recommending narrower scope to make information more discoverable and less likely to be within protection of privilege); Albert W. Alschuler, \textit{The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel}, 54 U. COLO. L. REV. 67 (1982) (agreeing that information needs to be more obtainable but rejecting relaxation of attorney-client privilege as means of accomplishing goal); Gerald Sobel, \textit{The Confidential Communication Element of the Attorney-Client Privilege}, 4 CARDOZO L. REV. 649 (1983) (advocating broad and permissive test for determining which communications should be confidential under attorney-client privilege); Fred C. Zacharias, \textit{Rethinking Confidentiality}, 74 IOWA L. REV. 351 (1989) (arguing against strict confidentiality in attorney-client communications and for well-reasoned, flexible approach based on results of empirical studies).

6. \textit{Trammel, 445 U.S.} at 50 (quoting \textit{Elkins, 364 U.S.} at 234 (Frankfurter, J., dissenting)).

7. 951 F.2d 1414 (3d Cir. 1991)

8. The \textit{Westinghouse} court phrased the issue as follows: [W]hether a party that discloses information protected by the attorney-client privilege and the work-product doctrine in order to cooperate with a government agency that is investigating it waives the privilege and the doctrine only as against the government, or waives them comp-
The attorney-client privilege expressly protects communication, thereby exposing the documents to civil discovery in litigation between the discloser and a third party. *Westinghouse*, 951 F.2d at 1417 (footnote omitted).

Thus, the Third Circuit's holding depended upon its interpretation of the scope of the attorney-client privilege and the work-product doctrine, and the purposes underlying these protections. See *id.* at 1425, 1427-28.

9. *Id.* The seminal Supreme Court case addressing the scope of these protections is *Upjohn Co. v. United States*. Upjohn, an international pharmaceutical firm, engaged outside counsel to investigate "possible illegal" payments that Upjohn's foreign subsidiaries might have made to foreign government officials. *Upjohn Co. v. United States*, 449 U.S. 383, 386-87 (1981). As part of the investigation, counsel mailed a questionnaire to all foreign managers requesting information on these "possibly illegal" payments. *Id.* at 387. The letter noted this information was to be kept highly confidential. *Id.* The IRS became aware of the possible existence of these payments and began an investigation into the tax consequences for Upjohn. *Id.* In accordance with this investigation, the IRS sought production of Upjohn's written questionnaires. *Id.* at 388. Upjohn resisted and asserted that these materials were protected by the attorney-client and work-product privileges. *Id.*

The Supreme Court held that these materials fell within the protection of both privileges. *Id.* at 397. The Court rejected the lower court's decision to restrict the attorney-client privilege's protection to a "control group" within the corporation. *Id.* The lower court had reasoned that because a corporation was an inanimate entity, only a corporation's senior executives would be sufficiently close to the corporation to be a part of its identity. *Id.* at 390. Accordingly, the control group would consist of these senior executives. *Id.*

The Supreme Court held that "[s]uch a view [the control group test]... overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* The Court determined that the questionnaire was part of the information exchange between attorney and client necessary for the production of informed legal advice. *Id.* at 394. The Court remarked that "[t]he control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392.

The Court held that the material was also within the protection of the work-product doctrine. *Id.* at 397. The Court credited the government for not disputing this point on appeal, noting that "[t]he Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses." *Id.* (citing Brief for Respondents at 16, 48). The Court reviewed the history of the work-product doctrine, noting the doctrine's announcement in *Hickman v. Taylor*, and its reinforcement in recent Court decisions. *Upjohn*, 449 U.S. at 397-98 (citing *Hickman v. Taylor*, 329 U.S. 495 (1947); *United States v. Nobles*, 442 U.S. 225 (1975)). In addition, the Court stated that the doctrine has been included in Federal Rule of Civil Procedure 26(b)(3). *Id.* at 398 (citing Fed. R. Civ. P. 26 (b)(3)). The Court also emphasized the strong public policy underlying the work-product doctrine. *Id.*

The work-product doctrine is a qualified privilege and can be overcome by a showing of substantial need. *See Fed. R. Civ. P. 26(b)(3).* The government argued in *Upjohn* that it had made a sufficient showing of need to overcome the privilege. *Upjohn*, 449 U.S. at 399. The Court rejected this argument, emphasizing the important distinction between opinion and non-opinion work product. *Id.* at 401. The Court noted the special protection accorded work product that constitutes the attorney's mental processes under the work-product doctrine. *Id.* at 400. The Court in *Upjohn* decided the information at issue was such opin-
communications between a client and his or her attorney that were made for the purpose of furnishing or obtaining professional legal advice or assistance. The work-product doctrine safeguards material prepared by an

ion work product and that the government had not met its heavy burden of showing substantial need. Id. at 401. The Court specifically declined to say whether opinion work product can never be discovered but it did stress the need for a very rigorous standard of necessity to force disclosure. Id. at 401-02.


10. BLACK's LAW DICTIONARY 129 (6th ed. 1990). The attorney-client privilege is defined as a "client's privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between he and his attorney." Id. Judge Wyzanski enunciated a comprehensive formulation of the elements necessary to invoke the attorney-client privilege in United States v. United Shoe Machinery, Corp., 89 F. Supp. 357, 358 (D. Mass. 1950). Judge Wyzanski said:

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 like 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.

Id. at 358-59.

The attorney-client privilege is well-recognized as the "oldest of the privileges for confidential communications known to the common law." Upjohn, 449 U.S. at 389 (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. ed. 1961)). All American courts recognize this privilege. COUND, supra note 1, at 778. It is an absolute privilege, therefore when it is invoked and recognized, no showing of compelling need can overcome the protection of the privilege. Id. at 786.

attorney in anticipation of litigation.\textsuperscript{11}

11. See Fed. R. Civ. P. 26(b)(3). Rule 26(b)(3) reads:

\textit{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.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

\textit{Id.}

This provision, enacted in 1970, codifies the work-product doctrine established in the federal courts. \textit{Id.} Unlike the attorney-client privilege, the work-product doctrine is not an absolute privilege and may be overcome by a showing of "substantial need" for the protected materials. See \textit{id.}

Prior to codification of the work-product doctrine in the Federal Rules of Civil Procedure, the Supreme Court addressed the discovery of work product in Hickman v. Taylor, 329 U.S. 495 (1947). In Hickman, the Court examined "the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen." \textit{Id.} at 497. The Court upheld the work-product protection and recognized its importance by stating:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

\textit{Id.} at 511.

The Court went on to observe that this protection can be overcome:

We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.

\textit{Id.}
In Westinghouse, the Third Circuit analyzed the circumstances under which a corporation waives the availability of each privilege. The court held that voluntary corporate disclosure to a governmental agency of otherwise protected material effected a complete waiver of the privileges. This waiver made the disclosed information discoverable in later lawsuits or investigations. The Westinghouse decision will have an important effect on companies' cooperation with governmental investigators.

The Hickman Court reiterated the substantial burden required of a party requesting work product, noting "that a burden rests on the one who would invade [the attorney's] privacy to establish adequate reasons to justify production through a subpoena or court order." Id. at 512.

The importance of protecting an attorney's work product was recently affirmed by the Fourth Circuit in In re Martin Marietta Corp. 856 F.2d 619 (4th Cir. 1988), cert. denied sub nom., Martin Marietta Corp. v. Pollard, 490 U.S. 1011 (1989). The Fourth Circuit noted that "[f]irst, and most generally, opinion work product is to be accorded great protection by the courts." Id. at 626. In support of its position, the court quoted part of Federal Rule of Civil Procedure 26(b)(3): "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 representatives of a party concerning the litigation." Id. (quoting Fed. R. Civ. P. 26(b)(3)).

For a further discussion of the Martin Marietta decision, see Breckenridge L. Wilcox, Martin Marietta and the Erosion of the Attorney-Client Privilege and Work-Product Protection, 49 Md. L. Rev. 917 (1990) (arguing that Martin Marietta court's decision further eroded attorney-client and work-product doctrine protections while relying on questionable premises); Margaret A. Carfagno, Note, Settlement Situations and the Maintenance of Confidentiality: A Look at the Martin Marietta Decision, 1990 Colum. Bus. L. Rev. 187 (1990) (arguing that Martin Marietta court's reasoning will deter settlements and cooperation between litigants).


13. For a discussion of the facts and circumstances under which Westinghouse disclosed protected information, see infra notes 16-44 and accompanying text.

14. Westinghouse, 951 F.2d at 1431. For a discussion of the Third Circuit's reasoning, see infra notes 45-132 and accompanying text.

15. See Milo Geyelin & Arthur S. Hayes, Privileged Information Rights Are Limited, Wall St. J., Dec. 23, 1991, at B6 ("The decision by the Third Circuit Court of Appeals in Philadelphia is expected to strongly discourage companies from turning over confidential information—especially the results of outside audits or investigations to federal agencies."). For a discussion of the effect of the Third Circuit's decision, see infra notes 134-48 and accompanying text.
Westinghouse Electric Corporation (Westinghouse) is one of the world's largest industrial firms.16 In the mid-1970s, Westinghouse sought the prime contract to construct the Republic of the Philippines' first nuclear power plant.17 Westinghouse retained Herminio T. Disini as a "special sales representative" to aid in this transaction.18 Disini was a close friend and business advisor of then Philippine President Ferdinand Marcos.19 Disini agreed to champion Westinghouse’s interest with the National Power Corporation (NPC), the Philippine agency handling contract negotiations for the nuclear power plant contract.20 Westinghouse was subsequently awarded the contract.21

A few years after Westinghouse received the contract, articles appeared in the Philippine and American press alleging Westinghouse had used Disini to bribe the government officials who had awarded Westing-
house the contract. In response to these reported allegations, the Securities and Exchange Commission (SEC) commenced an investigation of Westinghouse regarding possible United States securities laws violations.

Westinghouse engaged the law firm of Kirkland & Ellis as outside counsel to conduct an internal investigation and to determine whether any improper payments had been made. Kirkland & Ellis generated two letters reporting its findings. Westinghouse ordered Kirkland & Ellis to disclose these findings to the SEC. At the time of this disclosure, Westinghouse relied on SEC confidentiality regulations which provided that the SEC would not divulge the information obtained. The SEC, however, did not retain the reports.

Although the SEC eventually discontinued the investigation of Westinghouse in 1983, the Department of Justice (DOJ) initiated its own investigation of Westinghouse in 1978. The scope of the investigation encompassed Westinghouse's alleged illegal payments to obtain contracts in the Philippines and in several other countries. This investigation ended after Westinghouse admitted to making illegal payments to procure business in Egypt. In 1986, the DOJ reactivated the 1978 investigation after Ferdinand Marcos was deposed as President of the Philippines. A grand jury subpoena ordered Westinghouse to reveal the letters detailing Kirkland and Ellis' internal investigation findings and any documents involved in that probe. Westinghouse delivered.

22. Id.
23. Id.
25. Westinghouse, 951 F.2d at 1418.
26. Id. Westinghouse instructed Kirkland & Ellis to show the SEC one of its letter reports and to present orally all of its findings to the SEC. Id. Kirkland & Ellis did not turn over any of the documents underlying the report and the SEC agreed not to retain the report. Id.
27. Id. The SEC regulations relied upon by Westinghouse provided in pertinent part that “[i]nformation or documents obtained by the [SEC] in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public.” Id. at 1418 n.4 (quoting 17 C.F.R. § 203.2 (1978)). The regulations stated that SEC employees would not reveal this information unless they were specifically authorized to disclose it. Id. (citing 17 C.F.R. § 240.04 (1978)).
28. Id. at 1418.
29. Id. at 1419.
30. Id.
31. Id.
32. Id.
33. Id. Westinghouse initially resisted this disclosure in an attempt to preserve its attorney-client privilege and work-product protection and moved to
these papers on the basis of a confidentiality agreement negotiated with the DOJ. The agreement prohibited the release of the disclosed material to any other parties. The agreement also stipulated that Westinghouse did not waive its attorney-client or work-product privileges by turning the material over to the DOJ.

In 1988, the Republic of the Philippines and the NPC filed suit against Westinghouse. The Philippines and the NPC contended that Westinghouse tortiously interfered with President Marcos' performance of the fiduciary duties he owed to the Philippine people. The Philippines and the NPC also claimed Westinghouse had conspired to prevent Marcos from performing his fiduciary duties to the Philippine people and to the NPC. During discovery for these two claims, the Philippines and the NPC sought the documents and information Westinghouse had made available to the SEC and the DOJ during their investigations. Westinghouse refused to produce these materials, asserting that the materials were protected under the attorney-client and work-product doctrine privileges. The magistrate overseeing the discovery held, without specifying a reason, that some of the documents were clearly protected by the attorney-client privilege and some were protected by the work-product privilege. Republic of the Philippines v. Westinghouse Elec. Corp., 132 F.R.D. 384, 386 (D.N.J. 1990). The magistrate did not explain why the documents fell within these privileges nor did he specify which documents were protected because he found that West-
covery process, however, held that Westinghouse's prior disclosure of information to the SEC and the DOJ in adversarial situations had waived the protection of the attorney-client and work-product doctrine privileges, despite Westinghouse's reliance upon confidentiality agreements with the SEC and the DOJ. The United States District Court for the District of New Jersey upheld both of the magistrate's rulings. The United States Court of Appeals for the Third Circuit affirmed.

III. ANALYSIS

A. The Attorney-Client Privilege: Can It Be Selectively Waived?

The Third Circuit first addressed Westinghouse's claim that its voluntary disclosure of the potentially protected information to the SEC and the DOJ did not waive Westinghouse's attorney-client privilege. For a further discussion of the magistrate's rulings, see supra notes 41-42 and accompanying text.

The court noted that Westinghouse was attempting to employ a “selective waiver,” which entails divulging a privileged communication to one party while continuing to assert the privilege against other parties.\textsuperscript{46} The Third Circuit evaluated the validity of the “selective waiver” by examining two circuit opinions.\textsuperscript{47} The United States Court of Appeals for the Eighth Circuit recognized the potential use of selective waiver in \textit{Diversified Industries, Inc. v. Meredith}.\textsuperscript{48} The United States Court of Appeals for the District of Columbia Circuit, however, rejected the selective

\textsuperscript{46} Westinghouse, 951 F.2d at 1423. The court first distinguished between a selective waiver and a partial waiver. \textit{Id.} at 1425 n.7. The court viewed both of these as falling within the general limited waiver category. \textit{Id.} The court defined a partial waiver as disclosing a portion of the privileged information while trying to assert the privilege with regard to the remaining undisclosed portion. \textit{Id.} On the other hand, a selective waiver involves disclosing privileged information to one party and claiming privilege for that same information against another party. \textit{Id.} The court determined that Westinghouse was attempting a selective waiver. \textit{Id.}


\textsuperscript{47} Westinghouse, 951 F.2d at 1424.

\textsuperscript{48} 572 F.2d 596 (8th Cir. 1977). Under facts similar to those of Westinghouse, the SEC conducted an official investigation of Diversified. \textit{Id.} at 600. After the SEC investigation, Diversified employed outside counsel to prepare a report on certain areas of the company. \textit{Id.} Counsel eventually produced a memorandum and a full report in conjunction with this investigation. \textit{Id.} at 601. This material was voluntarily disclosed to the SEC. \textit{Id.} at 599. Because the court determined these materials were not privileged, it never directly addressed the question of waiver. \textit{Id.} at 604. The court did intimate in a footnote, however,
waiver theory in *Permian Corp. v. United States*.49 The *Westinghouse* court agreed with the *Permian* court's holding and adopted most of its reasoning.50 The *Westinghouse* court concluded that Westinghouse had waived its attorney-client privilege with respect to the earlier disclosed material that it would recognize a continuing privilege after a voluntary disclosure of privileged material. *Id.* n.1. The court said:

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 litigation in which the material is sought to be used against the party which yielded to the agency.

*Id.* In a subsequent en banc hearing, the court in *Diversified* expressed concern over discouraging internal investigations. *Id.* at 611. The court stated: "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." *Id.*

49. 665 F.2d 1214 (D.C. Cir. 1981). The facts of *Permian* are also similar to the situation in *Westinghouse*. In *Permian*, Occidental Corporation (*Permian*'s parent corporation) voluntarily disclosed material to the SEC pursuant to an SEC investigation. *Id.* at 1216. All disclosed documents were to be stamped with the following message in accordance with an agreement between Occidental and the SEC:

This Document constitutes a Trade Secret and/or Commercial or Financial Information which is Privileged and Confidential and may not be Released or Disclosed. Pursuant to procedures adopted by Occidental & the Securities & Exchange Commission, this Document may not be disclosed by the Commission to any third-party unless prior notice of such proposed disclosure has been given to Occidental.

*Id.* at 1216 n.3. (quoting *Permian v. United States*, Civ. No. 79-2098, mem. op. at 9 (D.D.C. May 15, 1980)). Occidental argued that this agreement, and its associated message, was intended to maintain its privilege with regard to the stamped material, and to prevent the SEC from disclosing the material to any other parties. *Id.* at 1217. The SEC then sought to disclose this information to the United States Department of Energy. *Id.* Occidental brought suit to prevent disclosure, invoking the attorney-client privilege. *Id.* The SEC agreed that this material was privileged but argued that the privilege had been waived by Occidental's voluntary disclosure. *Id.* The court held for the SEC and rejected the limited waiver rule of *Diversified*. *Id.* at 1220. The court did not see how such a rule would further the purposes underlying the attorney-client privilege. *Id.* The court observed that "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." *Id.* at 1221. The court also declined to adopt the *Diversified* rationale for suggesting the validity of selective waiver. *Id.* at 1220. The court remarked: "Unlike the Eighth Circuit, we cannot see how 'the developing procedure of corporations to employ independent outside counsel to investigate and advise them' would be thwarted by telling a corporation that it cannot disclose the resulting reports to the SEC if it wishes to maintain their confidentiality." *Id.* at 1221 n.13.

50. *Westinghouse*, 951 F.2d at 1425. The *Westinghouse* court agreed with the *Permian* court's contention that a selective waiver did not further the goals underlying the attorney-client or work-product doctrine privileges. *Id.* The *Westinghouse* court, however, did not adopt the *Permian* court's fairness analysis as additional justification for holding that a waiver existed on these facts. *Id.* at 1426.
The court was not persuaded to extend the privilege beyond its underlying purpose. The Westinghouse court initially traced the judicial interpretations of the purposes behind the attorney-client privilege. The court found that the ultimate purpose has been characterized as "promoting broader public interests in the observance of law and the administration of justice." The court noted that this purpose is fostered by encouraging open communication between attorneys and their clients. According to the court, protecting attorney-client communications is essential to the pursuit of justice. Without this protection, clients would suppress information they fear might be harmful to their case, even though this information might be necessary for their attorney’s defense preparation. As a consequence, attorneys would be unable to provide their clients with the most skillful representation. The court relied on authority which reasoned that this open communication between attorney and client is vital for effective attorney representation, which in turn aids in the attainment of justice.

The Westinghouse court did not reject the selective waiver rule based upon the Permian court's conclusion that selective waiver would be unfair to other adversaries. The Permian court noted that "because the attorney-client privilege inhibits the truth-finding process, it has been narrowly construed, and courts have been vigilant to prevent litigants from converting the privilege into a tool for selective disclosure." A party who has profited from disclosing protected information should not subsequently be allowed to claim the use of the privilege. The Westinghouse court chose not rely on this reasoning. The court noted that this fairness doctrine was used most often in partial rather than selective disclosure cases. The court concluded that the facts in Westinghouse involved a selective disclosure and the fairness doctrine was not applicable. In a footnote, the court also questioned whether there was anything unfair about permitting selective disclosure: "When a client discloses privileged information to a government agency, the private litigant in subsequent proceedings is no worse off than it would have been had the disclosure to the agency not occurred." In stressing the importance of the attorney-client privilege, the Third Circuit noted:

[The attorney-client privilege] is founded 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.

Id. (quoting Hunt v. Blackburn, 128 U.S. at 470).
The Westinghouse court stated that the attorney-client privilege is usually waived upon voluntary disclosure to a third party.\textsuperscript{59} In the case at bar, Westinghouse freely elected to furnish the government with information.\textsuperscript{60} The court held that granting Westinghouse the benefit of the attorney-client privilege under these circumstances was inconsistent with the guidelines and goals of the privilege.\textsuperscript{61} Because Westinghouse shared its information freely with the government, the privilege was not necessary to foster open communication with an attorney in pursuing legal advice.\textsuperscript{62}

Exceptions, however, do exist to the general rule that voluntary disclosure of protected information effects a waiver of the attorney-client privilege.\textsuperscript{63} The Third Circuit determined that Westinghouse's disclosure did not fall within any recognized exception.\textsuperscript{64} Westinghouse asked the court to create a new exception to the waiver doctrine "designed to accommodate voluntary disclosure to government agencies."\textsuperscript{65} The court noted that the weight of authority had applied traditional waiver doctrine in this situation and the court discerned no compelling reason to deviate from this policy.\textsuperscript{66} The court reasoned that a governmental agency exception would not promote an open exchange of information between attorney and client.\textsuperscript{67} Such an exception would only expand the attorney-client privilege's scope.\textsuperscript{68}

Although such an expansion would promote voluntary cooperation with investigatory government agencies, the Westinghouse court agreed with the first part of the reasoning of the District of Columbia Circuit in Permian.\textsuperscript{69} The Permian court acknowledged that promoting voluntary

\textsuperscript{59} Id. at 1424; see also Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (attorney-client privilege was "destroyed" when documents were disclosed to third party). But see Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977) (attorney-client privilege is absolute until waived).

\textsuperscript{60} Westinghouse, 951 F.2d at 1417. The Third Circuit reasoned that if Westinghouse felt comfortable sharing this information with the government, Westinghouse would not need the protection of the attorney-client privilege to share the information with the company's attorney. Id. at 1424.

\textsuperscript{61} Id. at 1425.

\textsuperscript{62} Id. at 1424.

\textsuperscript{63} Id. The Westinghouse court discussed certain circumstances where voluntary disclosure is consistent with the purpose of the privilege. Id. One such circumstance is the disclosure of information to the attorney's agent who is assisting the attorney in developing legal advice. Id. Another exception is the disclosure of information between co-defendants or co-litigants. Id. The court noted that "[t]hose [two] exceptions are consistent with the goal underlying the privilege because each type of disclosure is sometimes necessary for the client to obtain informed legal advice." Id.

\textsuperscript{64} Id.

\textsuperscript{65} Id.

\textsuperscript{66} Id.

\textsuperscript{67} Id. at 1425.

\textsuperscript{68} Id.

\textsuperscript{69} Id. at 1425-26 (quoting Permian Corp. v. United States, 665 F.2d 1214
cooperation with government investigations was a "laudable activity," but explained that it was not one within the purposes of the attorney-client privilege. The court in Westinghouse questioned the effectiveness and necessity of such an exception, noting that even if the exception were available, "no such privilege was established at the time Westinghouse decided to cooperate with the SEC and the DOJ." The creation of such a privilege covering disclosure to government agencies had also not been recognized by Congress. Accordingly, the Third Circuit declined to recognize a selective waiver of information protected by the attorney-client privilege.

Westinghouse next argued that it had relied on the SEC's confidentiality regulations and the confidentiality agreement it had signed with the DOJ. Westinghouse claimed that these measures preserved the

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70. Westinghouse, 951 F.2d at 1424-25 (quoting Permian, 665 F.2d at 1221). The Third Circuit stated:

We agree with the D.C. Circuit that these objectives, however laudable, are beyond the intended purposes of the attorney-client privilege . . . and therefore we find Westinghouse's policy arguments irrelevant to our task of applying the attorney-client privilege to this case. In our view, to go beyond the policies underlying the attorney-client privilege on the rationale offered by Westinghouse would be to create an entirely new privilege.

Id. at 1425 (citation omitted).

71. Id. at 1426.

72. Id. at 1425.

73. Id. at 1427.

attorney-client privilege protection for the information disclosed. The Westinghouse court rejected this claim, citing traditional waiver doctrine which holds that “a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else.” In support of the traditional waiver doctrine, the court emphasized that Westinghouse’s disclosures in both instances were voluntary and, therefore, Westinghouse had waived its attorney-client privilege.

For a discussion of waiver of privilege in other comparable situations, see Fred Russell Harwell, Waiving the Attorney-Client Privilege in “Hybrid” Internal Revenue Service Investigations, 13 J. LEGAL PROF. 287 (1988) (disclosure of attorney-client protected information during civil IRS audit waives privilege’s protection in subsequent litigation); Chris G. Outlaw, Note, Corporate Attorney-Client Privilege-Waiver by a Bankruptcy Trustee, 60 Tul. L. REV. 1307 (1986) (supporting decision to endow trustee in bankruptcy as party with power to exercise or waive attorney-client privilege).

The court then evaluated Westinghouse’s reliance on the SEC’s confidentiality regulations. These regulations “provided that the SEC would maintain confidentiality as to information and documents obtained in the course of any investigation.” The court held that Westinghouse’s reliance upon these regulations to preserve its attorney-client privilege was unreasonable. Two reasons guided the court’s rejection of this theory. First, the court observed that the same regulations contained language counseling against relying on them to preserve this privilege. The regulations specifically stated “that information obtained in the course of a non-public investigation must be made a matter of public record and provided upon request if the disclosure of the confidential information was not ‘contrary to the public interest.’ ” Thus, the court must have reasoned that disclosure of Westinghouse’s information would not have been contrary to the public interest. See id. Second, the court observed that the SEC had recently failed in an attempt to provide statutorily for a selective waiver. (citing SEC Statement in Support of Proposed § 24(d) of the Securities and Exchange Act of 1934, 16 Sec. Reg. & L. Rep. at 461 (March 2, 1984)).

The Westinghouse court, however, strongly suggested that their decision might have been different had the disclosure been compelled, not voluntary. The court stated:

We consider Westinghouse’s disclosure to the DOJ to be voluntary even though it was prompted by a grand jury subpoena. Although Westinghouse originally moved to quash the subpoena, it later with-
B. The Work-Product Doctrine: How Much Protection?

Westinghouse also argued that the work-product doctrine protected the information given to the SEC and the DOJ. Westinghouse asserted that its voluntary disclosure did not waive this protection. The Third Circuit rejected Westinghouse's alternative claim.

The Third Circuit looked to the Eighth Circuit and the D.C. Circuit for guidance on this issue. The Third Circuit first detailed the purpose of the work-product doctrine. The court concluded that "the work-product doctrine promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation." This confidentiality furthers the adversary system by "enabling attorneys to prepare cases without fear that their work product will be used against their clients." The court next examined what circumstances would constitute a waiver of the work-product doctrine. Unlike the attorney-client privilege, voluntary disclosure to a third party of information protected by the work-product doctrine does not automatically waive the privilege. The work-product protection operates to prevent adversaries from acquiring opposing counsel's work product. Most courts hold that waiver of the privilege through voluntary disclosure occurs only when this disclosure will result in an opponent acquiring the information. Accordingly, the threshold issue in such a voluntary disclosure case is whether the party receiving the information is an adversary. Westinghouse argued that it was cooperating with the SEC and the DOJ when it drew the motion and produced the documents pursuant to the confidentiality agreement. Had Westinghouse continued to object to the subpoena and produced the documents only after being ordered to do so, we would not consider its disclosure of these documents to be voluntary.

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78. Id. at 1427. For a further discussion of the work-product doctrine, see supra note 11.
79. Westinghouse, 951 F.2d at 1427.
80. Id. at 1429.
81. Id. at 1427.
82. Id. at 1427-28.
83. Id. at 1428.
84. Id. (citing Hickman v. Taylor, 329 U.S. 495, 510-11 (1947)). For a further discussion of the Hickman case and the doctrine it espoused, see supra note 11.
85. Westinghouse, 951 F.2d at 1428.
86. Id.
87. Id.
88. Id.; see also In re Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 845, 846 (6th Cir. 1988); United States v. AT&T, 642 F.2d 1285, 1299 (D.C. Cir. 1980); Grumman Aerospace Corp. v. Titanium Metals Corp. of Am., 91 F.R.D. 84, 90 (E.D.N.Y. 1981).
89. Westinghouse, 951 F.2d at 1428.
disclosed the requested information and thus was not an adversary to either agency. The court summarily rejected this argument because Westinghouse was the target of the SEC and the DOJ investigations. The court held that “[u]nder the circumstances, we have no difficulty concluding that the SEC and the DOJ were Westinghouse’s adversaries.”

However, the conclusion that Westinghouse and the government agencies were adversaries did not terminate the Westinghouse court’s analysis of the issue. The Third Circuit addressed whether Westinghouse’s prior disclosure acted to waive the work-product doctrine as against the Philippines. Although courts generally agree that disclosure to an adversary waives the work-product protection, they disagree over the reasons. Such disagreement precludes an easy application of this privilege in particular situations.

Seeking guidance, the Third Circuit initially considered the work-product doctrine as formulated by the Eighth Circuit in In re Chrysler Motors Corp. Overnight Evaluation Program Litigation. In this case, a corporation revealed work-product information to an adversary during settlement negotiations. This disclosure transpired after an agreement was reached between the parties that precluded further disclosure of this material. The Eighth Circuit held that disclosure to an adversary of information protected by the work-product doctrine effected a total waiver of such protection. The court rejected the claim that the confidentiality agreement prevented a waiver of the privilege.

The bright line rule enunciated by the Eighth Circuit in Chrysler Motors differed sharply from the D.C. Circuit’s approach in In re Subpoenas Duces Tecum. In Subpoenas, a corporation voluntarily disclosed materials protected by the work-product doctrine to the SEC to benefit from

90. Id. An adverse party is defined as “[a] party to an action whose interests are opposed to or opposite the interests of another party to the action.” BLACK’S LAW DICTIONARY 53 (6th ed. 1990).
91. Westinghouse, 951 F.2d at 1428. The court noted that Westinghouse was not assisting with the SEC or the DOJ investigations, rather it was the target of these investigations. Id.
92. Id.
93. Id.
94. Id. For a discussion of the Philippines’ request for the information and Westinghouse’s claim of protection under the work-product doctrine, see supra notes 40-41 and accompanying text.
95. Westinghouse, 951 F.2d at 1428.
96. Id.
97. 860 F.2d 844 (8th Cir. 1988).
98. Id. at 845.
99. Id.
100. Id. at 844-45.
101. Id. at 847.
102. 738 F.2d 1367 (D.C. Cir. 1984).
the SEC's Voluntary Disclosure Program. The Subpoenas court employed a three-part balancing test to determine whether disclosure effected a waiver. This test evaluated "the fairness of selectively disclosing work-product, the discloser's expectations of confidentiality, and the policy underlying the work-product doctrine." Applying this test, the Subpoenas court held that it would be unfair to permit selective waiver by disclosing to one adversary and not to another. In addition, the court determined that the corporation had no reasonable expectation of confidentiality in the disclosed information. Finally, there was no other applicable work-product doctrine policy that would mandate a denial of the waiver in these particular circumstances.

The Third Circuit in Westinghouse examined the approaches of both Chrysler Motors and Subpoenas but declined to adopt either one. Instead, the Third Circuit held that Westinghouse's disclosure to the SEC and the DOJ waived the corporation's work-product protection as against all other adversaries. The court emphasized the importance of the underlying purpose of the privilege by noting that a party could preserve the privilege in the face of disclosure by proving that "the disclosure furthered the doctrine's underlying goal." However, the court concluded that Westinghouse's disclosures to the governmental agencies were not made to further the underlying goal of the work-product doctrine.

Two factors contributed to the Westinghouse court's adoption of this standard for determining a waiver of the work-product doctrine. First, the court noted the important general principle mandating a narrow interpretation of evidentiary privileges. Second, the court recognized that unlike the absolute protection afforded by the attorney-client privilege, the work-product doctrine is a qualified privilege that may be overcome by a showing of "substantial need." The qualified protection status persuaded the court "that the standard for waiving the work-

103. Id. at 1368-69. The Subpoenas court stated that this program "promises wrongdoers more lenient treatment and the chance to avoid formal investigation and litigation in return for thorough self-investigation and complete disclosure of the results to the SEC." Id. at 1369 (quoting In re Subpoenas Duces Tecum, 99 F.R.D. 582, 584 (1983)).

104. Id. at 1372.

105. Id.

106. Id.

107. Id.

108. Id.

109. Westinghouse, 951 F.2d at 1428-29.

110. Id. at 1429.

111. Id.

112. Id.

113. Id.

114. Id.

115. Id.
product doctrine should be no more stringent than the standard for waiving the attorney-client privilege.""116 Applying the stated standard, the Third Circuit held that Westinghouse’s disclosures waived the work-product protection “because they were not made to further the goal underlying the doctrine,” which is to promote the adversary system by protecting attorneys’ papers created in preparation of litigation.117

The court viewed Westinghouse’s objective in disclosing this information as purely self-serving, an attempt to either preclude prosecution or receive lenient treatment.118 The court determined that these objectives, while understandable, did not in any way further the goal of the work-product doctrine and should not preclude waiver of the privilege.119 The court noted that its approach would still permit attorneys to enjoy the full benefit of the work-product doctrine, provided neither the attorneys nor their clients disclosed protected material to an adversary.120

The court then disposed of Westinghouse’s contention that its reasonable expectation that the SEC and the DOJ would maintain the confidentiality of the disclosed information precluded the waiver of its privilege.121 Westinghouse advanced two cases decided by the D.C. Circuit in support of its position, Subpoenas122 and In re Sealed Case.123 The Third Circuit distinguished Sealed Case because that case involved both a selective and a partial waiver.124 A partial waiver permits a party to protect the undisclosed portion of a document that has been partially disclosed to another party.125 The D.C. Circuit in Sealed Case employed a fairness analysis to decide the waiver issue.126 The Westinghouse case, however, only involved a selective waiver theory.127 In Subpoenas, the

116. Id.
117. Id. at 1429.
118. Id.
119. Id.
120. Id. The court speculated that recognition of selective waiver in these circumstances might actually work against the purpose of the work-product doctrine. Id. The court stated:

If internal investigations are undertaken with an eye to later disclosing the results to a government agency, the outside counsel conducting the investigation may hesitate to pursue unfavorable information or legal theories about the corporation. Thus, allowing a party to preserve the doctrine’s protection while disclosing work product to a government agency could actually discourage attorneys from fully preparing their cases.

Id. at 1429-30.
121. Id. at 1430.
122. 738 F.2d 1367 (D.C. Cir. 1984). For a discussion of Subpoenas, see supra notes 102-08 and accompanying text.
123. 676 F.2d 793 (D.C. Cir. 1982).
124. Westinghouse, 951 F.2d at 1430.
125. Id. at 1423 n.7.
126. Id. at 1430.
127. Id.
D.C. Circuit affirmed the fairness analysis used in Sealed Case in the context of a selective disclosure. 128 The Westinghouse court restated that when analyzing selective waiver under the attorney-client privilege, a fairness analysis only applied to a partial, not selective, disclosure of protected material. 129 The court held that this limitation of the fairness analysis was also applicable in the context of the work-product doctrine. 130 The Third Circuit concluded that "[it did] not see how disclosing protected materials to one adversary disadvantages another," and thus Subpoenas and Sealed Case did not support Westinghouse's position. 131 The court thus rejected Westinghouse's claim for protection under the work-product doctrine. 132

IV. CONCLUSION

The Third Circuit's decision in Westinghouse highlights a split among the federal circuits in an area of great importance to corporations and their counsel. 133 There exists much disagreement over the scope of the corporate attorney-client and work-product doctrine privileges and the circumstances under which they can be waived. 134 The Westinghouse court followed the general rule regarding waiver of the attorney-client privilege, holding that voluntary disclosure of material protected by the privilege completely waives the protection. 135 The Third Circuit also followed the majority of courts which hold that voluntary disclosure of work-product protected material to an adversary constitutes a waiver of the work-product privilege. 136 In analyzing the waiver of both privileges, the Westinghouse court accorded the privileges a narrow interpretation that the court thought was consistent with the privileges' underlying purposes. 137 This decision should have a significant impact on corporations incorporated in the Third Circuit as well as corporations incorporated elsewhere.

The Third Circuit held that a selective waiver theory was inconsis-
tent with and failed to further the goals behind the attorney-client and work-product doctrine privileges. The court also noted that a selective waiver was not within any recognized exception to the general waiver rule. The court thus declined to expand these well-settled privileges by recognizing a selective waiver exception to the general waiver rule.

The Third Circuit’s decision closely mirrored the D.C. Circuit’s decision in Permian. In deciding whether to recognize a selective waiver, the Permian court examined the underlying policy goals promoted by the privileges. The Third Circuit rejected an alternative approach articulated by the Eighth Circuit in Diversified. The Third Circuit’s more conservative approach recognized the Diversified court’s goal of encouraging corporations to conduct internal investigations and to cooperate with Federal investigative agencies.

The Westinghouse court correctly interpreted existing case law and the policies underlying the attorney-client and work-product doctrine privileges. The Westinghouse court recognized that these evidentiary protections, while important, may have detrimental effects and thus must be narrowly construed. The Westinghouse court’s refusal to expand these privileges beyond their recognized parameters prevents further withholding of relevant evidence. The Westinghouse court’s decision is consistent with a narrow interpretation of the privileges.

Despite its narrow construction, the Westinghouse court’s decision did uphold the protection afforded by these privileges. The impact of the Westinghouse decision will lie in future determinations of what constitutes a waiver of these privileges. While recognizing that the material at issue in Westinghouse was protected by the attorney-client and work-product doctrine privileges, the court merely held that Westinghouse voluntarily waived this protection when it freely disclosed the information. Because the attorney-client and work-product doctrine

138. Id. at 1424 (citing Permian, 665 F.2d at 1220).
139. Id.
140. Id.
142. Westinghouse, 951 F.2d at 1424. The Third Circuit stated that the Diversified court recognized the selective waiver theory, stating that disclosure to the SEC during an investigation of material protected by the attorney-client privilege constituted a selective waiver of the privilege. Id. at 1423. Because the attorney-client privilege was only selectively waived, the Third Circuit noted that the disclosed material in Diversified remained protected for ensuing civil litigation. Id. For a discussion of Diversified, see supra note 48 and accompanying text.
143. Westinghouse, 951 F.2d at 1425.
144. Id. at 1429.
145. Id. at 1425, 1429.
146. Id. at 1431.
147. Id.
protections maintain the confidentiality of certain information, voluntary disclosure of this information may logically lead to the conclusion that the information did not need the protection of these privileges. The Third Circuit and the decisions relied upon in its analysis recognized this in denying the selective waiver theory.\textsuperscript{148}

The Westinghouse court's decision, however, provides only limited guidance. Corporations targeted for governmental investigations will now refuse to cooperate because of the uncertainty surrounding what types of disclosures will waive the attorney-client or work-product doctrine privileges. This uncertainty will create problems for companies "voluntarily" engaging in internal investigations at the request of the government. Companies may not be as forthcoming with information for fear that they will waive their privileges for purposes of future litigation. The government will not be able to offer any concrete assurances. This confusion will likely increase the time, cost and difficulty of governmental investigations into companies.

In the Third Circuit, the Westinghouse decision's impact on companies will likely be more predictable. This decision gives companies and governmental investigators a clear exposition of the Third Circuit's approach in this area. Companies subject to governmental investigation who are interested in preserving their privileges in the Third Circuit and maintaining future confidentiality should, and probably will, cease to disclose voluntarily any protected information to the government. The fear will stem from the knowledge that once a privilege is waived, it is waived completely and forever. This will also result in a substantial chilling of communication between governmental investigators and companies in the Third Circuit.

The issue of waiver of a corporate attorney-client or work-product doctrine privilege in the context of a governmental investigation depends on the particular jurisdiction's law. This area is extremely important because of its impact on the government's ability to investigate corporate misconduct and its effect on a corporation's willingness to assist in that investigation while still protecting itself and its shareholders. A corporation in any jurisdiction in this country likely will not voluntarily disclose any protected information to the government, given the uncertain status of the law. A company willing to cooperate with governmental investigators should know the boundaries within which it can cooperate without harming itself. The issue regarding the limits of privileges and their waiver needs a definitive answer from the United States Supreme Court or from Congress. Such a resolution would hopefully eliminate the confusion and enable corporations under governmental investigation to cooperate confidently, not fearfully.

\textit{Thomas E. Smallman}

\textsuperscript{148} Id.