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NOTE

THE ATTORNEY, CLIENT AND . . . THE GOVERNMENT?: A NEW DIMENSION TO THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION IN THE POST-ENRON ERA

Melissa L. Nuñez*

INTRODUCTION

Imagine you are the CEO of a large publicly traded corporation. You just discovered that some of your officers and directors have manipulated earnings, hidden liabilities, and illegally kept information from you and your auditing firm. Now, along with having to adjust your financial statements and watch your stock price sink, the Securities and Exchange Commission wants to investigate your corporation, your management, and you. The SEC asks you for your cooperation in its informal investigation. You want to comply because you would rather make them happy and avoid an official, and very public, investigation of the corporation and everyone involved. So you turn over internal investigations and other otherwise privileged materials in the hopes that you can satisfy the SEC that you are turning the company around and eliminating the problem. But now your shareholders, shocked by the drop in their stock value, file a shareholder derivative action as a result of the accounting irregularities. Because you have disclosed everything related to the accounting fraud to the SEC, these shareholders can now discover all of this once privileged information and your corporation could be swamped in costly litigation for years, effectively destroying the company and your position in it.

Today's business culture places a premium on financial honesty and minimal controversy. Corporations, encouraged by federal legislation, seek to avoid scrutiny by strengthening internal controls that ensure compliance with securities laws. Yet, the government and public still distrust corporations and their directors and officers. This business climate has paved the way for increased use of corporate internal investigations and an increased desire by corporate outsiders to acquire the information contained in those investigations. Although corporations have incentives to disclose such information to the government, they have little incentive to disclose it to private parties. Corporations often face a difficult decision: If they disclose confidential material to the government they may thereby be forced to disclose it to private parties.

Over the past three decades, courts have struggled to find rules to fairly govern discovery of privileged or protected materials after those materials have been disclosed to a government agency. One method has been to bar subsequent discovery of materials once protected by attorney-client privilege under a "limited waiver" theory. Another method allows discovery of any materials previously disclosed, whether they were originally protected by attorney-client privilege or the work product doctrine, no matter what the circumstances of the disclosure. Still another method has allowed the protection provided by the work product doctrine to survive disclosure to the government when there has been a confidentiality agreement. The circuits that have decided this issue do not agree and many circuits have yet to choose how they will approach this issue.

As courts face these issues in the future, they should attempt to find rules that balance the policy concerns underlying both attorney-client privilege and work product protection. The Second Circuit did this best, providing that once a corporation has disclosed protected materials to the government, the corporation waives its attorney-client privilege as to those materials. However, if the corporation negoti-
ated with the government for a confidentiality agreement, the corporation has not waived its work product protection over those materials as to third parties.\textsuperscript{7}

I. The Government's Role in the Problem: What It Has Done to Encourage Disclosure

A. The Securities and Exchange Commission

Once a corporation has caught the eye of the SEC, it potentially faces serious penalties imposed by the government as well as devastating business consequences resulting from private litigation and loss of investor confidence. The SEC has the ability to seek injunctions, restitution, disgorgement, and can also deny corporations and individuals certain privileges, such as precluding individuals from being officers or directors of public companies in the future, among other forms of sanctions.\textsuperscript{8} In addition, the SEC is authorized to refer cases to criminal authorities, such as the Department of Justice.\textsuperscript{9} As a result, corporations have great incentives to comply with the SEC in the hopes that such compliance will result in lighter penalties or even a decision not to pursue a formal investigation.\textsuperscript{10}

The idea that disclosure may lighten penalties resulting from an investigation is not wishful thinking on the part of corporations. The benefits of cooperation with the SEC by waiving attorney-client and work product privileges can be inferred from the cases discussed later in this Note.\textsuperscript{11} The corporations involved in these cases likely would not have disclosed privileged materials to the SEC had they not believed that they would benefit from such disclosure.

But more than this, the SEC itself has made it quite clear that waiving attorney-client and work product privileges can substantially benefit a corporation under investigation. In 2001, the SEC

\textsuperscript{7} Id. at 236.


\textsuperscript{9} Id.

\textsuperscript{10} See infra notes 12–14 and accompanying text.

announced it would not take action against a corporation whose subsidiary, by way of acts of its controller, Gisela de Leon-Meredith, "caused the parent company's books and records to be inaccurate and its periodic reports misstated, and then covered up those facts." In its discussion of how it decided not to take any action in this case, the SEC listed thirteen factors it considers when deciding "whether, and how much, to credit self-policing, self-reporting, remediation and cooperation—from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions." The eleventh factor considered the following questions:

Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?


13 Report of Investigation, supra note 12, at 298; see id. at 298–99 (listing the thirteen factors).

14 Id. at 299.
In taking the "extraordinary step" of not taking action against the parent company,\(^{15}\) the SEC explained that:

[t]he company pledged and gave complete cooperation to our staff. It provided the staff with . . . the details of its internal investigation, including notes and transcripts of interviews of Meredith and others; and it did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation.\(^{16}\)

While this was not all the company did to cooperate with the SEC,\(^{17}\) it appears to be an important factor in the SEC's decision. This release sends a clear message to corporations under informal investigation by the SEC that waiving privileges can make the process much easier and perhaps even prompt the SEC to drop the investigation completely.

**B. The Department of Justice**

The SEC is not alone in rewarding disclosure of privileged materials. The Department of Justice has gone so far as to announce an official policy rewarding the waiver of attorney-client privilege and work product protection.\(^{18}\) In his discussion of how prosecutors should determine whether to charge a corporation with a crime, the Deputy Attorney General listed several factors, one of which was "[t]he corporation's timely and voluntary disclosure of wrongdoings and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges."\(^{19}\) He further explains that "granting a corporation immunity or amnesty may be considered in the course of the government's investigation."\(^{20}\) The memorandum goes on to explain that when the DOJ is working in conjunction with other agencies which have "formal voluntary disclosure programs," like the SEC, it will encourage corporations "as part of their compliance programs, to conduct internal investigations and to disclose their findings" irrespective of whether those findings were originally privileged or not.\(^{21}\)

\(^{15}\) Id. at 298.
\(^{16}\) Id. at 296 (emphasis added).
\(^{17}\) See id. (noting that the company provided complete cooperation and strengthened its final reporting processes).
\(^{19}\) Id. (emphasis added).
\(^{20}\) Id.
\(^{21}\) Id.
Although the memorandum makes quite clear that voluntary disclosure of privileged material can significantly benefit a corporation under investigation, it also points out that this type of waiver is just one factor of many a prosecutor may consider.\textsuperscript{22}

**C. The Issue: To Disclose or Not to Disclose**

Although the perks of waiving privileges may be tempting, corporations should be wary of disclosing privileged materials to government agencies. A corporation may escape formal investigation by the SEC or obtain a more lenient settlement, but this may not make up for the damage that could be caused by subsequent litigants who are able to obtain the disclosed materials because they are no longer privileged.

A corporation must make a decision about what is in its best interests, weighing the benefits and detriments of voluntarily disclosing privileged material to the government. When faced with this decision, corporations turn to their attorneys for advice. In order to provide clients with the best service, attorneys must understand how the law handles this situation. Because the case law in this area is, and has been for a long time, inconsistent,\textsuperscript{23} it is difficult for attorneys to accurately predict how courts may view this type of voluntary disclosure in future litigation. It is imperative that counsel is aware of the issues that courts take into consideration when deciding whether corporations have waived their privileges and especially what courts in their jurisdiction have decided on this issue. In circuits where there has been no definite decision on this issue, attorneys face the challenge of attempting to predict how district courts will analyze this problem given the many different examples set by other circuits.

Not only do corporations and attorneys in undecided circuits face uncertainty, but so do those in circuits which have adopted clear rules. Due to the wide variance between the circuits on this issue, even corporations and attorneys in circuits where a clear rule has been delineated may be surprised by a change in the law in this area. All of this uncertainty makes the decision of whether to disclose protected materials to the government a difficult one; one that does not need to be so difficult.

\textsuperscript{22} *Id.* ("The Department does not, however, consider waiver of a corporation’s privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation’s cooperation.").

\textsuperscript{23} See *infra* notes 47–53 and accompanying text.
This Note will discuss the case law supporting the different approaches that courts have taken when faced with these issues and show why the approach crafted by the Second Circuit and adopted by a recent decision of the Northern District of California in the Ninth Circuit offers the best way to handle these difficult issues. Part II of this Note will explain the basic rules governing attorney-client privilege and work product protection. This Part will discuss when these protections apply, how these protections can be waived, and what policies these protections are meant to uphold. Part III will discuss the current case law on this issue, providing examples of the many different rules that circuits have created. Part IV analyzes the case law coming from a district court in the Ninth Circuit, demonstrating a recent shift in that court’s approach to the issue. These cases are particularly important as they are the most current attempt to establish a rule governing this issue. Part V analyzes the different methods described in Parts III and IV and discusses the arguments that the different circuits have used to support their holdings, points out the flaws in many of the arguments and the strengths of others, and explains why the rule expounded by the Second Circuit and by a recent decision of the Northern District of California best upholds the public policy behind both attorney-client privilege and work-product protection.

II. EXPLANATION OF PRIVILEGE PROTECTIONS

A. Attorney-Client Privilege: Rule, Policy, and Waiver

Corporations, as well as individuals, enjoy the protections of the attorney-client privilege. It is the “oldest of the privileges for confi-

26 Id.
27 United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915). However, the extent to which the privilege applies to corporations has been debated. There are competing tests to determine whether employee communications to attorneys are considered privileged as a corporate communication. One test, called the “control group test,” provides that an employee’s statement is only privileged if the employee is “in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority.” City of Phila. v. Westinghouse Elec. Co., 210 F. Supp. 483, 485 (E.D. Pa. 1962). Another provides that
dential communications known to the common law." The protection is limited, however, to communication with attorneys, and therefore offers more narrow protection than the work product doctrine may offer. The attorney-client privilege rule applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and

an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation . . . where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 487-88 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971). The Supreme Court explicitly rejected the "control group test," reasoning that it "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." Upjohn Co. v. United States, 449 U.S. 383, 392 (1981). Instead the court adopted a "case-by-case" approach. Id. at 396. It has been suggested that the Court here created six different factors to consider when deciding if communications between employees and corporate counsel are privileged: (1) "the communication must be made by a corporate employee upon an order of a corporate superior, and it must be necessary for the corporation to secure legal advice"; (2) the information "must not be available to upper level management"; (3) the communication "must concern matters within the scope of the employee's corporate duties"; (4) "the employees must be aware that their communication with counsel was for the purpose of rendering legal advice to the corporation"; (5) "the communications must be ordered to remain confidential"; and (6) the "court may consider the identity and resources of the opposing party." Rashelle C. Tanner, Adjudicator or Advocate? Attorneys' Responsibilities Under Sarbanes-Oxley, For Def., Jan. 2003, at 27, 29. Thus, attorneys may face further confusion in determining whether certain communications are protected by attorney client privilege at all as they attempt to apply this list of factors.

28 Upjohn, 449 U.S. at 389.
29 Id. at 395.
30 See Hickman v. Taylor, 329 U.S. 495, 511 (1947) (explaining that attorney work product includes "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible" things).
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.31

Accordingly, if a court determines that the attorney-client privilege originally applied to communications or documents requested in discovery, it must establish that the privilege has not been waived in order to ensure that the materials or information still retain that privilege.32 Waiver of attorney-client privilege occurs when there is disclosure of the privileged material to a third party.33 However, waiver does not occur where the disclosure is made in order to prepare a joint or common defense.34 The issue of when waiver of attorney-client privilege occurs has created disagreement between circuits and confusion among corporations and their attorneys.

In determining what should constitute a waiver of the attorney-client privilege, it is useful to examine the policy behind the privilege. The Supreme Court stated that the privilege is meant to "encourage full and frank communication between attorneys and their clients and . . . recognizes that sound legal advice or advocacy serves public ends and that such advice . . . depends upon the lawyer's being fully informed by the client."35 If the purpose of the privilege is to ensure that attorneys are fully informed and can provide adequate service to their clients, continuing to allow the privilege to cover materials disclosed to the government does not serve this goal. This is because the client in this situation has already disclosed the information to his attorney and there is no further hindrance to the attorney's ability to represent his client once they have decided to disclose the materials to the government.36

B. Work Product Protection: Rule, Policy, and Waiver

Corporations can also attempt to shield internal investigations and other documents from discovery by invoking the protection of the

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33 In re Horowitz, 482 F.2d 72, 81 (2d Cir. 1973) ("[S]ubsequent disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege.").
34 See United States v. Schwimmer, 892 F.2d 237, 243-45 (2d Cir. 1989); United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir. 1979).
36 See infra Part V for further discussion of this issue.
work product doctrine. The work product doctrine can potentially
protect more than the attorney-client privilege because it is not lim-
ited only to communications between clients and attorneys.\textsuperscript{37} The
work product doctrine protects "written statements, private memo-
randa and personal recollections,"\textsuperscript{38} often called attorney work prod-
uct, from discovery when prepared for or by an attorney in
anticipation of litigation.\textsuperscript{39}

Similar to attorney-client privilege, work product protection can
be waived. As a general rule, waiver of work product protection
occurs when a party shares protected material with an adversary.\textsuperscript{40}
This waiver rule varies from the rule governing attorney-client privi-
lege in that it is specific to disclosure of the material to an adversary.
Work product protection is waived when "disclosure is inconsistent
with maintaining secrecy from possible adversaries."\textsuperscript{41} Therefore,
attorney-client privilege will generally be waived when protected mate-
rial is disclosed to any third person, but to show waiver of work product
protection, that third person must be at least a potential
adversary.\textsuperscript{42} Additionally, the different policies each doctrine is
meant to foster can affect whether a protection has been waived; if

\textsuperscript{38} Id. at 510. This rule is now codified in Federal Rule of Civil Procedure
26(b)(3), which provides:

[A] party may obtain discovery of documents and tangible things otherwise
discoverable under subdivision (b)(1) of this rule and prepared in anticipa-
tion of litigation or for trial by or for another party or by or for that other
party's representative (including his attorney, consultant, surety, indemni-
tor, 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 substan-
tial 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.

\textsuperscript{39} See, e.g., Tenn. Laborers Health & Welfare Fund v. Columbia/HCA Healthcare
Corp. (\textit{In re Columbia/HCA Healthcare Corp. Billing Practices Litig.}), 293 F.3d 289,
304 (6th Cir. 2002). Work product protection does not apply, however, to documents
addressing business, rather than legal, issues prepared by counsel. \textit{See In re Kidder

\textsuperscript{40} See United States v. Nobles, 422 U.S. 225, 239 (1975).
\textsuperscript{41} \textit{Stix Prods., Inc. v. United Merchs. & Mfrs., Inc.}, 47 F.R.D. 334, 338 (S.D.N.Y.
1969).
\textsuperscript{42} \textit{See, e.g.}, United States v. AT&T Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).
disclosure undermines the policy that originally protected the material, it is more likely that a court will consider the protection waived.43

The policy concerns underlying the work product doctrine differ from those of the attorney-client privilege. Work product protection ensures that an attorney may serve his client effectively without worrying that his work will later be discoverable in court.44 The Supreme Court stated that without protection for attorney work product "much of what is now put down in writing would remain unwritten. An attorney's thoughts . . . 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."45 Additionally, the doctrine ensures that discovery serves its intended purpose of bringing the facts of the case to light and does not enable lawyers to piggyback on the work of opposing counsel.46

As a result, whether attorney-client privilege or work product protection applies to the materials in question will affect how a court decides whether or not a corporation has waived its protection.

III. Privilege Waiver Case Law: The Many Approaches to Waiver

While the rules and policies behind attorney-client privilege and work product protection may seem clear, courts have not applied them consistently. In cases where a party has previously disclosed protected material to a government agency, such as the SEC, courts have not agreed whether subsequent litigants have a right to discovery of the once-protected materials.47 Some courts have created bright line rules, others are more flexible.48 Those applying bright line rules are

43 Cf. McMorgan & Co. v. First Cal. Mortgage Co., 931 F. Supp. 703, 709 (N.D. Cal. 1996) (explaining that due to the differing policies underlying the two forms of privilege, attorney-client privilege does not apply when the materials were never intended to be kept confidential, but attorney work product protection is not necessarily waived in this situation).
45 Id. at 511.
46 Id. at 516 (Jackson, J., concurring) (reasoning that "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary").
48 Compare Diversified, 572 F.2d at 611 (disclosure to the government never waives attorney-client privilege), with Salmon Bros. Treasury Litig. v. Steinhardt Partners,
in conflict: One court holds that disclosure to a government agency of materials protected by attorney-client privilege never waives that privilege as to other parties,49 while another court says that in such a situation attorney-client privilege is always waived.50 Similar disparities exist in the law applying to materials once protected as work product.51

Courts that do not agree with such rules consider such things as whether the party and the government agency entered into a confidentiality agreement. In Salmon Brothers Treasury Litigation v. Steinhardt Partners, L.P. (In re Steinhardt Partners, L.P.),52 the Second Circuit declined to adopt a bright line rule of waiver, acknowledging that in some circumstances, such as when a confidentiality agreement has been negotiated, waiver may not be appropriate.53

Because the Supreme Court has not determined what law should apply in cases like this, the courts of appeal have discretion to choose which methods suit them. However, not all circuits have taken a stance on the issue, leaving district courts and attorneys in their jurisdictions with little guidance. In this circumstance, district courts must look to what other circuits have done and determine which route is most persuasive. Attorneys must try to predict what districts courts will decide when faced with this issue as they advise their clients about the decision to disclose privileged material to government agencies.

L.P. (In re Steinhardt Partners, L.P.), 9 F.3d 230, 236 (2d Cir. 1993) (disclosure to the government may waive work product protection depending on the circumstances of the waiver).

49 Diversified, 572 F.2d at 611.
50 Tenn. Laborers, 293 F.3d at 303–04.
51 Compare id. at 306–07 (work product protection is always waived when there is disclosure to an adversary), with Salmon Bros., 9 F.3d at 236 (work product protection may not necessarily be waived where the parties signed a confidentiality agreement or where the parties share a common interest).
52 9 F.3d 230.
53 Id. at 236.
A. Limited Waiver Doctrine.\textsuperscript{54} The Eighth’s Circuit’s Approach to Waiver of Attorney-Client Privilege

In 1977, the Eighth Circuit established an exception to the waiver provision of the attorney-client privilege doctrine.\textsuperscript{55} The exception allowed a corporation to retain its attorney-client privilege over documents even if they were voluntarily turned over to the SEC. The court described this act as a “limited waiver” of the attorney-client privilege.\textsuperscript{56}

Diversified Industries appealed to the Eighth Circuit after the district court denied protection under the attorney-client privilege and the work product doctrine of several documents prepared by Diversified’s attorneys. Diversified had been involved in proxy fight litigation when it came to light that Diversified may have been engaging in an unlawful conspiracy as well as violating antitrust laws. The proxy fight litigation settled, and Diversified later hired a law firm to conduct an internal investigation of its business practices.\textsuperscript{57}

As a result of the proxy fight litigation, the SEC began its own investigation of Diversified.\textsuperscript{58} In the course of its investigation, the SEC issued a subpoena demanding the documents in question.\textsuperscript{59} Diversified voluntarily produced the documents to the SEC.\textsuperscript{60}

In a second round of litigation, Diversified’s contracted partner, Weatherhead Company, sought discovery of the material handed over to the SEC.\textsuperscript{61} Diversified argued that the documents were protected by the attorney-client privilege and the work product doctrine.\textsuperscript{62} The three-judge panel that first heard the case rejected Diversified’s work product argument, concluding that the documents were not prepared in anticipation of litigation because the documents were prepared in the regular course of business for the purpose of informing the corporation about the situation and how to avoid the same problems in the

\textsuperscript{54} The doctrine is also referred to as “selective waiver” by many courts. See, e.g., Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1423 & n.7 (3d Cir. 1991); \textit{id.} at 1423 n.7 (“Although the rule in \textit{Diversified} is often referred to as the ‘limited waiver rule,’ we prefer not to use that phrase because the word ‘limited’ refers to two distinct types of waivers: selective and partial.”).

\textsuperscript{55} Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).

\textsuperscript{56} \textit{id.}

\textsuperscript{57} \textit{id.} at 599–600 (panel).

\textsuperscript{58} \textit{id.}

\textsuperscript{59} \textit{id.} at 611 (en banc).

\textsuperscript{60} \textit{id.}

\textsuperscript{61} \textit{id.} at 600 (panel).

\textsuperscript{62} \textit{id.} at 599.
future. On hearing the case en banc, the court decided that the
report prepared by Diversified's attorneys, including employee inter-
views, were entitled to the attorney-client privilege, but other docu-
ments Weatherhead sought in discovery were not entitled to the same
privilege. The more difficult issue for the court was whether Diversi-
fied had waived its attorney-client privilege with respect to the report
when it voluntarily turned it over to the SEC. The court decided that
although the traditional waiver rule seemed to dictate that any volun-
tary production of protected material waived the privilege, in this case
the waiver was only limited and therefore Weatherhead was not enti-
tled to discovery of the report or any parts thereof. The court
explained that "[t]o hold otherwise may have the effect of thwarting
the developing procedure of corporations to employ independent
outside counsel to investigate and advise them in order to protect
stockholders, potential stockholders and customers."

Thus, the Eighth Circuit held that when the attorney-client privi-
lege applies, voluntary production of the privileged material to the
SEC does not categorically waive that privilege in the future. This is
ture where, as here, the parties have not even entered into a confiden-
tiality agreement with the SEC. However, because work product pro-
tection never applied to the materials sought in Diversified Industries,
Inc. v. Meredith, this holding cannot be seen to extend the principle
of limited waiver to materials once protected as work product. Since
1977, the Eighth Circuit has not overruled the limited waiver doc-

63 Id. at 603–04.
64 Id. at 610–11 (en banc).
65 Id. at 611. In its decision that only a limited waiver occurred, the court cited
(holding that testimony from a suppression hearing cannot be admitted in a subse-
quent criminal trial) and United States v. Goodman, 289 F.2d 256, 259 (4th Cir. 1961),
vacated on other grounds, 368 U.S. 14 (1961) (concluding that defendants can invoke
the Fifth Amendment privilege in a subsequent investigation unless prosecution is
barred by statute of limitations). Diversified, 572 F.2d at 611 (en banc).
66 Diversified, 572 F.2d at 611.
67 Id.
68 Id. at 604 (panel).
However, other circuits have explicitly denounced the doctrine.\footnote{But see In re Grand Jury Proceedings Subpoena, 841 F.2d 230, 234 (8th Cir. 1988) (questioning Diversified's holding, arguing that "disclosure is inconsistent with the confidential attorney-client relationship and waives the privilege" and that "'[a] claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal service is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes'" (quoting John Doe Corp. v. United States (In re John Doe Corp.), 675 F.2d 482, 484 (2d Cir. 1982))).}

\section*{B. Rejection of Limited Waiver Doctrine: Absolute Waiver of Both Protections}

Courts applying this line of reasoning hold that any voluntary disclosure to a third party waives attorney-client privilege as to all others, and if that third party is an adversary, then work product protection is also waived.\footnote{See, e.g., Tenn. Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp. (In re Columbia/HCA Healthcare Corp. Billing Practices Litig.), 293 F.3d 289, 304 (6th Cir. 2002); United States v. Mass. Inst. of Tech., 129 F.3d 681, 685–86 (1st Cir. 1997); Permian Corp. v. United States, 665 F.2d 1214, 1221–22 (D.C. Cir. 1981).}

\footnote{Tenn. Laborers, 293 F.3d at 304–06.}


\footnote{Id. at 304–06.}

However, while the approach from these circuits does reject limited waiver of attorney-client privilege, there does not seem to be a true majority approach to waiver of work product protection.

In \textit{Tennessee Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp. (In re Columbia/HCA Healthcare Corp. Billing Practices Litigation)},\footnote{Id. at 292.} the Sixth Circuit adopted the opposite rule regarding waiver than that espoused by the Eighth Circuit in \textit{Diversified}. \textit{Tennessee Laborers} illustrates the rule that disclosure to a third-party adversary waives not only attorney-client privilege, but also work product protection.\footnote{Id. at 292.}

\textit{Tennessee Laborers} involved the discovery of documents the defendant, Columbia/HCA, claimed were covered by both attorney-client privilege and work product protection.\footnote{Id. at 292.} Columbia/HCA had previously disclosed the documents to the DOJ and other government agencies when it was under investigation for alleged Medicare and
Medicaid fraud. Under the disclosure agreement, the DOJ agreed to maintain the confidentiality of the documents. Subsequently, private parties filed lawsuits stemming from the activities the DOJ had investigated. Not surprisingly, these parties requested discovery of the materials disclosed to the DOJ.

Columbia defended its refusal to produce the documents by arguing that it had not waived its privileges, citing the holding in Diversified. It also argued that the agreement it made with the DOJ preserved the confidentiality of the documents as to the plaintiffs, as they were not government entities. The plaintiffs did not argue that the documents were not originally protected by attorney-client privilege or work product protection; thus, the court proceeded on the assumption that the documents were privileged under both doctrines and focused its analysis on whether the disclosure to the DOJ had waived these privileges.

The court first turned to waiver of attorney-client privilege. After examining the selective waiver doctrine, the court rejected it “in any of its various forms.” The court reasoned that the doctrine has “little, if any, relation to fostering frank communication between a client and his or her attorney.” It argued the selective waiver doctrine “transforms the attorney-client privilege into ‘merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.’” Further, it stated that “attorney-client privilege is a matter of common law right” and is “not a creature of con-

76 Id. at 291.
77 Id. at 292. The terms of the confidentiality agreement were as follows:

“[T]he disclosure of any report, document, or information by one party to the other does not constitute a waiver of any applicable privilege or claim under the work product doctrine. Both parties to the agreement reserve the right to contest the assertion of any privilege by the other party to the agreement, but will not argue that the disclosing party, by virtue of the disclosures it makes pursuant to this agreement, has waived any applicable privilege or work product doctrine claim.”

Id. (quoting the confidentiality agreement between Columbia/HCA and the DOJ). This confidentiality agreement, however, allowed the DOJ to disclose the information to other government agencies and congressional committees. See id. at 292 n.2.
78 Id. at 292.
79 Id. at 293.
80 Id. (citing Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978)).
81 Id.
82 Id. at 294.
83 Id. at 302.
84 Id.
85 Id. (quoting Salmon Bros. Treasury Litig. v. Steinhardt Partners, L.P. (In re Steinhardt Partners, L.P.), 9 F.3d 230, 235 (2d Cir. 1993)).
tract, arranged between parties to suit the whim of the moment. It also rejected Diversified’s reasoning that selective waiver would assist in the “truth finding process” by providing incentives to disclose privileged materials to the government by pointing out that private litigants are just as important a part of finding the truth as the government may be. Finally, the court noted that defendants are never forced to waive their attorney-client privilege, but rather choose to do so after weighing the benefits of disclosure against the detriments. Thus, the court found no legitimate reason, given the policies underlying attorney-client privilege, to support the doctrine of selective waiver.

The court then turned to the issue of work product protection waiver. It first noted that attorney-client privilege waiver laws are not the same as those governing waiver of work product protection, and therefore it did not follow from its conclusion that attorney-client privilege had been waived that work production protection was also waived. Thus, when faced with a defendant claiming protection under both doctrines, the court must analyze each separately to determine whether there has been waiver. However, this court stated that the only difference between the two was that in order to waive work product protection, the disclosure must be made to an adversary, not just any third party, as is the case in attorney-client privilege waiver. In support of this conclusion, the court stated, “[t]he ability to prepare one’s case in confidence, which is the chief reason articulated in Hickman for the work product protection[,] has little to do with talking to the Government.” Additionally, the court argued that the waiver of work product protection, like the waiver of attorney-client privilege, is a strategic choice. The court did not analyze the effect of the confidentiality agreement.

As a result of this case, the prevailing law in the Sixth Circuit dictates that when a defendant has previously disclosed protected materials to a government agency that is the defendant’s adversary, the defendant waives both its attorney-client privilege and its work prod-

86 Id. at 303.
87 Id.
88 Id. at 304.
89 Id.
90 Id.
91 Id. at 306.
92 Id. (internal citation omitted) (citing Hickman v. Taylor, 329 U.S. 495 (1947)).
93 Id. at 306–07.
uct protection. The result does not depend on whether the parties entered into a confidentiality agreement.

C. Case-by-Case Waiver Analysis: The Second Circuit’s Compromise

The Second Circuit adopted a more flexible rule regarding waiver of work product protection that will require future courts to analyze each situation on a case-by-case basis. In Salmon Brothers, plaintiffs requested a memorandum that Steinhardt Partners previously disclosed to the SEC in a separate investigation. The SEC had requested the memorandum as part of an investigation into possible wrongdoings in the market for Treasury notes. Steinhardt agreed to share the memorandum with the SEC but did not enter into a confidentiality agreement with the SEC. When civil litigants later requested discovery of this memorandum, Steinhardt claimed that it was protected under the work product doctrine. Thus, the court faced the issue of whether the voluntary disclosure of the memorandum to the SEC, once protected by the work product doctrine, waived that protection as to subsequent civil litigants.

In its analysis, the court acknowledged that the district courts in the Second Circuit had come to different conclusions when faced with this issue. The district court below had found that the SEC was an adversary to Steinhardt and that Steinhardt had voluntarily disclosed the memorandum to the SEC. Thus, the district court held that, as a matter of law, Steinhardt had waived its work product protection over the memorandum. The Second Circuit agreed that the SEC was an adversary because “Steinhardt knew that it was the subject of an SEC investigation, and that the memorandum was sought as a part of this investigation.” Additionally, the court agreed that the disclosure was voluntary and “therefore distinguishable from situations in which

94 Id. at 304–06.
95 9 F.3d 230, 232 (2d Cir. 1993).
96 Id.
97 Id. at 232–33.
99 Salmon Bros., 9 F.3d at 234.
100 Id.
101 Id.
disclosure to an adversary is only obtained through compulsory legal process." However, the court of appeals disagreed with the district court's decision that these two conclusions necessarily led to a waiver of work product protection as a matter of law. After examining the purpose of work product protection, "that opposing counsel should not enjoy free access to an attorney's thought processes," the court of appeals held that, in this particular case, Steinhardt did waive its work product protection. But in so holding, the court declined "to adopt a per se rule that all voluntary disclosures to the government waive work product protection." The court explained that doing so would fail to anticipate 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.

This rationale implies that a corporation will retain work product protection over materials disclosed to the SEC if it either shares a common interest with the SEC or if it enters into a confidentiality agreement with the SEC. However, if the corporation shares a common interest with the SEC, the SEC is probably not an adversary of the corporation. It is only when a party discloses work product to an adversary that the protection may be waived. Courts have routinely held that the SEC is an adversary even when it is not conducting a formal investigation or when it has not filed any charges against a corporation on the theory that the SEC has the option of doing so in the future.

102 Id.
103 Id. at 236.
104 Id. at 234 (citing Hickman v. Taylor, 329 U.S. 495, 511 (1947)).
105 Id. at 235.
106 Id. at 236.
107 Id.
109 See, e.g., Salmon Bros., 9 F.3d at 234. However, an interesting dilemma may arise when the corporation believes, correctly or not, that the SEC is requesting the documents as part of an investigation of a third party. If the SEC later uses those documents against the disclosing corporation, the SEC is clearly an adversary at that point. But the SEC may not have been an adversary at the time of disclosure. In situations like this, it is possible for courts to allow the corporation to retain its work product protection, either on the basis that the SEC was not an adversary at the time of disclosure or by arguing that even though the SEC is an adversary, the corporation had a common interest with the SEC at the time of disclosure. This is another issue that has yet to be resolved.
Thus, for all practical purposes, if the SEC is investigating a corporation for possible violations of the securities laws, the only way a corporation may be able to retain work product protection over materials it voluntarily discloses to the SEC, at least in the Second Circuit, is to enter into an agreement whereby the SEC must keep the disclosed materials confidential.\textsuperscript{110}

For corporations in this jurisdiction, a confidentiality agreement protects from waiver of work product protection because disclosure has not violated the policy underlying such protection. Work product protection is meant to ensure that an attorney can work efficiently and effectively without fear that opposing counsel will be able to use his work against him.\textsuperscript{111} Because disclosure combined with a confidentiality agreement is not “inconsistent with maintaining secrecy from possible adversaries,” work product protection should not be waived as to future adversaries.\textsuperscript{112}

Although the issue of attorney-client privilege waiver did not come up before the court in \textit{Salmon Brothers}, the court did address the issue in its discussion in dictum.\textsuperscript{113} The court agreed with the analysis of the D.C. Circuit in \textit{Permian Corp. v. United States},\textsuperscript{114} which rejected the selective waiver theory adopted by the Eighth Circuit in \textit{Diversified}.\textsuperscript{115} The court reasoned that waiver upon voluntary disclosure to the government does not harm the attorney-client relationship and that “selective assertion of privilege should not be merely another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.”\textsuperscript{116} A corporation presumably gets something in return for disclosing privileged material to the SEC, and it must therefore weigh that benefit against the detriment it might incur in later litigation when deciding whether it will disclose the privileged material or keep it confidential.\textsuperscript{117} The Second Circuit did not indi-

\textsuperscript{110} \textit{But see} Richard M. Strassberg & Sarah E. Walters, \textit{Is Selective Waiver of Privilege Viable?}, N.Y.L.J., July 7, 2003, at 7 (noting that Sarbanes-Oxley’s requirement of “inquiry into allegations of wrongdoing and the government’s heightened efforts to require counsel to assist their investigations—in effect deputizing counsel to act as private prosecutors—may have the effect of bringing the interests of the company and the government more in line, and revitalizing this line of argument for selective waiver”).

\textsuperscript{111} Hickman v. Taylor, 329 U.S. 495, 511 (1947).


\textsuperscript{113} \textit{Salmon Bros.}, 9 F.3d at 235.

\textsuperscript{114} 665 F.2d 1214 (D.C. Cir. 1981).

\textsuperscript{115} \textit{Salmon Bros.}, 9 F.3d at 235.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.} at 235–36.
cate that any exception should be made when a corporation enters into a confidentiality agreement with the government when disclosing materials protected by the attorney-client privilege. Thus, a corporation may be able to shield from discovery materials protected under the work product doctrine, but not under attorney-client privilege, by negotiating for confidentiality.

The SEC submitted an amicus brief arguing against the selective waiver doctrine in this case. The SEC convinced the court that the selective waiver theory was not necessary in order for corporations to continue to cooperate with investigations through disclosure of materials covered by the attorney-client privilege. The SEC stated that despite rejection of selective waiver in many jurisdictions, corporations were still complying with requests to disclose protected materials. Apparently, the benefits of disclosure to the SEC outweigh the detriments of privilege waiver.

IV. THE NINTH CIRCUIT: AN EXAMPLE OF SHIFTING PERSPECTIVES ON PRIVILEGE WAIVER

Recently, a district court in the Ninth Circuit shifted its perspective on the issue of waiver. In the space of two years, this court moved from applying a rule which provided for an absolute waiver of work product protection upon disclosure to an adversary to a rule allowing for retention of work product protection where the disclosure was accompanied by a confidentiality agreement. The case law does not yet provide a satisfying conclusion to the issue, but recent changes in district court reasoning may provide some guidance. These decisions point attorneys in the direction of law like that of the Second Circuit as exemplified in Salmon Brothers.

A. United States v. Bergonzi: The Old Approach

In 2003, the Northern District of California applied similar rules to those applied in the Sixth Circuit's decision in Tennessee Laborers. United States v. Bergonzi involved a situation in which former executives of HBO & Company were indicted for securities, mail and wire fraud following the discovery of accounting irregularities by McKesson, a

118 Id. at 236.
119 See id.
120 Id.
123 216 F.R.D. 487.
company that had recently acquired HBO. McKesson, through its attorneys, entered into a confidentiality agreement with the SEC agreeing to provide the internal investigation report that it was preparing while investigating these irregularities. The agreement provided that McKesson did not waive its work product or attorney-client privileges in regard to the disclosed material. It further provided that the SEC would keep the information confidential "except to the extent that the [SEC] determines that disclosure is otherwise required by federal law." Subsequently, McKesson entered into a similar agreement with the United States Attorney's Office (USAO). McKesson later discovered that the USAO had inadvertently provided some of the materials covered by its confidentiality agreement to the former executive defendants of HBO facing the securities, mail, and wire fraud charges. McKesson requested the return of the documents from the executive defendants, and only one of them complied with this request. As a result, the court faced the issue of whether the noncomplying defendant had to return the documents as a result of attorney-client or work product privileges.

The court first turned to the issue of attorney-client privilege. The court stated that "communications between client and attorney for the purpose of relaying communication to a third party [are] not confidential and not protected by the attorney-client privilege." Thus, because the documents in question were prepared after McKesson agreed to disclose them to the government, they were never covered by attorney-client privilege.

Next the court turned to the application of work product protection. First, the court distinguished the applicability of attorney-client privilege from that of work product protection by pointing out that there was no similar requirement for work product protection that the materials are not created with the intent to disclose them to a

124 Id. at 490.
125 Id. at 491.
126 Id. (quoting the confidentiality agreement between McKesson HBOC and the SEC).
127 Id.
128 Id.
129 Id. at 491–92.
130 Id. at 492.
131 Id. at 493–94.
132 Id. at 493 (citing United States v. Sudikoff, 36 F. Supp. 2d 1196, 1204–05 (C.D. Cal. 1999)).
133 Id. at 494.
134 Id. at 494–98.
third party.135 Thus, because the materials in question were prepared in anticipation of litigation, the court held that work product protection applied originally.136

Finally, the court had to determine whether McKesson had waived its work product protection. McKesson argued that it did not waive its work product protection because it shared a common interest with the USAO.137 The court rejected McKesson’s common interest argument, reasoning that

the “common interest” alleged is not like the interest shared by allied lawyers and clients who are working together in prosecuting or defending a lawsuit. “Indeed, the Company and the Government did not have a true common goal, as it could not have been the Company’s goal to impose liability onto itself, a consideration always maintained by the government.138

It further rejected the argument that the confidentiality agreement demonstrated a common interest, noting that the “agreement made by the Government to keep the documents was not unconditional”139 because it provided for an exception where disclosure was required by law.140 The court then held that McKesson waived its work product protection over the material in question because “[o]nce a party has disclosed work product to one adversary, it waives work product protection as to all other adversaries.”141

The court’s reasoning in this case is similar to that of the Sixth Circuit’s in Tennessee Laborers, in that it held that work product protection is waived whenever there is disclosure to a third-party adversary, despite the existence of a confidentiality agreement. However, the court does seem to indicate that if the confidentiality agreement did not include an exception allowing the government to disclose the documents if “otherwise required by federal law,”142 it would have ruled differently on this issue.143 This point does not provide much assistance to corporations or their counsel, as the government is hardly likely to agree to confidentiality when federal law requires disclosure. Even if the government did sign an agreement purporting to do such

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135 Id. at 494 (citing McMorgan & Co. v. First Cal. Mortgage Co., 931 F. Supp. 703, 709 (N.D. Cal. 1996)).
136 Id. at 495.
137 Id.
138 Id. at 496 (citing McMorgan, 931 F. Supp. at 703).
139 Id. at 496-97.
140 Id. at 491.
141 Id. at 498.
142 Id. at 491.
143 Id. at 494.
a thing, it would not be enforceable if, in fact, federal law did require disclosure. Thus, this court’s decision, for all practical purposes, does not distinguish between cases where the corporation has entered into a confidentiality agreement with the government and those cases where no such agreement was made.

B. Aronson v. McKesson HBOC, Inc. (In re McKesson HBOC, Inc.)\(^{144}\): The New Approach

Although only a district court decision, *Aronson v. McKesson HBOC, Inc. (In re McKesson HBOC, Inc.)* indicates a surprising change in jurisprudence in this area. Despite its own previous decision on this issue in *Bergonzi* following precedent from the Sixth Circuit decision in *Tennessee Laborers*, the District Court for the Northern District of California applied principles from the Second Circuit decision in *Salmon Brothers* when it faced the issue of waiver for the second time.\(^{145}\)

In *McKesson*, plaintiff shareholders sought discovery of the same report and other materials prepared by McKesson’s attorneys that were disputed in *Bergonzi*.\(^{146}\) McKesson refused to comply with the discovery request, claiming protection under attorney-client privilege and work product protection.\(^{147}\) The court thus faced the same issue of whether either or both of the privileges were waived upon disclosure to the SEC and the USAO.

The court first addressed the issue of attorney-client privilege. Attorney-client privilege does not apply to material that was never intended to be kept confidential.\(^{148}\) McKesson agreed to disclose the report and other materials to the SEC and USAO before the report was prepared.\(^{149}\) Thus, the court held that this privilege never applied to the materials in the first place, and there was no need to discuss whether the privilege was waived by voluntary disclosure.\(^{150}\) This deci-

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145 Id. at *10; see Bergonzi, 216 F.R.D. at 498 (holding that “once a party has disclosed work product to one adversary, it waives work product protection as to all other adversaries” with no exceptions). Interestingly, in both of these cases the party attempting to assert privilege over the materials in question was McKesson HBOC. See McKesson, 2005 WL 934331, at *1; Bergonzi, 216 F.R.D. at 490.
146 McKesson, 2005 WL 934331, at *1.
147 Id.
148 Id. at *5 (citing United States v. Tellier, 255 F.2d 441, 447 (2d Cir. 1958)).
149 Id. at *1 n.3.
150 Id. at *5.
sion by the court followed the same reasoning that it applied in Bergonzi.151

There was no dispute regarding the application of work product protection to the report and other materials, so the court focused on the issue of waiver of this protection.152 The court first concluded that the government agencies were adversaries for the purpose of waiver due to the "potential for dispute and even litigation."153 Further, although McKesson professed an interest in "pinpointing the source of the alleged accounting misdeeds," it did not share a "sufficiently aligned" common interest with the government to make this exception to the waiver doctrine apply to this case.154 Under the decision in Bergonzi, these conclusions on their own would be enough to deny McKesson's work product protection.155

But the McKesson court continued its analysis of the waiver issue. The court next examined whether the disclosure increased McKesson's adversaries' access to the report and back-up materials.156 The court reasoned that it could allow work product protection to stand in this case without adopting the limited waiver doctrine of Diversified.157 It noted that several courts have left open the issue of whether a confidentiality agreement covering disclosed materials serves to keep work

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153 Id. at *6 (quoting United States v. Mass. Inst. of Tech., 129 F.3d 681, 687 (1st Cir. 1997)).
154 Id. at *7.
155 Bergonzi, 216 F.R.D. at 495–98.
157 Id. at *8. The court discusses the SEC's similar view, asserted in its amicus brief to the court:

[T]he SEC asserts that finding no waiver of work product protection pursuant to a confidentiality agreement with the government need not be construed as endorsement of the selective waiver doctrine because these cases have recognized while rejecting the selective waiver doctrine, that disclosure to the government pursuant to a confidentiality agreement can preserve work product protection.

Id. at *8 n.11 (citing Brief for SEC as Amicus Curiae, McKesson, No. 99–CV–20793, 2005 WL 934331). Compare this to the SEC's position in Salmon Brothers, supporting the rejection of the selective waiver doctrine because corporations did not need such protection in order to have motivation to disclose materials protected by attorney-client privilege with the SEC. Salmon Bros. Treasury Litig. v. Steinhardt Partners, L.P. (In re Steinhardt Partners, L.P.), 9 F.3d 230, 236 (2d Cir. 1993). Does this imply that the SEC believes that there is no such incentive for documents covered by work product protection?
product protection intact. The court then explicitly rejected the Sixth Circuit's holding in *Tennessee Laborers* that work product protection was waived even if the parties had agreed to confidentiality. Following the reasoning of Judge Boggs's dissenting opinion in *Tennessee Laborers*, the court agreed that "the principles of waiver should . . . accommodate a public policy recognizing the need for cooperation with the government where such cooperation does not distort the adversarial relationship protected by the work product doctrine." Thus, when disclosing protected material to the government under a confidentiality agreement, the court held that work product protection will not be waived. The confidentiality agreement ensures that the disclosure does not undermine the policy underlying work product protection.

Applying this to the case at bar, the court determined that McKesson did not waive its work product protection. The court took "into consideration the benefit to the public of permitting disclosure of work product to the government and . . . the cases . . . rejecting selective waiver but endorsing the preservation of work product protection under 'negotiated confidentiality with the government.'" Thus, in the span of just two years, facing nearly the same set of facts, the Northern District of California shifted its position considerably, allowing work product protection to stand as a result of the confidentiality agreement between McKesson and the government.

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158 *McKesson*, 2005 WL 934331, at *8 ("'[E]stablishing a rigid rule [that disclosure to the government waived work product protection] would fail to anticipate 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.'" (alternations in original) (quoting *Salmon Bros.*, 9 F.3d at 236)); *id.* (citing *Permian Corp. v. United States*, 665 F.2d 1214, 1218 (D.C. Cir. 1981) (holding that work product is preserved when parties agree to confidentiality before disclosure); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1375 (D.C. Cir. 1984) (holding that work product protection is preserved for internal reports when not disclosed or when there is a confidentiality agreement before disclosure).


160 *Id.* at *9 (citing *Tenn. Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp.* (In re *Columbia/HCA Healthcare Corp. Billing Practices Litig.*), 293 F.3d 289, 311 (6th Cir. 2002) (Boggs, J., dissenting)).

161 *Id.* Disclosure to a nongovernment entity yields the opposite result. *Id.*

162 *Id.* at *10.

163 *Id.*
V. Analysis of Case Law: Why the Second Circuit and the Northern District of California Took the Best Approach

Until the Supreme Court decides these issues, each circuit is on its own to determine which of these approaches it will take, or if it will choose to create a new approach. When examining the reasoning of these different courts, it becomes clear that some approaches have more support than others.

A. Should Courts Apply the Limited Waiver Doctrine?

The Eighth Circuit in Diversified did not give much legal support for its decision that attorney-client privilege was not waived upon disclosure to the government. In its creation of the limited waiver doctrine, the court simply cited two cases with no discussion of their relevance. The first case the court cited, Bucks County Bank & Trust Co. v. Storck, held that testimony from a hearing on a motion to return property obtained in an illegal search and seizure did not waive attorney-client privilege as to the information in the testimony and therefore could not be used against a defendant in a criminal case. The second case the court cited, United States v. Goodman, discussed waiver of Fifth Amendment privileges in a subsequent criminal investigation when there has been prior disclosure to investigating officials.

These two cases do not mandate the conclusion in Diversified. There are different policy considerations underlying the Fifth Amendment privilege than those of attorney-client privilege. The Fifth Amendment exists to protect an "individual from compulsory incrimination through his own testimony or personal records." This policy is unrelated to that of the attorney-client privilege, which is to foster communication between attorney and client. Additionally, two completely different sets of rules govern procedure in federal civil and criminal cases. Further, the rules regarding admissibility of evidence in a criminal case may differ from the rules regarding admissibility in

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164 Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).
166 Id. at 1123.
168 Id. at 259.
civil cases.\textsuperscript{171} Thus, the Eighth Circuit cites to no precedent that mandates its conclusion in \textit{Diversified}.

The court instead relied, for the most part, on the policy argument that not creating such a doctrine would "thwart[] the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."\textsuperscript{172} In 1977, when the court wrote this decision, this policy argument may have been persuasive, but in the wake of Sarbanes-Oxley’s regulations relating to independent audit committees,\textsuperscript{173} this argument simply does not hold much weight. Sarbanes-Oxley set up rules for independent audit committees that the SEC implemented in Rule 10A-3.\textsuperscript{174} Rule 10A-3 requires publicly traded companies to have independent audit committees that have established procedures for reviewing complaints, allowing confidential submissions of concerns about accounting or auditing violations, and also requires that the committee have the authority to retain independent counsel or other advisors.\textsuperscript{175} As a result, the concern highlighted by the Eighth Circuit that disallowing limited waiver of attorney-client privilege would keep corporations from obtaining independent audits or independent counsel no longer applies in today’s business climate.

The validity of the Eighth Circuit’s point is further undermined by the ever increasing use of internal investigations by corporations.\textsuperscript{176} Because corporations’ regular practice now includes creating internal investigations,\textsuperscript{177} courts should not create rules of law simply to ensure this practice continues. All of the changes in law and in corporate governance that have occurred since 1977 point to the conclusion that the selective waiver doctrine is not necessary to ensure that corporations retain independent counsel and investigate their own possible accounting violations: The law already requires corporations to do this.

\begin{itemize}
\item \textsuperscript{171} See, \textit{e.g.}, \textit{Fed. R. Evid.} 404 (distinguishing evidence admissible in criminal cases relating to character).
\item \textsuperscript{172} \textit{Diversified Indus., Inc. v. Meredith}, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).
\item \textsuperscript{174} 17 C.F.R. § 240.10A-3 (2006).
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{177} \textit{Id.}
\end{itemize}
Additionally, and most importantly, the limited waiver doctrine does not further the policy underlying attorney-client privilege. The ultimate purpose of this privilege is to encourage clients to speak freely with their attorneys.\(^{178}\) When a corporation, after disclosing information to its attorney, decides to disclose the same information to third parties, the purpose of the attorney-client privilege has already been satisfied. Because clients choose when they will or will not disclose privileged material to a third party, a waiver of privilege as a result of such a disclosure in no way affects the corporation's initial decision to consult with its attorney. Waiver of this privilege is in the hands of the client, to do with as it pleases. No matter what choice a corporation makes about subsequent disclosure, providing for waiver of the privilege upon disclosure provides no deterrent for the corporation to discuss the underlying legal issues with its attorney. This argument holds true whether or not the corporation negotiates with the government for a confidentiality agreement, because at that point it has already conferred with its attorney.

Thus, courts in undecided circuits, although free to do as they choose as of now, should not apply the limited waiver doctrine espoused by the Eighth Circuit in *Diversified*. Upon disclosure to the government of material once protected by attorney-client privilege, the privilege ought not apply in subsequent litigation, regardless of any confidentiality agreements the corporation may have entered into with the government.

**B. Should Courts Apply Sixth or Second Circuit Precedent When Handling Work Product Waiver Issues?**

Courts have the option of choosing to follow either the Sixth or the Second Circuit's lead when faced with waiver of work product protection. If a court applies Sixth Circuit precedent, it will follow the rule that when a corporation discloses protected material to the government, and the government can be considered an adversary, the material will no longer be protected from discovery by third parties, despite any other circumstances.\(^{179}\) If a court follows the example of the Second Circuit, it will allow work product protection to stand where the corporation has entered into a confidentiality agreement


with the government, protecting the work product from discovery by third parties.\textsuperscript{180}

Examination of the policy underlying the work product doctrine provides support for the Second Circuit's approach to this issue, which allows protection when the parties have entered a confidentiality agreement. The Supreme Court explained that the work product doctrine is meant to restrict opposing counsel’s ability to piggyback on an attorney’s work.\textsuperscript{181} It is also meant to ensure that attorneys can effectively represent their clients without worrying about discovery of their work in the future.\textsuperscript{182} The court wanted to ensure that attorneys felt free to write their work down.\textsuperscript{183} The law provides for waiver of this protection upon voluntary disclosure to an adversary,\textsuperscript{184} and the parties are free to choose whether they disclose in this way.

These policies underlying work product protection do not necessarily demand that waiver should apply when the disclosing party has negotiated for confidentiality. A client’s determination to provide work product to the government should not lead to the conclusion that any other opposing party should also be able to take advantage of the attorney’s work. If the attorney has taken appropriate steps to maintain the confidentiality of the information as to third parties, then the attorney has not violated the policy underlying work product protection through such a disclosure. The attorney may have allowed the government to benefit from his work, but this does not imply that the attorney should allow every other opposing counsel the same benefit. As a result, the policy reasons for protecting work product still apply to other adversaries.

Additionally, third parties seeking discovery of material disclosed to the government have the option of arguing that discovery of protected material is appropriate where there is a substantial need for the materials and the information cannot be obtained any other way.\textsuperscript{185} This is the same rule that would apply if these parties were the first to

\textsuperscript{180} Salmon Bros. Treasury Litig. v. Steinhardt Partners, L.P. (\textit{In re Steinhardt Partners, L.P.}), 9 F.3d 230, 236 (2d Cir. 1993).
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} United States v. Nobles, 422 U.S. 225, 239 (1975).
\textsuperscript{185} Hickman, 329 U.S. at 511–12. This brings up the issue, however, of how future adversaries will even know what sort of information is disclosed in the protected documents in order to argue that there is a substantial need for the materials and that the information cannot be obtained through other means. Given that this issue is common to all cases where discovery of any sort of work product is desired, this issue is one that is not unique to this particular situation.
attempt to discover otherwise protected attorney work product.\textsuperscript{186} Thus, the provision of work product to the government would have no effect on the ability of third parties to discover such materials.

This rule will also encourage corporations to cooperate with the government. If corporations feel confident that their attorney work product will remain confidential as to third parties, they are more likely to disclose it to the government, a “laudable activity” in the eyes of the Second Circuit.\textsuperscript{187} Encouraging cooperation with the government will make it easier for agencies like the SEC and the DOJ to investigate corporations and ensure compliance with criminal and securities laws.

As a result, courts will uphold the policy underlying the work product doctrine by following the lead of the Second Circuit in \textit{Salmon Brothers} and allowing retention of work product protection where the corporation has entered into a confidentiality agreement with the SEC.

\textbf{Conclusion}

An analysis of the many different approaches to the doctrines of waiver of attorney-client privilege and waiver of work product protection shows that the best approach is that taken by the Second Circuit and, most recently, by the Northern District of California. Allowing corporations to selectively waive attorney client privilege does not comport with the policy underlying the privilege, but allowing work product protection to stand after disclosure under a confidentiality agreement does not violate the policy goals of work product protection. This approach also encourages corporations to cooperate with the government. Given that this issue is not settled, corporations and their attorneys must be aware that many courts have the option to pick and choose which rules they will apply. As a result of this uncertainty, attorneys should advise their corporate clients of the different possibilities and, if their clients choose to disclose protected materials to the government, should negotiate with the government for a confidentiality agreement in order to protect their client as much as possible. Until the Supreme Court decides what rules will ultimately govern these issues, attorneys must prepare their clients for all possible situations.

\textsuperscript{186} \textit{Id.}
