

THE REVIEW OF SECURITIES & COMMODITIES REGULATION

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 42 No. 21 December 2, 2009

CHANGES IN THE CULTURE OF WAIVER

Under pressure from Congress, the government has backed off and adopted new policies against seeking waivers of attorney-client privilege and work-product protections. As to any waiver, most courts hold that it cannot be “selective” and extends to all parties and all materials on the same subject – but new Federal Rule of Evidence 502 may limit the “subject matter” scope of the waiver.

By Stacie R. Hartman *

In the past few years, market participants cooperating with a governmental or regulatory investigation have faced a serious dilemma: either waive the attorney-client privilege and work-product protections in order to prove that their cooperation deserves credit against any penalty assessed for wrongdoing; or preserve the protections and appear uncooperative. The government has repeatedly and strongly emphasized “voluntary” waiver as an important measure of cooperation.¹ The benefits of waiver to the government are clear: it permits prosecutors or agencies to obtain more complete evidence, including statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements; it also enables the evaluation of the completeness of voluntary disclosure and cooperation. The need to demonstrate extensive cooperation is obvious – a target

may be able to minimize any sanctions or avoid prosecution altogether.

The heightened pressure to cooperate, particularly in the wake of widely publicized corporate scandals and increasingly aggressive prosecutions and enforcement actions, has become so pervasive as to lead to what many describe as a “culture of waiver.” But waiving fundamental legal protections such as the attorney-client privilege and work-product doctrine can expose the target to increased risk in litigation, particularly any ensuing private litigation following the governmental or regulatory investigation. This is because, as a general rule, a waiver with respect to one person (such as a government agency) is a waiver as to all, for all purposes and all times, including as to third parties in subsequent private litigation. Indeed, a target can expect that one of the first items sought in any civil litigation that follows a governmental or agency investigation will be disclosure of any internal investigation or other documents or testimony provided to the government.

¹ The term “waiver” is used for ease of reference; the circumstances are often such that a target decides not to assert the privilege or protection at all, rather than waiving them after an initial assertion.

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In large part due to the actions of those at the legal bar, it appears that the “culture of waiver” is finally changing and that the environment in which cooperation is evaluated is returning to a more sensible balance of competing fundamental interests. The Commodities Futures Trading Commission (“CFTC”) was among the first government agencies to signal a “retreat,” by issuing a revised Enforcement Advisory in March 2007 that recognized that the attorney-client privilege and work-product doctrine are “fundamental to the American legal system,” and stating that such rights are “not intended to be eroded or heightened” by the advisory.² The U.S. Department of Justice and the Securities and Exchange Commission (“SEC”) went even further last year, directing prosecutors and enforcement attorneys expressly not to ask for waiver.³

ORIGINS OF THE CULTURE OF WAIVER

To better appreciate the significance of these developments, it is necessary to review the recent history of the federal government’s actions with respect to waiver. Beginning with pronouncements such as the Holder Memorandum in 1999 and continuing with the Thompson Memorandum in 2003, the Department of Justice revealed the government’s intention to treat waiver of the attorney-client and work-product protections as a significant measure of cooperation, instructing prosecutors to consider whether there had been waiver when evaluating the level of cooperation.⁴ The Department strongly encouraged waiver

in exchange for more lenient treatment. The SEC followed a similar path, issuing what is known as the “Seaboard Report” in October 2001. The report expressly identified cooperation (including privilege waiver) as a factor to be weighed in determining whether and how to initiate and resolve enforcement actions, noting that the potential benefits ranged from the SEC’s “taking no enforcement action to bringing reduced charges, or seeking lighter sanctions.”⁵ The CFTC followed with its own Enforcement Advisory in August 2004, identifying a company’s willingness to waive attorney-client and work-product protections as an important factor in determining the appropriate level of sanctions to recommend for violation of the Commodities Exchange Act.⁶ None of these policies required that a target waive the protections in order to be eligible for a recommendation of reduced sanctions, nor did they promise that such waiver – or any other form of cooperation – would guarantee such a recommendation. But as a practical matter, waiver became a significant, if not central, element of cooperation, and

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1999); Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys, on *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), available at www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.

² *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations*, U.S. Commodity Futures Trading Commission, Division of Enforcement, issued March 1, 2007, available at <http://www.cftc.gov/stellent/groups/public/@cpdisciplinryhistory/documents/file/enfcooperation-advisory.pdf>.

³ *Principles of Federal Prosecution of Business Organizations*, Memorandum from Mark Filip, Deputy Attorney General, August 28, 2008, available at <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>; *Enforcement Manual* (2008), Securities and Exchange Commission, Division of Enforcement, available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

⁴ Memorandum from Eric Holder Jr., Deputy Attorney General, to Heads of Department Components and United States Attorneys on *Bringing Criminal Charges Against Corporations* (June 16,

⁵ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969 (Oct. 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

⁶ *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations*, U.S. Commodity Futures Trading Commission, Division of Enforcement, available at www.cftc.gov/files/enf/enfcooperation-advisory. The cooperation factors set forth in the Advisory were not new; the Division of Enforcement previously had given credit for cooperative conduct by respondents, including waiver of privileges. See, e.g., *In re Enserco Energy, Inc.*, CFTC No. 03-22, 2003 WL 21756915 at *2 (July 31, 2003) and *In re El Paso Merchant Energy, L.P.*, CFTC No. 03-09, 2003 WL 21468567 at *2 (March 26, 2003).

thus an influential factor in mitigating the severity of any penalties arising from a prosecution or enforcement action.

CHANGES IN THE CULTURE OF WAIVER

To address the perceived assault on the sanctity of the attorney-client relationship, the American Bar Association established a Task Force on Attorney-Client Privilege in the fall of 2004. The Task Force issued a report on May 18, 2005, noting that companies felt pressured to comply with requests for privilege waivers and that such waivers came at a “considerable price.” The Task Force expressed “significant concern” that such waivers could eventually lead to the compelled disclosure of “privileged information . . . to private parties and other public agencies.”⁷ The report opposed the “routine practice by governmental officials of seeking to obtain a waiver of the attorney-client privilege or work-product doctrine through the granting or denial of any benefit or advantage,” concluding that the ABA “strongly supports the preservation of the attorney-client privilege and work-product doctrine.”⁸

In 2006, both the Senate and House of Representatives heard testimony on the issue, as a result of which members of Congress introduced legislation that would effectively overrule the Justice Department’s policies. Immediately thereafter, the Department issued revised charging guidelines in the McNulty Memorandum, curtailing some of the adverse effects of the Holder and Thompson Memoranda. The Department restricted – at least partially – the circumstances under which prosecutors could seek a waiver of the attorney-client privilege or the work-product doctrine. Under the revised guidelines, prosecutors could request a waiver of applicable privileges only if there was a “legitimate need,” and only as to a subset of such information. This subset was primarily what was called “Category I” information, which referred to “purely factual information.” Upon a showing of legitimate need, prosecutors could seek a waiver with respect to such documents, after a “careful balancing” of policy considerations and law enforcement objectives, by obtaining written authorization from the United States Attorney. As to what was called “Category II” information, *i.e.*, attorney-client communications and non-factual attorney work product, such information could be sought

only in “rare circumstances,” and only if the Category I information failed to provide a complete basis to conduct a thorough investigation. Although a refusal to waive protections over Category II information could no longer be considered in making a charging decision, a respondent’s acquiescence to a government’s waiver request could “always [be] favorably considered” by prosecutors.⁹

Thus, despite a narrowing of the circumstances under which the Department could seek privilege waivers, the McNulty Memorandum left in place the principle and power of seeking waivers under (somewhat) defined circumstances, and of taking into account the target’s response, at least in some of those circumstances, at the time of making charging decisions. The McNulty Memorandum did not address voluntary waivers, which targets still felt compelled to make in order to maximize the prospects of receiving lenient treatment. As a result, the McNulty Memorandum did little to quell the mounting criticism of such policies. Senator Arlen Specter stated firmly that the guidelines “continue to erode the attorney-client relationship.”¹⁰ Similarly, ABA President Karen Mathis stated that the revisions “fall far short of what is needed to prevent further erosion of attorney-client privilege . . . during government investigations.” Rather than adequately strengthening the protections offered by the attorney-client privilege and work-product doctrine, the McNulty Memorandum served to continue the “culture of waiver,” which still exerted “extreme pressure” on companies to waive protections in “virtually every case.”¹¹

Due to the perceived shortcomings in the McNulty Memorandum, Congress again considered legislation, the “Attorney-Client Privilege Protection Act,” which would have prohibited the Department from seeking protected information, as well as from using waiver as a factor relating to charging or cooperation. In response to this proposed legislation, and continued negative reaction to the McNulty Memorandum, the Department of Justice retreated further on August 28, 2008, unveiling the current guidelines – the “Filip Memorandum.”¹²

⁷ At least one court agreed with this view, holding that the Justice Department’s policy amounted to coercion, which was a basis under California’s rules of evidence for finding that the company’s disclosure of privileged material to the Justice Department was not a waiver. *Regents of University of California v. Superior Court*, 165 Cal. App. 4th 672, 676-77, 81 Cal. Rptr. 3d 186 (4th Dist. 2008).

⁸ Report of the ABA Task Force on Attorney-Client Privilege (May 18, 2005), *available at* http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted/pdf.

⁹ Memorandum from Paul J. McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

¹⁰ Edward Hayes, Congress Eyes Regulators’ Claims on Atty/Client Privilege, *available at* <http://www1.cchwallstreet.com/ws-portal/content/c360/04-04-2007>.

¹¹ The McNulty Memorandum’s Effects on the Right to Counsel in Corporate Investigations: Hearing the H. Comm. on the Judiciary, 110th Cong. (2007) (statement of Karen Mathis), *available at* http://www.abanet.org/poladv/letters/attyclient/2007mar08_privwaivh_t.pdf.

¹² Filip Memorandum, *supra* n.3.

Under the policies articulated in the Filip Memorandum, the Department is no longer to focus on whether a target of an investigation waives its privileges in assessing the extent of its cooperation. Instead, “cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence,” regardless of whether a party waives a privilege to do so.¹³ Indeed, the “disclosure of facts, and not a corporation’s waiver,” is the “only proper inquiry when determining whether a corporation receives cooperation credit.”¹⁴ Prosecutors are now prohibited from requesting the disclosure of non-factual, “core” attorney-client privileged and work-product materials, including attorney notes and memoranda generated during internal investigations.¹⁵

The SEC has similarly softened its position. One month after the Filip Memorandum was issued, the SEC published its own set of revised guidelines, known as the “Red Book.” The SEC, like the Justice Department, has shifted its focus away from whether a corporation has waived its privileges, and instead focuses on whether a party has “disclosed all relevant facts within the party’s knowledge that are responsive to the staff’s information requests.” That inquiry does not depend on “whether a party has elected to assert or waive a privilege.” The Red Book instructs investigators that they “should not ask a party to waive the attorney-client or work-product privileges and [are] directed not to do so.” It further states that “[w]aiver of a privilege is not a prerequisite to obtaining credit for cooperation,” and that an organization’s assertion of a privilege “will not negatively affect [its] claim to credit for cooperation.”¹⁶

The CFTC acted more quickly than either the Justice Department or the SEC, issuing its revised Enforcement Advisory in March 2007. The revision’s focus was “to properly balance the interests of rewarding meaningful cooperation with the legal protections provided by the attorney-client and work-product privileges by eliminating the prior advisory’s reference to waiver of these privileges.”¹⁷ Thus, the CFTC appeared to effectively abandon its earlier practice of encouraging waivers. These

recent developments are significant retreats from the earlier policies that led to the culture of waiver.¹⁸

THE CONSEQUENCES OF WAIVER

Though the formal demands for waiver are decreasing, the pressure to waive voluntarily has not disappeared – leaving many targets with much of the same dilemma about whether to waive the attorney-client privilege or work-product protections in order to maximize cooperation credit, at the price of risking disclosure to opponents in the private litigation that so often follows a government or regulatory investigation of any substantial size.

If a company waives the privileges to provide information to the government, has it inevitably waived them as to subsequent private plaintiffs as well? Usually, though not quite always. Whether a company succeeds in protecting from discovery in subsequent litigation the information it discloses to the government (pursuant to privilege waiver) depends largely on (i) which protection – attorney-client privilege or work product – is at issue; (ii) whether there was a confidentiality agreement between the disclosing party and government or regulatory agency; and (iii) the jurisdiction in which the subsequent litigation is pending. A few courts have allowed a company to protect this information from subsequent civil discovery under a theory that the initial disclosure was only a “selective” waiver, or was made pursuant to a “government investigation” exception to the general rule governing waiver. But these instances are rare.

The (Very) Limited Viability of Selective Waiver of the Attorney-Client Privilege

The purpose of the venerable attorney-client privilege is to encourage full and frank communications between attorneys and their clients in order to foster sound legal advice, which depends on the lawyer’s being fully informed by the client.¹⁹ As noted above, however, the disclosure to a third party of information protected by the attorney-client

¹³ Letter from Mark Filip, Dep. Att’y Gen. to Chairman Patrick J. Leahy and Sen. Arlen Specter (July 9, 2008).

¹⁴ U.S. Dept. of Justice, United States Attorneys’ Manual Section 9-28.720 (Aug. 28, 2008).

¹⁵ *Id.* (Prosecutors “should not ask for such waivers and are directed not to do so.”).

¹⁶ SEC Enforcement Manual (2008), *supra* n. 3.

¹⁷ CFTC Enforcement Advisory, *supra* n.2.

¹⁸ At least some members of Congress remain skeptical that the attorney-client and work-product protections are sufficiently preserved during governmental investigations, leading to introduction of new legislation in the Senate called the “Attorney-Client Privilege Protection Act of 2009.” S. 445, 111th Cong. (2009). Noting that the government guidelines had changed numerous times – and could be changed again, Sen. Specter argued that the legislation was necessary to codify the preservation of the attorney-client and work-product protections. 154 Cong. Rec. S2331-S2332 (Feb. 13, 2009), available at <http://federalevidence.com/pdf/2009/Misc/S.445.CR1.pdf>.

¹⁹ *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981).

privilege ordinarily constitutes a complete waiver of the privilege for all purposes and all parties, not only with respect to that information but all other privileged communications on the same subject. The rationale is that a party who voluntarily discloses otherwise protected information to a third party thereby destroys the secrecy or confidentiality of such information and cannot thereafter assert a privilege against anyone with respect to that information. Courts conclude from the subsequent disclosure that the existence of the privilege must not have been a necessary incentive for the privileged communication to occur in the first place. There is also a vague but real “fairness” consideration against selective disclosure: a party should not be allowed to choose to whom it will disclose privileged information while withholding it from all others, any more than it can pick and choose which privileged information it will disclose and which it will withhold.

Following such principles, the majority of courts have permitted parties in private litigation (often class-action plaintiffs) to obtain, through the usual discovery devices, information disclosed by a company to the government, finding that the company’s disclosure waived the privilege with respect to such information. For example, the Sixth Circuit held that a company waived the attorney-client privilege when the results of an internal investigation were disclosed to the Justice Department in response to its investigation of whether Columbia/HCA committed Medicare or Medicaid fraud in its billing practices.²⁰ The court ordered Columbia/HCA to produce to the insurance companies and other private parties the results of its internal fraud audits, reasoning that the privilege’s purpose in fostering frank communication between client and attorney was not served by voluntary disclosure to government agencies, and that a party should not be able to “pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality as to others.”²¹ Similarly, the D.C. Circuit held that the rationale of selective waiver does not serve the interests that underlie the privilege, finding that although “[v]oluntary cooperation with government investigations may be a laudable activity, . . . it is hard to understand how such conduct improves the attorney-client relationship.”²²

²⁰ *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 302-04 (6th Cir. 2002).

²¹ *Id.* at 303 (citation omitted).

²² *Permian Corp. v. U.S.*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (requiring the company to disclose to the Department of Energy the same documents it had shared with the SEC). Other federal appeals courts have reached similar conclusions. *See, e.g., Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 170 (2nd Cir. 2003) (rejecting “limited waiver” of privilege and ordering that documents that had been disclosed to the SEC be produced to

The existence of a confidentiality agreement with the government pursuant to which a company discloses its privileged communications has generally been unpersuasive to courts determining the availability of selective waiver. The court in *Columbia/HCA Healthcare* found the privilege waived despite the fact that the company entered into a confidentiality agreement with the SEC, finding that the privilege is a matter of common law right, and not one of contract arranged privately between parties.²³ The Third Circuit similarly accorded little weight to the fact that the company had disclosed its internal documents to the SEC only pursuant to a confidentiality agreement, even though the agreement was memorialized in a stipulated order entered by the district court.²⁴ Even where confidentiality agreements with the Justice Department and the SEC expressly provided that production to them did *not* constitute a waiver, the Tenth Circuit found waiver nonetheless (in refusing to adopt a selective waiver), noting that the agreements did not restrict the agencies’ use of the materials.²⁵

Several courts have opined that adopting a doctrine of selective waiver would amount to the creation of an entirely new privilege, because the theory of selective waiver extends far beyond the underlying purposes for the attorney-client privilege and work-product protections.²⁶ Such a creation would contravene the Supreme Court’s cautioning against recognizing a privilege in an area in which Congress has considered the competing concerns but declined to act, referring to the failure of proposed

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shareholder plaintiffs); *U.S. v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) (ordering production of documents to the Internal Revenue Service that MIT had produced to the Department of Defense as part of the periodic audits for review of contract performance, rejecting any principle of selective waiver); and *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988) (company’s disclosure to DOJ and Department of Defense of internal audit, interview notes, and transcripts in an attempt to settle criminal investigation constitutes waiver of the attorney-client privilege). The Seventh Circuit has stated that “selective disclosure is not an option,” although it has not explicitly decided whether a company’s disclosure to the government in response to prosecution or an investigation effects a complete or merely selective waiver of the attorney-client privilege. *Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003).

²³ 293 F.3d at 303.

²⁴ *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1426-27 (3rd Cir. 1991).

²⁵ *In re Qwest Communications Int’l, Inc.*, 450 F.3d 1179, 1194 (10th Cir. 2006).

²⁶ *Id.* at 1192; *see also Westinghouse*, 951 F.2d at 1425.

amendments to the Federal Rules of Evidence and an amendment to the Securities Exchange Act that would have established a selective waiver rule regarding documents disclosed to the SEC.²⁷ As the Tenth Circuit recently noted, the issue of selective waiver was being considered as part of newly enacted Federal Rule of Evidence 502 at the time of its opinion, but it was not adopted.²⁸ The Advisory Committee of Evidence Rules eliminated the proposed provision in April 2007, noting that the issue was “controversial” and political, and finding that the Committee was unable to determine whether selective waiver protection was necessary to encourage cooperation with government investigations.²⁹

The sole federal appeals court to adopt a blanket endorsement of selective waiver is the Eighth Circuit, which carved out a limited exception to the general rule of waiver of the attorney-client privilege specifically because the disclosure was made to the SEC.³⁰ The information at issue was the internal report prepared by outside counsel after its investigation of allegations of corporate bribery (including references to counsels’ interviews of employees) and related minutes of the board of directors, all of which the company produced to the SEC pursuant to subpoena. The information was sought in discovery in subsequent litigation brought by one of the customers whose employees allegedly were bribed. The Eighth Circuit held that the disclosure of protected materials to the SEC during the course of a formal investigation constituted a selective waiver of the privilege limited to the SEC, and consequently, the materials were not subject to discovery by private plaintiffs in subsequent civil litigation. The court acknowledged its departure from traditional waiver doctrine, but noted that a contrary holding would have the “effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them”³¹ This case was decided before the “culture of waiver” took hold, but its reasoning has not been adopted by other courts. This may reflect that the court’s concern, *i.e.*, companies might not hire lawyers to investigate them if the results were to be disclosed to all, has not been realized to warrant the departure from traditional rules of waiver.

A more forceful case for adopting selective waiver was made by Judge Boggs in dissent from the Sixth Circuit’s majority opinion in *Columbia/HCA Healthcare*, the thrust of which was emphasis on the strong public policy of facilitating governmental investigations.³² Judge Boggs noted that the rationale for complete waiver – that a party must not intend to protect the confidentiality of communications if it discloses them to a third party – fails to take into account the disparity in time between the client’s sharing information with its lawyer and subsequent disclosure to the government. In other words, the client cannot predict at the time it entrusts confidential information to counsel that one day such information may need to be shared with the government – and the client would be more reluctant to share such information if it knew that such disclosure may be made eventually to all its adversaries. Judge Boggs cast the issue as whether “to create incentives that permit voluntary disclosures to the government at all,” not whether “to release privileged information to private parties that has already been disclosed to the government.” Thus, he concluded that, because the harms of selective disclosure “are not altogether clear,” the benefits of increased information to the government should prevail, particularly because the government is more likely to pursue matters in the public interest than private parties in civil litigation – and the government would do so more effectively with greater, not less information. As with the Eighth Circuit’s decision in *Diversified*, the rationale of Judge Boggs’ dissent has not been followed.

In contrast to the largely unsuccessful application of selective waiver of the attorney-client privilege, there has been modestly broader recognition of selective waiver for disclosure of work product to the government.

The (Somewhat) Wider Acceptance of Selective Waiver of Work-Product Protection

The scope of the work-product doctrine is broader than the attorney-client privilege, in that it protects more than communications between the attorney and client. It applies to any document (as well as non-documented information) prepared in anticipation of litigation, whether by the attorney or by someone else for him or her.³³ Moreover, its core protection applies to an attorney’s mental processes, and thus is most intimately connected to the attorney’s strategic and other judgments, even apart from communications with the client. Thus, the courts often apply a higher threshold for waiver of work product, which is understood to protect the adversary system by allowing attorneys to prepare their cases without concern that their

²⁷ *Qwest*, 450 F.3d at 1198-99; *Westinghouse*, 951 F.2d at 1425.

²⁸ *Qwest*, 450 F.3d at 1200.

²⁹ See Minutes of Advisory Committee on Evidence Rules Meeting, at 15 (April 12-13, 2007), available at <http://federalevidence.com/pdf/2008/FRE502/EV04-2007.pdf>.

³⁰ *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (*en banc*).

³¹ *Id.* at 611.

³² 293 F.3d at 308-14.

³³ *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947); Federal Rule of Civil Procedure 26(b)(3).

work will be used against their clients. The protection accorded an attorney's mental impressions is almost absolute; and the protection is not necessarily waived by disclosure to a third party.

In contrast to the decisions finding against selective waiver of the attorney-client privilege, more courts have been receptive to limiting waiver of work product, particularly when disclosure to an enforcement agency is made pursuant to a confidentiality agreement. For example, the D.C. Circuit affirmed the holding that a company maintained its work-product protection for documents that it voluntarily disclosed to the SEC pursuant to a confidentiality agreement, even though the same confidentiality agreement was deemed inadequate to prevent waiver of the attorney-client privilege for those documents.³⁴ Consistent with that approach, the Second Circuit noted the absence of any confidentiality agreement between the target company and the SEC (which had apparently refused to enter into such an agreement with this particular company), in holding that the company had waived its work-product protections by disclosing to the SEC memoranda about irregularities in the treasuries market.³⁵ The court noted that it declined "to adopt a *per se* rule that all voluntary disclosures to the government waive work-product protection," anticipating "situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing

information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials."³⁶ The Second Circuit has more recently emphasized that its rejection of the selective waiver theory to preserve the attorney-client privilege after documents had been disclosed to the SEC should not be construed as necessarily applying to work-product protections.³⁷

Notwithstanding these decisions, the Sixth Circuit has rejected selective waiver in any of its forms, including work product disclosed pursuant to a confidentiality agreement.³⁸ While acknowledging the benefits of disclosing information to the government in encouraging self-policing and settlement of disputes, the court nonetheless disallowed selective waiver of work product as inconsistent with the underlying rationale of the doctrine. "The ability to prepare one's case in confidence, which is the chief reason articulated in *Hickman* for the work-product protections, has little to do with talking to the Government." Similarly, the Third Circuit rejected the argument that a confidentiality agreement could preserve the work-product protection where Westinghouse disclosed its work product to two government agencies investigating it.³⁹ The court expressed concern that creating an exception to waiver for disclosures to the government might ultimately hinder operation of the work-product doctrine, in that internal investigations conducted with an eye toward eventual disclosure to the government may not pursue unfavorable information; disclosing work product for the purpose of forestalling prosecution or obtaining lenient treatment would be antithetical to the objectives of the work-product doctrine.

³⁴ *Permian*, 665 F.2d at 1222. See also *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1375 (D.C. Cir. 1984) (noting that a party can avoid waiver of work-product protection by "insist[ing] on a promise of confidentiality before disclosure to the SEC"); *In re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982) (recognizing that a confidentiality agreement with the SEC or other government agency may prevent waiver of work-product protection); cf. *U.S. v. Williams Companies, Inc.*, 562 F.3d 387 (D.C. Cir. 2009) (despite company's having reasonable basis to rely on confidentiality agreement with government, such agreement cannot preclude discovery from government by indicted former employee in light of his constitutional rights to defend himself).

³⁵ *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2nd Cir. 1993); see also *In re Natural Gas Commodities Lit.*, 232 F.R.D. 208, 211 (S.D.N.Y. 2005) (affirming magistrate judge's order denying motion to compel documents disclosed to government pursuant to non-waiver agreement); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 244 F.R.D. 412 (N.D. Ill. 2006) (based on existence of confidentiality agreement, applying selective waiver in denying civil plaintiff's motion to compel documents disclosed to the SEC but declining to adopt a *per se* rule regarding waiver with respect to government disclosures); *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Ch. Nov. 13, 2002) (adopting selective waiver rule for disclosures made to government pursuant to confidentiality agreement).

³⁶ The other scenario to which the Second Circuit alluded, namely, that the disclosing company may share a "common interest" with the government agency to which the information is disclosed, has not gained much traction outside the Second Circuit. See, e.g., *Westinghouse*, 951 F.2d at 1428; *U.S. v. MIT*, 129 F.3d at 686 (to find that auditing agency holds a common interest with the company it audits "would be to dissolve the boundary almost entirely"); cf. *In re Cardinal Health, Inc. Sec. Litig.*, 2007 WL 495150 (S.D.N.Y. Jan. 26, 2007) (defendant could selectively waive the protection as to the government and not be compelled to do so as to the private litigants in the pending securities litigation, due to common interest shared between company's audit committee and the government).

³⁷ *Ratliff*, 354 F.3d at 170, n.6.

³⁸ *Columbia/HCA Healthcare*, 293 F.3d at 306-07.

³⁹ *Westinghouse*, 951 F.2d at 1431.

Rule 502 May Limit Scope of Any Waiver

Although newly enacted Federal Rule of Evidence 502 deliberately omits any support for selective waiver,⁴⁰ it may be used to limit the *scope* of any waiver. In particular, Rule 502(a)(3) limits the scope of waiver to already-disclosed information unless “in fairness they [*i.e.*, other information within the same subject matter as the disclosed information] ought to be considered together.” Rule 502(d) extends this to other proceedings, providing that, “[a] Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other Federal or State proceeding.” Although on its face this may be read to permit selective waiver, the drafters clarified that such provision shall not permit selective disclosure. A Statement of Congressional Intent submitted by the House Judiciary Committee states that: “[T]his subdivision [referring to Rule 502(d)] does not provide a basis for a court to enable parties to agree to selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information.”⁴¹

A federal district court in New York, basing its decision on the “cabined waiver” provided by Rule 502, recently limited the scope of waiver to only that material disclosed by Bank of America to the SEC – specifically excluding any material that disclosed the same subject matter but that related only to the defense of private litigation.⁴² This is potentially a limitation of real value, since, as noted earlier, the usual rule is that waiver is not limited to documents or information actually disclosed, but extends to documents and information within the subject matter of such disclosures.

PRACTICAL SUGGESTIONS

The “culture of waiver” appears to be in decline. Nonetheless, the pressure to waive in order to maximize cooperation credit remains, and the law is unsupportive of selective waiver. Thus it is only prudent, given the current state of the law, to assume that any disclosure made to the government will be available to private plaintiffs in subsequent litigation. Just as such disclosure provides

detailed information to the government, it may provide a road map to opponents in subsequent civil litigation. This may be unfair, in that such parties would otherwise never have the benefits of these details if not for the disclosure as to which the private parties played no part. But, for now at least, it remains the most likely scenario if disclosure is made.

Given these circumstances, should a company waive the privileges in order to maximize its credit for cooperation with the government? The decision necessarily will depend on the facts of each case, but the serious consequences of waiver and the potential risk exposure in ensuing civil litigation should be one of the determining factors. If disclosure of privileged material is made, there are a few things that may lessen the chances of all the information being turned over to private parties. First, determine whether disclosure of all information is truly necessary, or whether it is possible to negotiate as to which information would assist the government but not open up the company to unnecessary risk with private plaintiffs. Reasonable alternatives to a complete waiver include sharing information orally with the government, including as part of an attorney proffer or plea negotiations – which generally is inadmissible in any subsequent proceeding pursuant to Federal Rule of Evidence 410. Employees can be identified and required to speak with the government as part of continued employment. If written privileged information is required, disclosure should be made only pursuant to a detailed, written, unconditional confidentiality agreement with the government. The scope of waiver for such written disclosure can be limited to specific categories under Federal Rule of Evidence 502, and such limitations should be made part of the court’s order under Rule 502(d). Finally, if it is determined that a written internal investigation report is necessary, it should be prepared with the broader protections of work product in mind.

Notwithstanding these precautionary measures, any disclosure of protected information to the government should be made with great care in view of the likelihood that it eventually may be produced to opponents in private litigation, carrying with it all the risks of exposure and out-sized effects that the disclosure of protected information so often does. ■

⁴⁰ See *supra*, n. 29.

⁴¹ 154 Cong. Rec. H7818-19 (Sept. 8, 2008), available at <http://federalevidence.com/pdf/2008/09-Sept/H7817on%20S2450.pdf>.

⁴² *U.S. Securities and Exchange Comm’n v. Bank of America Corp.*, Case No. 09 Civ. 06829 (JSR) in the U.S. District Court for the Southern District of New York, 2009 WL 3297493 (Oct. 14, 2009).